Volume 3, Issue 3 | October 2011

The National Association of

namwolf

Minority & Women Owned Law Firms

"Legal excellence knows no color or gender"

Inside this issue:

Articles:

NAMWOLF's 10th Anniversary Annual Meeting & Law Firm Expo

By Justi Rae Miller, Berens & Miller, P.A., Minneapolis, MN

The NAMWOLF 2011 Annual Meeting and Law Firm Expo took place at the Bellagio, Las Vegas, NV on September 18 - 21st. The 2011 Annual Meeting was a true celebration of 10 years of the organization and featured

- A cocktail kick-off reception at the delightful and beautiful Ghostbar at The Palms located 55 stories above the strip. The event included, among other activities, blackjack against the NAMWOLF board members, a palm reader, a tarot card reader and an unparalleled view overlooking Las Vegas.
- Welcome address by Vernice "FlyGirl" Armour, a former Marine fighter jet pilot - the first African American woman in such a role, who in a very energetic morning session, directed us on how to strategize and accomplish goals.
- A luncheon with keynote speaker, Julie Spellman Sweet, Accenture's General Counsel & Chief Compliance Officer, who captivated us with stories of her start in the legal profession and discussed Accenture's strong commitment to diversity.
- Seven CLE sessions for a total of ten plus hours of credit including, employment law updates, cloud computing, IP pitfalls in corporate transactions, preparing the corporate witness, employee misclassification, hot topics in jury trials, and protecting privilege as corporate counsel.
- Informative sessions on how to have difficult discussions with your corporate client, taking your client communication to the next level, "how to" hire NAMWOLF firms and a law firm cross-marketing session.

- The Law Firm Expo for nearly 80 law firms networking with each other and the 71 corporations who attended.
- Gala Awards Dinner of fabulous music and food to honor Gilda Spencer, Vice President, Chief Litigation Counsel for Nationwide as the 2011 recipient of the Outstanding Service by an Advisory Council

(Continued on page 2)

(*Annual Convention… Continued from page 1)*

Member Award and Nationwide as NAMWOLF's Diversity Initiative Achievement Award Winner.

Most importantly, the NAMWOLF Annual Meeting continued to foster the spirit of helping each other, building relationships and meeting potential new partners. If you have not attended an annual meeting, you are truly missing out on the experience and value of NAMWOLF.

If you missed this year's Annual Meeting, or if you attended and need CLE materials, they can be found at NAMWOLF's website or by clicking here.

NAMWOLF was extremely honored to have Julie Spellman Sweet in attendance on September 20 to offer the luncheon keynote address.

NAMWOLF 2011 ANNUAL MEETING AWARD WINNERS

Diversity Initiative Achievement
Nationwide

Outstanding Service by an Advisory Council Member
Gilda L. Spencer
Vice President, Chief Litigation Counsel
Nationwide

Did you know?

The NAMWOLF Newsletter is formatted with hyperlinks so you can link to a person, firm or company by clicking on a name, photo, logo or event…

NAMWOLF NEWSLETTER/ WEBSITE SUBMISSIONS

Please send **newsletter submissions** to the editor, Justi Rae Miller, at jmiller@berensmiller.com in Word, Arial, 10 font, single space. Please limit substantive articles to 550 words. Photo and logo submissions should accompany the article and need to be jpg equivalent at 300 DPI. Deadlines are as follows:

4th Quarter 2011: November 15, 2011
1st Quarter 2012: February 1, 2012

NAMWOLF now features member law firm successes & announcements on its website at Emerging Trends and sends out these notices on Twitter and Facebook.

Please send **announcements & successes** to jane_kalata@namwolf.org in Word, Arial, 10 font, single space and limited to approximately 350 words. Photo and logo submissions should accompany the announcement/awards and need to be jpg equivalent at 300 DPI. A link to the article at your firm's website is also suggested.

Message from the Executive Director

As a NAMWOLF member, partner or supporter – you would have to live under a rock not to know that the organization is celebrating its 10th Anniversary this year. When you reach any milestone in an organization like ours it is common practice to look back on your past and reflect upon the journey. Yes, NAMWOLF has grown tremendously in every way an organization can grow – membership, staff size, meeting attendance and name recognition. We've gone through some changes and growing pains routinely associated with an organization coming into its own identity. But the one constant has been the desire to maintain an 'atmosphere of inclusion' in everything we do. That has never been demonstrated better than it was at this year's Annual Meeting.

NAMWOLF held its 7th Annual Meeting and Law Firm Expo in Las Vegas. This year it was special because the organization was celebrating its 10th Anniversary. On a personal note, it was special to me because I've attended every previous Annual Meeting as a corporate partner – this was my first as Executive Director of NAMWOLF. I was thrilled to note that despite the growth of our meetings in terms of number of participants and the size of the venue– the atmosphere that is uniquely NAMWOLF remains the same. Throughout the networking events and the Law Firm Expo, I witnessed an atmosphere that was uplifting, encouraging, open and inviting. This atmosphere of inclusion is what makes NAMWOLF different from other organizations. It is what defines us and gives us our purpose. Our mission is to promote true diversity within the legal profession by fostering the development of long lasting relationships between MWBE law firms and private/public entities. The atmosphere we create provides the ideal environment for the development of relationships that produce opportunities for our firms.

Napoleon Bonaparte once said that 'Ability is nothing without opportunity'. The atmosphere created during our Annual Meeting creates the connections that open the doors to these opportunities. We are building relationships to build a more inclusive profession. During our time in Las Vegas, we recognized individuals and organizations that have contributed a great deal to the success of NAMWOLF through sponsorship, volunteerism and successful partnerships. I am hopeful that we will continue to add new names and logos to that impressive list in the coming years. If you missed out on this year's Annual Meeting – I invite you to join us in Atlanta in 2012!! I feel a strong sense of pride that our organization has stayed true to its mission for the past 10 years…and I remain committed to ensuring that we continue to successfully create an atmosphere of inclusion at NAMWOLF.

Welcome New NAMWOLF Members
&
Congratulations to CPEPP Platinum Partners

New Law Firm Members:

- **Abadin Cook**
  Miami, FL
- **Bertone Piccini, LLP**
  Hasbrouck Heights, NJ
- **Espinosa Trueba, PL**
  Miami, FL

Congratulations to Five Corporate and Public Entities Partner Program (CPEPP) Platinum Partners*:

- **Accenture**
- **American Airlines**
- **Federal Deposit Insurance Company (FDIC)**
- **Key Corp**
- **Shell Oil Company**

** Each of these companies met their goal of spending 5% of their outside legal budget on minority and women owned law firms.*

SPOTLIGHT - CORPORATE PARTNER
KRISPY KREME DOUGHNUTS

By Carrie L. Christie, Rutherford & Christie LLP

"To touch and enhance lives through the joy that is Krispy Kreme."

Krispy Kreme's mission statement is quite a goal, but it is one that has been achieved every day since 1937, when the first hot Original Glazed® doughnut was handed through a hole cut in the store's wall to passers-by on a street in Winston-Salem, North Carolina. A complex company, Krispy Kreme is involved with manufacturing, sales to large companies like Walmart and Kroger, and direct consumer sales through its corporate owned and franchised retail shops in the United States and abroad.

"Krispy Kreme's corporate mission naturally led us to interest in NAMWOLF," said Marsch

With over 200 U.S. stores, and more than 400 locations in 21 countries, Krispy Kreme has an appreciation for diversity as unique as the hot confections it produces. According to Darryl Marsch, Senior V.P and General Counsel, "Our employees serve customers from diverse cultures and backgrounds, from Atlanta to Bangkok. By gaining an appreciation for other people's perspectives, we inevitably enrich service to our customers."

Companywide, Krispy Kreme works diligently to provide opportunities for every voice to be heard. At its All-Team Member Meetings and Annual Fall Picnic, team members from across the organization gather to socialize and share updates from all departments about the company's vision, progress and development. Krispy Kreme also provides four additional paid days off, known as "Faith, Family and Community Days," to encourage employees to touch and enhance the lives of others on a local level. To that end, the legal department recently used one such day to volunteer at a local food bank. In addition, the legal department supports giving at least 10 hours per year in pro bono service, sometimes partnering with outside law firms to achieve those objectives.

Marsch gained an appreciation for the importance of a well-qualified and diverse team early in his career. While at the University of Texas School of Law, which he says, "had a robust diversity initiative," his class was more than 50 percent women. After law school, he joined the law firm of Jones Day in D.C., where his class of 23 associates was half female and one-quarter minority, before joining R.J. Reynolds Tobacco Company as Senior Counsel. Marsch joined Krispy Kreme in 2007 and took the helm as General Counsel in 2008. Marsch is extremely proud of his in-house team and says that it is a highly qualified group of legal professionals first. The fact that it happens to be diverse speaks to Krispy Kreme's commitment to diversity.

"Krispy Kreme's corporate mission naturally led us to interest in NAMWOLF," said Marsch. "We want to increase our corporate spend to minority and women owned law firms, and encourage other organizations our size to consider the same. NAMWOLF's aspirational goal of spending a minimum of five percent of outside counsel budget with certified minority and women owned law firms is a great starting point."

(Continued on page 5)

Group photo caption: Krispy Kreme's legal department (l-r): Annie Hundly (Executive Assistant); Jamila Granger (Sr. Counsel); Lisa Brown (Sr. Paralegal); Darryl Marsch (SVP & General Counsel); Kimberly Kennedy (Counsel); and Wesley Suttle (VP, Associate General Counsel and Secretary).

Krispy Kreme DOUGHNUTS®

(Kristpy Kreme… Continued from page 4)

After discussing the initiative with his department, Marsch's legal team presented their proposal to increase corporate spend to minority and women owned firms at a leadership meeting of more than 100 managers, directors and Vice Presidents, including senior management. "The idea was met with a round of applause," said Marsch. "Everyone in the company is aware of our efforts and they are very excited and supportive," adds counsel Kimberly Kennedy.

"It is important that all lawyers, regardless of race, ethnicity or gender, see and understand there are wonderful opportunities out there to work with world-class companies like Krispy Kreme. We hope our efforts will inspire women and minority lawyers entering the practice," said Marsch. He adds, "We also encourage our outside law firms to offer opportunities to women and minority owned businesses." To that end, Krispy Kreme's written Outside Counsel Billing and Staffing Policies and Procedures require all outside firms, to the extent possible, to utilize their position and power to staff cases with women and minority lawyers and staff. Marsch explains, "We want to inspire others to increase these numbers across the board."

Marsch's legal team believes that by being a leader in its relationship with minority and women owned law firms, they further their goal to touch and enhance lives through the joy that is Krispy Kreme. As Marsch added, "If we fulfill our mission statement, we don't have to worry about how many doughnuts we sell. That will take care of itself."

Carrie L. Christie is a business trial lawyer for Rutherford & Christie LLP, a certified woman-owned law firm with offices in Atlanta and New York. She has a national litigation practice, representing restaurant, hospitality and airline companies in the areas of general business litigation, employment, general liability and ERISA.

R&C | RUTHERFORD & CHRISTIE
NEW YORK ATLANTA

NAMWOLF BOARD OF DIRECTORS NEWS

At the NAMWOLF Annual Meeting, new board members were announced to include Janice Brown, Kim Howard and Robin Wofford. Karen Giffen was elected to another three-year term.

NAMWOLF would like to thank the following Board Members for their tremendous service over the years:

Carlos Rincon
Rincon Law Group
Bernie Garza
Callier & Garza
Michelle Miller
Miller Law Group
Siobhan Moran
Moran Karamouzis LLP

Current Board of Directors include:

Emery K. Harlan (Chair)
Gonzalez Saggio & Harlan LLP
Carlos Concepcion
Concepcion, Sexton & Martinez
Gerardo H. Gonzalez
Gonzalez Saggio & Harlan LLP
Karen Giffen
Giffen & Kaminski, LLC
Joel Stern
Stern Legal Consulting
Kenneth I. Trujillo
Trujillo, Rodriguez & Richards, LLC
Jose Rojas
Rojas Law Firm, LLP
Richard Amador
Sanchez & Amador, LLP
Lynn Luker
Lynn Luker & Associates, LLC
Janice Brown
Brown Law Group
Kim Howard
Smith Fisher Maas & Howard
Robin Wofford
Wilson Turner Kosmo LLP

The National Association of namwolf Minority & Women Owned Law Firms
"Legal excellence knows no color or gender"

Photos From the NAMWOLF10th Anniversary Annual Meeting & Law Firm Expo

CLICK HERE FOR MORE VEGAS PHOTOS

Good Credit – Bad Credit – Employers Must Be Careful

By Linda G. Burwell and Terry Bonnette, Nemeth Burwell

According to a recent report by the Society for Human Resource Management, 13 percent of U.S. employers perform credit checks on all job applicants and as many as 60 percent use them for at least some job applicants. In Oct. 2010, the EEOC held a public hearing on what they called "a growing practice." In its press release recapping the meeting, the EEOC quoted testimony stating, "You can't re-establish your credit if you can't get a job, and you can't get a job if you've got bad credit." Consequently, the EEOC has made it clear it will scrutinize this practice very closely.

The EEOC's position regarding credit checks is stated on its website:

"Inquiry into an applicant's current or past assets, liabilities or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they tend to impact more adversely on minorities and females. Exceptions exist if the employer can show that such information is essential to the particular job in question." www.eeoc.gov/laws/practices/nquiries_credit.cfm, last accessed Jan. 31, 2011.

In a March 9, 2010 advisory opinion, the EEOC further clarified its position:

"Title VII prohibits an employment practice that disproportionately screens out racial minorities, women or another protected group unless the practice is job related and consistent with business necessity. Thus, if an employer's use of credit information disproportionately excludes African-American and Hispanic candidates, the practice would be unlawful unless the employer could establish that the practice is needed for it to operate safely or efficiently." www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html, last accessed Jan. 31, 2011.

The EEOC is concerned that credit reports are a poor predictor of job performance, and are riddled with errors rendering their predictive value unreliable. More importantly, the EEOC believes that the use of credit histories as an employment screening tool can have a disparate impact on many protected groups.

To bring its point home, on Dec. 21, 2010, the Cleveland field office of the EEOC filed suit against Kaplan Higher Education Corp. in U.S. District Court. Civil Action No. 1:10-cv-02882. The EEOC alleged that since 2008, Kaplan has had a nationwide hiring practice of rejecting applicants based on their credit history and thus created an unlawful racially discriminatory impact that it is neither job-related nor justified by business necessity.

"The practice of utilizing credit history as part of pre-employment screening is coming under legislative attack as well. "

The practice of utilizing credit history as part of pre-employment screening is coming under legislative attack as well. In 2011, Illinois became the fourth state to pass legislation significantly limiting an employer's ability to consider credit history when making an employment related decision.

These state acts make it illegal for an employer to refuse to hire, discharge, or otherwise discriminate against an individual because of their credit history or report. Employers are prohibited from inquiring about an applicant's or employee's credit history. At least 18 other states have considered similar legislation.

As this debate continues, employers will require counsel. Employers in Oregon, Hawaii, Washington and Illinois should be counseled to abide by their more restrictive state laws, while employers in other states should be urged to consider whether they can present a legitimate business need to conduct credit checks. Employers may want to cross-reference that business purpose with any written job descriptions as well as with any written background requirements or disqualifications.

Employers who conduct credit checks should continue to comply with the Fair Credit Reporting Act. Adverse information should be the basis for further exploration, not necessarily automatic rejection. The EEOC has stated that as part of its E-Race initiative, it will be seeking out systemic violations. The EEOC requires, among other things:

• Employers should ensure that selection procedures are properly validated for the positions and purposes for

(Continued on page 8)

(Good Credit…. Continued from page 7)

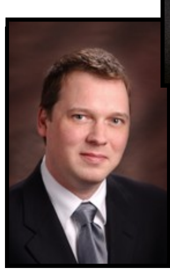
which they are used. The selection procedure must be job-related and its results appropriate for the employer's purpose.

• If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.

• To ensure that selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the selection procedures accordingly.

• Employers should ensure that selection procedures are not adopted casually by managers who know little about these processes. A selection procedure can be an effective management tool, but no selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job and whether it can be appropriately administered and scored.

Linda G. Burwell is a partner and Terry Bonnette is an associate in Nemeth Burwell's Detroit office. Nemeth Burwell, P.C., a NAMWOLF Firm, is a Detroit-based nationally recognized employment and defense law firm, working exclusively with employers to prevent, resolve and litigate employment matters.



NEMETH BURWELL P.C.
Attorneys & Counselors

The National Association of namwolf
Minority & Women Owned Law Firms
LAW FIRM MEMBER
"Legal excellence knows no color or gender"

More Photos From Las Vegas

CLICK HERE FOR MORE VEGAS PHOTOS

Family Responsibility Cases on the Rise: Best Practices to Avoid Claims

By Lisa Hamasaki, Miller Law Group

With employment discrimination charges already at a 45-year high, employers are seeing a particular increase in claims brought by workers who are pregnant or caring for young children, ill spouses or aging parents. Plaintiffs in these family responsibility discrimination cases are more likely to prevail than in any other type of employment discrimination case, drawing judgments of up to $250 million, with average awards topping $500,000.

Employers on the "Best Companies to Work For" lists have been sued for family responsibility discrimination, proving that no employer is immune from these suits. As a result, all employers must recognize the potential for liability and take steps to prevent it.

What Is Family Responsibility Discrimination?

Family responsibility discrimination (FRD) is a form of gender discrimination against men or women because of their caregiving roles for family members, usually children. However, with nearly one in four Americans caring for aging parents, increasingly caregiving extends to the elderly and disabled. Caregiver status can also support an employee's claim of retaliation.

Examples of family responsibility discrimination include:

- Refusing to hire or failing to promote women with preschool-aged children, even though men with children the same age are hired or promoted;
- Giving an impossibly heavy workload to a father who takes time off to be with his kids;
- Rejecting scheduling requests from women for childcare reasons even though similar requests by men were granted;
- Firing a man when he asks for leave to care for elderly parents;
- Firing women or giving them unfounded critical evaluations after becoming pregnant;
- Assuming a working mother would not want to relocate to another city, ruling her out for promotion;
- Denying a family leave request for a man to care for his newborn because the employer believes only women should care for infants;
- Refusing to hire the most qualified candidate, a parent with sole custody of a disabled child, because the employer assumes caregiving responsibilities will affect attendance and performance.

FRD Claims Can Be Based on Federal, State or Local Laws

Although family responsibility discrimination is not specifically prohibited by federal anti-bias laws, claims have been successfully brought under Title VII, the Pregnancy Discrimination Act, the Family and Medical Leave Act, the Equal Pay Act, the Americans with Disabilities Act and state equivalents.

"Employers on the 'Best Companies to Work For' lists have been sued for family responsibility discrimination."

Some states – including Alaska and the District of Columbia – have passed laws specifically prohibiting family responsibility discrimination, and more than 60 cities and counties have similar provisions. In addition, claims may be brought under state common law theories, including wrongful termination and breach of contract.

Increasing Claims, Large Awards

A 2010 report by the Center for WorkLife Law at the University of California Hastings College of the Law found that family responsibility litigation increased 400 percent between 1998 and 2008, with plaintiffs prevailing in more than half the cases. Similarly, in that same period, pregnancy discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) and state agencies almost doubled.

A recent notable case is *Velez v. Novartis Pharmaceuticals Corp*., in which a New York jury awarded $3.4 million in compensatory damages and $250 million in punitive damages in a class action in which the jury found discrimination against women in pay, promotion, pregnancy and family leave policies. One manager had commented, "First comes love, then comes marriage, then comes flex time and a baby carriage." That statement, along with other evidence, cost Novartis 2.6 percent of its annual revenue.

Five Best Practices to Avoid FRD Claims

According to the EEOC, family responsibility cases often result from employer stereotypes about the dedication and competency of caregivers, rather than making decisions

(Continued on page 10)

(Family Responsibility … Continued from page 9)

based on their work performance or behavior. Even when employers' assumptions are well-intentioned and perceived by the employer as being in the employee's best interest, stereotypes can lead to FRD claims.

Companies following these practices will be well-prepared to meet the growing FRD challenges:

1. Train supervisors regarding gender stereotyping, discrimination, harassment and retaliation with respect to workers with family care responsibilities;

2. Ensure that managers are aware of state or local leave provisions pertaining to caregivers;

3. Ensure employees are evaluated on performance rather than stereotypes or assumptions about a commitment to the job;

4. Create personnel programs – such as flex schedules – to give employees support for their caregiving needs; and

5. Institute an effective mechanism for receiving and investigating FRD complaints and treat caregiver complaints the same as those from other employees.

Lisa Hamasaki is a Shareholder with Miller Law Group, a women-owned law firm in San Francisco. For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation.

Miller LAW GROUP

The National Association of namwolf Minority & Women Owned Law Firms LAW FIRM MEMBER "Legal excellence knows no color or gender"

NAMWOLF Headquarters
735 N. Water St.; Suite 1205
Milwaukee, WI 53202
Tel: 414.277.1139 | Fax: 414.831.2285
info@namwolf.org

Jason L. Brown
Executive Director & General Counsel
jason_brown@namwolf.org | 414.277.1139 ext. 2130

Yolanda Coly
Senior Director of Advocacy & Development
ycoly@namwolf.org | 414.277.1139 ext. 2137

Jane Kalata
Director of Events & Operations
jane_kalata@namwolf.org | 414.277.1139 ext. 2131

Find us on Facebook

Linked in

follow us on twitter

Progress and the Art of Corporate Maintenance: Delaware Clarifies and Improves Entity Statutes for 2011

By Scott L. Matthews, The Delaware Counsel Group LLP

Delaware long has sought to cement its role as the pre-eminent jurisdiction for the formation of business entities and as a leading commercial law jurisdiction. In 2011, the Delaware General Assembly amended the General Corporation Law of the State of Delaware, the Delaware Limited Liability Company Act (the "LLC Act"), the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), the Delaware Revised Uniform Partnership Act ("DRUPA"), and the Delaware Statutory Trust Act, in an effort to further solidify Delaware's stature in the business community. Unless otherwise stated, amendments became effective August 1, 2011. The following is a brief discussion of some of the more important amendments adopted in 2011.

> ***"Written consents are another area of controversy in LLC and partnership law."***

In one of the more substantive amendments to the various entity statutes, DRULPA, DRUPA and the LLC Act were amended to provide for a result different from that articulated by the Delaware Chancery Court in *In re LJM2 Co-Investment, L.P. Limited Partners Litigation,* 866 A.2d 762 (Del. Ch. 2004), in which the court held that if a partnership or LLC agreement contained a clause requiring a supermajority vote to amend any provision itself requiring a supermajority vote for action to be taken, then the supermajority amendment provision also applied to default provisions of the applicable entity statute not included in the text of the agreement. The amendments make clear that such a supermajority amendment provision does not apply to default provisions of the applicable entity statute, absent express contractual incorporation by reference.

DRULPA, DRUPA and the LLC Act were also amended to allow for the filing of a certificate of correction to effectively "correct" the filing of a certificate of cancellation of a partnership or LLC that was filed prior to the completion of the winding-up process of the entity. The main problem these amendments were designed to eliminate is the situation where stakeholders in a Delaware LLC or partnership discover an asset or liability after termination of the legal existence of the entity, despite their best efforts to identify all actual or contingent assets and liabilities of the entity in the dissolution and winding-up process.

Written consents are another area of controversy in LLC and partnership law. The LLC Act, DRULPA and DRUPA were amended to provide that when providing electronic evidence of written consent to actions to be taken by the entity, the members, managers or partners, as the case may be, need not restate subject matter of the resolutions being adopted, as is required by the stockholders of a Delaware corporation.

DRUPA was amended to provide that a partner is not personally responsible for liabilities arising out of circumstances or events occurring during the period in which a general partnership has limited liability partnership status. Previously, the statute provided protection for partners only with respect to liabilities *incurred* during the period in which a partnership is a limited liability partnership – not for liabilities which materialize later but are the result of circumstances or events during the period of the partnership's LLP status. DRUPA was also amended to clarify that the cancellation of a statement of partnership existence does not act to cancel a statement of qualification as an LLP, or vice versa.

The LLC Act was amended to establish a default rule for amendment of an LLC agreement. Previously, the statute did not address whose consent was required for amendment of an LLC agreement, in the absence of an express amendment provision. Now, if the LLC agreement does not provide for the manner in which it is to be amended, the unanimous consent of the members will be required under the new default rule, which takes effect January 1, 2012.

With these amendments, Delaware has ensured that the coherent, practical body of law that has been developed in the state over the course of the past century has been enhanced yet again. Once again, the General Assembly, with the assistance of the state bar, has provided a bit of key maintenance and in so doing, has helped maintain the relevance and pre-eminence of Delaware business entity legislation as we round out 2011.

THE DELAWARE Counsel GROUP LLP
Attorneys At Law

NLRB Final Rule Requires Unionized and Non-Unionized Employees To Post Notice of Employee Rights Under NLRA

By Sara Goldsmith Schwartz, Schwartz Hannum PC

On August 25, 2011, the National Labor Relations Board ("NLRB" or "Board") issued a Final Rule requiring most private-sector employers to post a notice informing their employees of their rights under the National Labor Relations Act ("NLRA"). The Final Rule was posted in the Federal Register on August 30, 2011, and is to take effect 75 days later, on November 14, 2011.

Substance Of The Notice. The required posting is intended to inform private-sector employees of their NLRA rights "to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities." The posting will specifically notify employees that they may discuss "wages and benefits and other terms and conditions of employment or union organizing" with their co-workers or a union, and that an employer may not prohibit them from "talking about or soliciting for a union during non-work time, such as before or after work or during break times."

Posting Requirements. Per this new Final Rule, employers must physically post the notice where other workplace notices are typically posted. Additionally, employers must post the notice on an internet or intranet site if personnel rules and policies are customarily posted there. The notice must be posted in English and in another language if at least 20% of the employer's workforce is not proficient in English and speaks the other language. However, employers need not distribute the notice via email, voicemail, text messaging or related electronic means, even if they customarily communicate with their employees via these channels.

Unionized And Non-Unionized Employers Must Comply. All employers subject to the Board's jurisdiction must comply with the new posting requirement, whether or not they are unionized. The Board's jurisdiction extends to most private-sector employers, excluding agricultural, railroad and airline employers. (Note: although the Board has chosen not to assert its jurisdiction over very small employers whose annual volume of business has only a slight effect on interstate commerce, small employers should not assume that they are exempt, as the Board's standards for coverage vary by the employer's type of business and gross annual volume of business.)

Consequences Of Noncompliance. Failure to post the notice may be treated as an unfair labor practice under the NLRA. The Board also may remedy noncompliance by extending (or "tolling") the six-month statute of limitations for filing unrelated unfair labor practice charges against the employer. If the Board determines that an employer's noncompliance was knowing and willful, then the failure to post the required notice may be considered evidence of the employer's unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

Sara is the Founder and Managing Partner of Schwartz Hannum PC, a management-side labor and employment law firm located in Andover, Massachusetts. Sara gratefully acknowledges the efforts of Arabela Thomas, who assisted with the preparation of this article.

SCHWARTZ HANNUM PC
Labor and Employment Lawyers Guiding Management

Recommendations For Employers. Employers should immediately determine if they are covered by the NLRB's jurisdiction and, if so, prepare to implement the required posting by November 14, 2011. The NLRB will make copies of the notice available at its offices on request and at no cost beginning on or before November 1, 2011. The notice also will be made available for downloading from the Board's website, on or before November 1.

As the notice will likely spur increased union-organizing efforts by employees, non-unionized employers desiring to remain union-free should create or update workplace policies intended to help preserve a non-union environment. Such policies should cover non-solicitation, non-distribution, and restrictions on third-party access to the premises.

We encourage employers to conduct training sessions for managers, supervisors and human resources personnel on how to identify and lawfully respond to union-organizing activity. This is especially critical where such personnel may be confronted with a union-organizing campaign for the first time.

We also recommend that employers review the workplace for any issues that may need to be addressed, including management issues and employee compensation and benefits, and develop communication programs to help address those issues. Ultimately, these programs are critical to any successful union-avoidance efforts because they help to identify and address the workplace issues that would likely encourage employees to reach out to a union in the first place.

Of course, all such policies and programs must be consistent with Board law on these topics. Accordingly, employers should consult with experienced labor lawyers before implementing these measures.

Protecting Your Brand Online: What Every Business Person Needs to Know about the New .XXX Red Light District

By Dina Leytes, Griesing Law, LLC

The Internet Corporation for Assigned Names and Numbers (ICANN) has recently approved a controversial new .xxx top-level domain (TLD) that is meant to give the adult entertainment industry a clearly marked home on the Internet. This addition to familiar TLDs like .com, .biz, .org, .net and others will alert Internet users that a website contains adult content and will presumably make it easier to block such online content. What does this mean for your business? Virtually every business that offers goods or services under a brand name has trademark rights. The creation of the .xxx TLD will allow cybersquatters to register your trademark as a .xxx domain name. Trademark owners who value their reputation and seek to avoid an association with the adult entertainment industry should consider taking simple proactive measures now to reduce the likelihood of engaging in costly administrative or legal proceedings later.

> ***"Brand owners should also be aware that in addition to creating the .xxx TLD, ICANN has announced additional plans to expand TLDs."***

The .xxx TLD will be operated by Florida-based ICM Registry. ICM has set up an opt-out mechanism that will allow most trademark owners of nationally registered marks to prevent third-party registration of their marks as .xxx domain names *before the .xxx TLD is launched*.

Here's how the opt-out mechanism works: For 30 days starting around September 2011, there will be a "sunrise" period when trademark owners can defensively register their marks for a one-time fee, placing them on a reserved list and preventing others from registering their marks as .xxx domain names. The fee to opt-out has not been finalized, but is expected to be around $300 per domain name. If you register your trademark during the "sunrise" period, anyone attempting to access your trademark at the .xxx TLD will land on a generic page stating that the domain name has been reserved. To guarantee you are well positioned when the "sunrise" period opens, we recommend that you pre-register your mark now for free at ICM's website, http://domains.icmregistry.com.

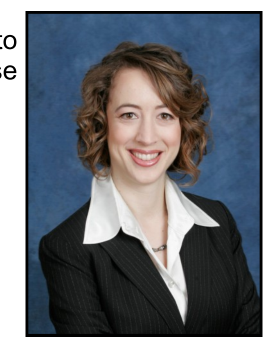
This new development is an important reminder to companies to consider registering domain names in *all* available TLDs that correspond to their primary trademark and website to avoid the expense and hassle of fighting for them later, including in foreign jurisdictions where a company has a *bona fide* intent to do business.

The National Association of namwolf Minority & Women Owned Law Firms
LAW FIRM MEMBER
"Legal excellence knows no color or gender"

Monitoring your domain name portfolio is just one aspect of protecting and promoting your brand online. Other considerations include: 1) selecting a strong mark when launching your brand or business; 2) filing for a trademark registration with the U.S. Patent and Trademark Office (PTO) and where appropriate internationally; 3) monitoring your trademark online with Google alerts and other Internet tools; 4) policing the Internet and PTO database for trademarks that are identical or confusingly similar to your own; and 5) developing internal guidelines on how your company can use social media to strengthen brand awareness and trademark rights.

Brand owners should also be aware that in addition to creating the .xxx TLD, ICANN has announced additional plans to expand TLDs. ICANN has authorized the creation of new "vanity" TLDs, paving the road for an unlimited number of TLDs reflecting familiar brands such as .cocacola or simply generic TLDs such as .shop or .movie. Vanity TLDs will be costly at $185,000 for the application fee and $25,000 for the annual fee, as well as third party costs. ICANN is also expanding domain names to include Chinese, Cyrillic and other non-Latin scripts.

If you have questions about how to protect your brand online, please contact Dina Leytes.



GRIESING LAW LLC

MEDICARE ISSUES IN LITIGATION: A PRACTICAL APPROACH
Why Has Medicare Become Such A Hot Issue In All Personal Injury Cases?

By Jennifer Eble, Bush Seyferth Paige & Erinn Deporre, Chrysler Group LLC

For over 30 years, the Medicare Secondary Payer Act ("MSP") has given the Centers for Medicare and Medicaid Services ("CMS" aka "Medicare") broad recovery rights if Medicare is not reimbursed for conditional payments made on behalf of a Medicare beneficiary at the time of settlement, judgment or other award. A conditional payment is broadly defined as a Medicare payment for services for which a primary payer (i.e., Liability Insurance (including Self-Insurance), No-Fault Insurance, and Workers' Compensation) is responsible.

"Failure to comply with this mandatory reporting requirement carries a stiff penalty of $1,000 per day per claimant…

In the past, Medicare has not uniformly enforced its conditional payment recovery rights under the MSP in general liability litigation because it could not track settlement monies or judgments to do so. However, now it can. Effective October 1, 2011, the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") will require *all* insurers and self-insured entities to report payment of *any* settlement, judgment or award intended to fully or partially resolve a claim with Medicare or Medicare-eligible claimants/plaintiffs to Medicare. Failure to comply with this mandatory reporting requirement carries a stiff penalty of $1,000 per day per claimant. Further, Medicare may seek reimbursement for all conditional payments from the primary payer as well as any entity that receives a "primary payment" (i.e., a settling plaintiff or plaintiff's counsel). As a result, Medicare's reporting requirements and recovery rights will directly impact *every* settlement with a Medicare or Medicare-eligible beneficiary, and may also impose a risk of future liability against the parties.

How Can You Minimize The Risks Of Exposure To Medicare Recovery When Litigating Personal Injury Cases?

This is a rapidly evolving area of law and it is important to understand MSP and MMSEA compliance and develop appropriate MSP protocols in order to adopt the "best practices" for your practice and/or company. Here are a few suggestions:

Discovery: Determine whether Medicare has made any conditional payments for medical services arising out of the accident or incident at issue. Obtain this information through formal discovery early in the litigation – assuming litigation has been initiated. Otherwise, ask claimant's counsel and obtain documentation regarding the claimant's Medicare/Social Security Disability Income ("SSDI") status.

Conditional Payment Amounts and Settlement Negotiations/Mediation: In cases involving a Medicare beneficiary, obtain a Conditional Payment Letter ("CPL") from the Medicare Secondary Payer Recovery Contractor ("MSPRC") prior to entering into settlement negotiations or mediation. This letter will provide Medicare's *initial* claimed conditional payment amount. The MSPRC will issue a Final Demand Letter with the final conditional payment amount when it receives settlement confirmation, including the settlement date, amount and the total attorneys' fees and costs. Because only the plaintiff has standing to challenge the conditional payment amounts, it is important to require plaintiff to cooperate in any challenges that may be necessary.

Medicare's reporting requirements and recovery rights will directly impact every settlement with a Medicare or Medicare-eligible beneficiary, and may also impose a risk of future liability against the parties. "

Medicare Reimbursement and Settlement: Ensure that Medicare is reimbursed for any conditional payments out of the settlement or judgment proceeds, or face potential recovery actions by Medicare. If a primary payer settles with a Medicare beneficiary who fails to reimburse Medicare within 60 days of receiving the settlement payment, the primary payer may be required to pay Medicare for such conditional payments, even though it already paid the settling plaintiff, and may face still penalties, including double damages and liability to the plaintiff under the private cause of action provision of the MSP.

(Continued on page 15)

(Medicare… Continued from page 14)

Release Agreements: Include appropriate language in all Releases to ensure direct payment to Medicare for all conditional payments, or, depending on the jurisdiction, put funds into plaintiff's counsel's escrow account to be paid to Medicare once a Final Demand Letter is obtained. Also include appropriate language regarding plaintiff's ongoing cooperation, as well as indemnification language addressing Medicare recovery and a waiver of plaintiff's statutory private cause of action under the MSP.

Medicare Set-Asides: If the plaintiff is a Medicare beneficiary or Medicare-eligible and has ongoing medical treatment and expenses for accident-related injuries, then consider including a Medicare Set-Aside ("MSA") for future injury-related Medicare-covered services. Although MSAs are not expressly required by the MSP, they are Medicare's "preferred" and "recommended" vehicle to protect its "future interests" and prevent the parties from shifting the burden of the claimant's future accident-related medical care to the Federal government.

Court Approval of Settlements: Consider obtaining Court approval of any settlement involving a Medicare beneficiary or Medicare-eligible beneficiary. Courts sometime make findings of fact and conclusions of law reflecting the parties' efforts to reasonably consider and adequately protect Medicare's interests in the settlement.

The Bottom Line

This is a rapidly developing area of law. It is important for attorneys to become and remain knowledgeable of the effects of the MSP and MMSEA to protect their clients and their own interests when litigating personal injury cases with a Medicare beneficiary or Medicare-eligible beneficiary.

bsp LAW OFFICES Bush | Seyferth | Paige

CHRYSLER

Tips to enhancing the security of data in the cloud

By Polly A. Dinkel, Sideman & Bancroft LLP

The best way to enhance the security of data in the cloud is to pay close attention to contract and Service Level Agreement (SLA) terms and negotiate terms that provide the appropriate level of protection for the data being stored.

- The SLA should include all of the measures that will be implemented by the vendor to secure the stored data. At a minimum, an organization must be aware of any regulatory or contractual requirements it has with regard to stored data and determine that by entering into the contract it will not be at risk of violating its own legal requirements.

- The contract should provide a suitable remedy in the event the vendor fails to meet its obligations or when security measures fail and the organization's data is exposed or destroyed. Care must be taken that disclaimers of warranties and limitations of liability do not unacceptably limit the negotiated remedy.

> ***"Unfortunately, small and midsized businesses don't always have the clout or legal budget necessary to negotiate changes to standard contracts offered by cloud providers."***

- Forty-six states have adopted laws requiring notification upon an inadvertent disclosure of personal information. Ideally, the contract should require the vendor to notify its customer of any data security breach so that the customer can determine the appropriate course of action. If the security breach is caused by the vendor, then the costs should be borne by the vendor.

- The contract should also address the vendor's obligations to protect any data in transit when the vendor is transferring it within its own systems, and between the customer's system and the vendor's system.

Additional measures to protect your data

Unfortunately, small and midsized businesses don't always have the clout or legal budget necessary to negotiate changes to standard contracts offered by cloud providers. If negotiating strong contractual protections is not possible, an organization can nevertheless take measures to protect its data.

- Conduct a thorough due diligence of the vendor's encryption and access security, as well as the physical location of the data center. Check the vendor's data center certifications.

- Investigate the financial stability of the vendor. In the case of a bankruptcy, the company could lose access to its data.

- Consider internal measures to protect the data, such as encrypting data sent to the vendor's system and maintaining back-up copies of the data. These may not be acceptable solutions if the organization is under a regulatory obligation to maintain the confidentiality of information, or where the stored information constitutes trade secrets.

- Select a "private" cloud, rather than a "public" or "community" cloud to reduce the chance that others will inadvertently access the data and reduce the probability that the cloud will be a target of hackers.

- Look for redundancy in the storage model provided by the vendor, to reduce the risk of irretrievably lost or corrupted data.

S)B SIDEMAN & BANCROFT LLP

Polly Dinkel of Sideman & Bancroft LLP was recently asked by a blogger about the best ways for small and medium-sized businesses to protect the security of their data in cloud computing arrangements. The comments above were originally posted on IsUtility.com.

Founded in San Francisco in 1978, Sideman & Bancroft LLP is a certified women-owned law firm offering significant expertise in civil litigation, government investigations and business crimes, intellectual property, corporate and real estate transactions, tax, estate planning and family law.

THANK YOU
TO ALL OF OUR 2011 COMMEMORATIVE
SPONSORS

Accenture
Microsoft
Nationwide
NBCUniversal
Visa

Prudential
Walmart
General Motors
BP
Pacific Gas and Electric Co.
Freddie Mac

American Airlines
Johnson Controls
Tyco
Lincoln Financial Group
Northwestern Mutual
DuPont
FDIC
Altria
Citigroup
Panasonic
MGM Resorts
Volkswagen Group of America
MillerCoors

COCKTAIL RECEPTION SPONSOR (SEPT. 20): GlaxoSmithKline

MOBILE APP SPONSOR: KeyBank

CONTRIBUTING SPONSORS: WellPoint, WE Energies, Cargill, Sempra Energy, Rockwell Automation, ArcelorMittal, Novartis, JPMorgan Chase, U-Haul, Exelon

WATER STATION SPONSOR: The U.S. Securities Exchange Commission