The Advocate

Official Publication
of the Idaho State Bar
Volume 58, No. 1
January 2015

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The Official Publication of the Idaho State Bar
58 (1), January 2015

Section Articles

Columns

News and Notices

On the Cover:

Lance Foster took this photo along a creek near Payette. Foster is a freelance photographer from Gulfport, Mississippi who has chronicled his visits across the globe through pictures. Discovering his passion for photography while serving in Sarajevo in 1996, he has come to appreciate the essence of the moment that can be documented through pictures. Subscribing to the idea that all genres of the art should be attempted, he has shot everything from high profile weddings to NCAA football games. You can view more of Lance's photos at http://justisphoto.com

Section Sponsors:

This issue of *The Advocate* is sponsored by the Employment and Labor Law Section.

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Special thanks to the January editorial team: A. Denise Penton, Angela Schaer Kaufmann, Susan M. Moss.

February issue sponsor:

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Upcoming CLEs

January

January 15
Science in Litigation: Admission of Evidence and Working with Experts
Sponsored by the ISB Environment & Natural Resources Law Section
The Idaho Water Center, 322 E. Front St. – Boise/Statewide Webcast
11:45 a.m. (MST)
3.0 CLE credits

January 16
Attorney Ethics & the Use of Credit Cards in Law Firms
Sponsored by the Idaho Law Foundation, Inc. in partnership with WebCredenza, Inc.
Teleseminar / Audio Stream
11:00 a.m. (MST)
1.0 Ethics Credit

January 23
Annual Flagship CLE: The Rules They Are a-Changin'
Sponsored by the Idaho Law Foundation, Inc.
Red Lion Boise Downtowner, 1800 Fairview Ave. – Boise
8:00 a.m. (MST)
4.0 CLE credits of which 1.0 is Ethics **NAC**

February

February 6
CLE Idaho: Lunch and Ethics (Caldwell)
Sponsored by the Idaho Law Foundation, Inc.
Canyon County Administration Building, 111 North 11th Ave. - Caldwell
Noon (MST)
1.0 Ethics credit **NAC**

February 6
CLE Idaho: Lunch and Ethics (Lewiston)
Sponsored by the Idaho Law Foundation, Inc.
Nez Perce County Courthouse, 1230 Main Street - Lewiston
Noon (PST)
1.0 Ethics credit **NAC**

February (continued)

February 6
CLE Idaho: Lunch and Ethics (Coeur d'Alene)
Sponsored by the Idaho Law Foundation, Inc.
Kootenai County Administration Building, 451 Government Way - Coeur d'Alene
Noon (PST)
1.0 Ethics credit **NAC**

February 12-14
33rd Annual Bankruptcy Seminar
Sponsored by the ISB Commercial Law & Bankruptcy Section
The Riverside Hotel, 2900 Chinden Blvd. – Boise
For lodging accommodations please call (208) 343-1871 and mention "Idaho State Bar Bankruptcy Seminar" to receive the negotiated group rate.

February 20
Annual Real Property Seminar
Sponsored by the ISB Real Property Section
Boise Centre, 850 W. Front St. – Boise
For lodging accommodations at Hotel 43 please call (208) 422-2279 and mention "Idaho State Bar Real Property Seminar" to receive the negotiated group rate.

February 27
Annual Workers Compensation Seminar
Sponsored by the ISB Workers Compensation Section
The Sun Valley Resort, 1 Sun Valley Road – Sun Valley
For lodging accommodations please call (800) 786-8259 and mention "Idaho State Bar Workers Compensation Seminar" to receive the negotiated group rate.

March

March 6-7
Trial Skills Academy
Sponsored by the Litigation Section
James A. McClure Federal Building and U.S. Courthouse, 550 W. Fort St. – Boise
13.0 CLE credits of which 1.0 is Ethics **NAC**
Open to attorneys who have practiced 10 years or less
For lodging accommodations at The Grove Hotel please call (888) 961-5000-8259 and mention "Idaho State Bar Mentee Block" to receive the negotiated group rate.

***NAC** — These programs are approved for New Admittee Credit pursuant to Idaho Bar Commission Rule 402(f).

**Dates, times, locations and CLE credits are subject to change. The ISB website contains current information on CLEs.

Live Seminars

Throughout the year, live seminars on a variety of legal topics are sponsored by the Idaho State Bar Practice Sections and by the Continuing Legal Education Committee of the Idaho Law Foundation. The seminars range from one hour to multi-day events. Upcoming seminar information and registration forms are posted on the ISB website at: isb.idaho.gov. To learn more contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov. For information around the clock visit isb.fastcle.com.

Webcast Seminars

Many of our seminars are also available to view as a live webcast. Pre-registration is required. Watch the ISB website and other announcements for upcoming webcast seminars. To learn more contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov. For information around the clock visit isb.fastcle.com.

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IDAHO STATE BAR

President's Message

The Value of Mentoring — Where Do We Go From Here?

Paul B. Rippel
President, Idaho State Bar
Board of Commissioners

The topic of mentoring gets kicked around in meetings and discussions about how we can help improve the profession and practice of law in Idaho. It usually ends up as an aspirational goal rather than a recommendation for a bar resolution that would make such activity mandatory.

I have just been on a "road trip" of the Idaho State Bar District Associations. One of the resounding themes regarding those who received the Professionalism Award was the message that the people who received that award were great mentors. In this year, that referred to lawyers who were in firms mentoring younger members, but that is not always the case. As a law clerk to the thoughtful District Judge Arnold T. Beebe I saw what to do and what not to do, to have credability, both on briefing and argument. Judge Beebe mentored me to love the law more than the facts — to always get the law right, so that no one could say that they had been treated unfairly. Although I certainly had a license from the state to do so, I realized that I should not be released on the public, having seen examples of both good and not-so-good lawyers. To competently represent a client, and to charge them a fee for that assistance, I realized there was so much more to being a good lawyer than just learning the rules of law, evidence and procedure. I also began to understand the difference between just being a mouthpiece and being a lawyer, which required being both an attorney at law and a counselor at law. Those two descriptions encompass being both an advocate for a client and counselor to them on the issues, showing the risk and rewards of their positions, including the potential for owing the other side's attorney's fees.

There is a substantial value to being either in a mentoring relationship in a law firm or finding a local mentor. I have personally benefitted over several decades by having lawyers in my law firm who could provide a solid sounding board when I encountered something new.

I am told that the Idaho State Bar has more lawyers volunteering to act as mentors than lawyers requesting a mentor, (i.e. newer members of the bar). In days gone by, I also understand that in many districts, lawyers would gather at a particular restaurant for lunch, with all sharing their impressions on practice issues or a particular judge on the case. Thus, even if you were not in a firm, you got a good dose of mentoring from those who had gone before you. Now, it seems the technological and electronic age is beginning to dominate all aspects of legal practice, from real estate to felony crimes. With those changes, we are now talking about a cross-mentoring benefit, i.e. older lawyers being mentored by younger members on how to keep up with information age, cell phones that respond to verbalized questions, use of pads and computers in court, and so on.

I realized there was so much more to being a good lawyer than just learning the rules of law, evidence and procedure.

Where do we go from here? Idaho lawyers rarely want to be told what to do, or how much of it to do. For example, we failed to pass a resolution to increase the MCLE requirements incrementally, and the rule on pro bono work is aspirational with no mandatory reporting. Still, we should keep the idea of mentoring alive. Ultimately, the public will benefit from having lawyers with broad experience. If you agree in whole or in part, discuss how you think mentoring can be advanced at local bar meetings.

About the Author

Paul B. Rippel *is a member of Hopkins Roden in Idaho Falls, and current President of the Idaho State Bar Board of Commissioners. Mr. Rippel received a BS from the University of Idaho in 1976, MS at NM State University in 1978, and his JD from the University of Idaho in 1981. He has practiced in Idaho Falls since clerking for the Hon. Arnold T. Beebe for a year. His wife Alexis is also a U of I graduate and they have a son and daughter living in Portland, Oregon.*

LETTER TO THE EDITOR

Appellate Section takes flight

Dear Editor,

The Idaho Appellate Practice Section ("IAPS") was created in April 2014 to advance good appellate practice and professionalism before the state and federal appellate courts, to increase awareness of appellate practice in Idaho, and to enhance the skills of its members.

To further those goals in 2015, IAPS offers its members the following services:

Weekly Summaries of Idaho State and Federal Appellate Decisions. Members receive by email weekly summaries of opinions issued by Idaho state and federal appellate courts. This is a unique service being offered only to our members.

CLE Brown Bag Lunches. Member meetings will be held at noon (MST) on the second Thursday of April, June, September, and December 2015, at the Idaho State Bar offices. The first 15 minutes of each meeting is dedicated to Section business, with the remainder devoted to CLE presentations on appellate practice topics.

The Idaho Appellate Handbook. IAPS recently took over responsibility to update *The Idaho Appellate Handbook*. The handbook was last updated in 1996, and we are planning to publish a new edition in the fall of 2015. Please look for announcements about the handbook next year.

Standard membership dues are $25, but dues are $10 for attorneys admitted to ISB for less than three years. Law students are free. Please go to http://isb.idaho.gov/member_services/sections/apl/apl.html for more information on IAPS.

W. Christopher Pooser
Boise

DISCIPLINE

Brian L. Boyle
(Suspension)

On October 27, 2014, the Idaho Supreme Court issued a Disciplinary Order suspending Meridian attorney Brian L. Boyle from the practice of law for a period of 90 days, effective October 1, 2014. The Disciplinary Order included a withheld six-month suspension and a one-year disciplinary probation upon reinstatement.

The Idaho Supreme Court found that Mr. Boyle violated I.R.P.C. 1.2(a) [Scope of representation], 1.3 [Diligence], and 1.4 [Communication]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Boyle admitted that he violated those rules.

The formal charge case related to Mr. Boyle's representation of a client who sought a guardianship of a disabled child. In that case, Mr. Boyle failed to promptly file the guardianship petition, failed to communicate with his client about the status of the case, and failed to communicate with the minor's appointed guardian ad litem. The client erroneously believed that she had been appointed as guardian. However, the Court had not appointed a guardian and instead scheduled a show cause hearing due to inactivity in the case. Approximately two months before the show cause hearing, the child died. At the show cause hearing, Mr. Boyle informed the Court that the child was still living and that his client wanted to be appointed guardian. After the hearing, the guardian ad litem contacted Mr. Boyle's client, learned that the child was deceased, and informed the Court. The case was ultimately dismissed.

The Disciplinary Order provides that 90 days of suspension will be served effective October 1, 2014, and six months will be withheld. Mr. Boyle will also serve a one-year probation following reinstatement, subject to conditions specified in the Order.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

Richard E. Kriger
(Suspension/Probation/Restitution)

On December 15, 2014, the Idaho Supreme Court issued a Disciplinary Order suspending Washington attorney Richard E. Kriger from the practice of law for a period of two years, with all but four months of such suspension withheld.

The Idaho Supreme Court found that Mr. Kriger violated I.R.P.C. 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation] and 8.4(d) [Conduct prejudicial to the administration of justice]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Kriger admitted that he violated those Rules.

The formal charge case related to a minor's compromise case in which Mr. Kriger was appointed as conservator for his then 6-year-old son, D.K., who had received a $25,000 settlement for injuries sustained in a motor vehicle accident. Despite a court order directing Mr. Kriger to hold the settlement funds in trust for

D.K.'s benefit until D.K. turned 18, Mr. Kriger used the settlement funds for his own living expenses. When D.K. turned 18 and requested the funds, Mr. Kriger falsely informed D.K. that the funds were unavailable until D.K. turned 21, and subsequently advised D.K. that the funds had been exhausted.

Prior to the Idaho State Bar's filing of the formal charge Complaint, D.K. accepted Mr. Kriger's offer to repay the $25,000 in monthly installments. Mr. Kriger has sent the monthly restitution payments to D.K. as agreed since February 2014.

The Disciplinary Order provided that during the four-month period of suspension and until reinstatement, if any, Mr. Kriger shall send D.K. monthly payments until the entire $25,000, plus an additional $24,772.60 in interest, is reimbursed. The Disciplinary Order also provided that upon reinstatement, Mr. Kriger will serve a three-year probation with conditions that include his continuing monthly payments to D.K. until the entire $25,000, plus $24,772.60 in interest, is reimbursed. Under the Disciplinary Order, if Respondent fails to submit payments to D.K. during his suspension period or probation, or if he violates any other condition of his probation, the 20-month period of suspension that was previously withheld shall be automatically and immediately imposed.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

Danny J. Radakovich

(Public Reprimand/
Withheld Suspension/Probation)

On December 15, 2014, the Idaho Supreme Court issued a Disciplinary Order issuing a Public Reprimand to Lewiston attorney Danny J. Radakovich. The Disciplinary Order included a withheld 90-day suspension and a six-month disciplinary probation.

The Idaho Supreme Court found that Mr. Radakovich violated I.R.P.C. 1.2(a) [Abide by client objectives], 1.3 [Diligence] and 1.4 [Communication]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Radakovich admitted that he violated those Rules.

The formal charge case related to Mr. Radakovich's representation of a client in a conditional use permit case. The client sought judicial review of a county's decision limiting his permit for a gravel operation. In the underlying case, Mr. Radakovich failed to timely file his client's appeal brief despite multiple extensions and failed to promptly inform his client when the Court dismissed the case for failure to timely file the appeal brief. Mr. Radakovich was ultimately successful in having the Judgment dismissing the case set aside, and also refunded all fees relating to his representation.

The Disciplinary Order provides that the 90-day suspension will be withheld and that Mr. Radakovich will serve a six-month period of probation subject to the condition that he will serve the withheld suspension if he admits or is found to have violated any Idaho Rules of Professional Conduct for which a public sanction is imposed for conduct that occurred during the probationary period.

The public reprimand, withheld suspension and probation do not limit Mr. Radakovich's eligibility to practice law.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

Mark A. Ellison

(Resignation in Lieu of Discipline)

On October 27, 2014, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Boise attorney, Mark A. Ellison. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

On May 17, 2013, a federal grand jury issued a Superseding Indictment. The Superseding Indictment charged Mr. Ellison with 88 counts of securities fraud, wire fraud, mail fraud and interstate transportation of stolen property, conspiracy to commit money laundering and interstate transportation of property taken by fraud. The charges related to Mr. Ellison's representation of DBSI.

On July 7, 2014, following trial, a federal jury found Mr. Ellison guilty of 44 counts of securities fraud and aiding and abetting securities fraud. The jury found Mr. Ellison not guilty on 35 counts and 9 counts of the Superseding Indictment were dismissed on motion of the United States.

Mr. Ellison was sentenced to 5 years on each of the counts, all to be served concurrently. Following his release from custody, Mr. Ellison will be on supervised release for 3 years.

The Idaho Supreme Court accepted Mr. Ellison's resignation in lieu of discipline. By the terms of the Order, Mr. Ellison may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If

he does make such application for admission, he will be required to comply with all of the bar admission requirements in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttal presumption of the "unfitness to practice law."

The Order also provides that consistent with I.B.C.R. 512(d), if an appeals court vacates or reverses Mr. Ellison's conviction, or if a trial court enters an order granting a motion for a new trial, a motion for judgment of acquittal, or a motion to withdraw a plea of guilty, that removes Mr. Ellison's conviction of the crimes, which are the basis for this sanction, Mr. Ellison may file with the Clerk of the Idaho Supreme Court, a motion for dissolution or amendment of the sanction.

By the terms of the Idaho Supreme Court's Order, Mr. Ellison's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on October 27, 2014.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

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IDAHO STATE BAR

Executive Director's Report

2014 Resolution Process—The Results Are In

Diane K. Minnich
Executive Director, Idaho State Bar

The Idaho State Bar membership considered three resolutions during the 2014 resolution process. One of the resolutions recommended changes to the Idaho Bar Commission Rules, one recommended changes to the Lawyer Referral Service program and policies, and the last resolution requested support for the 2016 National Mock Trial Competition, which will be held in Boise. All of the resolutions were approved by the membership.

A summary of the resolutions is below, along with the vote totals.

The proposed rule change would allow lawyers who are licensed as House Counsel to perform pro bono work under the auspices of an Approved Legal Organization, currently Idaho Legal Aid Services or the Idaho Volunteer Lawyers Program.

Changes to Idaho Bar Commission Rule 225

The need for pro bono services in Idaho continues to far exceed the supply of available volunteer lawyers. Currently, Idaho Bar Commission Rule 225 prohibits its licensed House Counsel from participating in the provision of pro bono legal services. The proposed rule change would allow lawyers who are licensed as House Counsel to perform pro bono work under the auspices of an Approved Legal Organization, currently Idaho Legal Aid Services or the Idaho Volunteer Lawyers Program.

Lawyer Referral Service

For the past few years, the LRS Committee has studied the program's performance and compared it with similar programs operated by other bar organizations. As part of its review, the LRS Committee consulted the American Bar Association's PAR review assessment through site visits, the ABA's Model Rules on LRS, and criteria for ABA accreditation.

The LRS Committee identified areas for improving Idaho's LRS program for both attorneys and the public as: (a) creating objectively verifiable criteria that show panel attorneys possess the minimum qualifications to handle a high-stakes referral, and (b) shifting the collection of the $35 fee paid to the panel attorney to the ISB because having the fee collected by the attorney results in a high occurrence of missed appointments by the public and time-consuming fee collection by the attorney that is often waived.

The approved amendments to the LRS program Rules and Registration materials (a) require minimum qualifications for LRS attorneys to accept referrals in felony criminal, bankruptcy, and high-conflict family law matters (or be willing to accept a mentor in these cases), and (b) authorize the ISB to collect a fee for the referral and require panel members to provide the half-hour consultation without a fee effective January 1, 2016. The LRS Rules will be published in the Desk Book Directory and on the ISB website so panel attorneys and the public have access to the current policies and procedures of the LRS program.

National Mock Trial Competition

The National High School Mock Trial Championship is the nation's premier law-related academic tournament for high school students. Student mock trial participants learn practical aspects of our legal system, effective dispute resolution, the role of the judiciary in our democracy, respect for the rule of law, effective communication skills, critical thinking and civility.

The Idaho Law Foundation submitted a bid, which was granted, to host the 2016 National High School Mock Trial Championship in Boise, Idaho. As the host for the 2016

2014 Resolution Results											
District		1st	2nd	3rd	4th	5th	6th	7th	OSA*	Totals	
Members eligible to vote		458	238	261	2,093	313	216	399	1,185	5,163	
Percent of total membership		*9%*	*5%*	*5%*	*41%*	*6%*	*4%*	*8%*	*23%*	*100%*	
Members voting		95	78	54	330	78	78	79	82	874	
Percent of members voting		*21%*	*33%*	*21%*	*16%*	*25%*	*36%*	*20%*	*7%*	*17%*	
Number in attendance		25	46	23	32	28	43	42	4	243	
Percent in attendance		*5%*	*19%*	*9%*	*2%*	*9%*	*20%*	*11%*	*0%*	*5%*	
14-01	For	92	74	51	319	77	74	78	76	841	97%
House Counsel License	Against	3	4	1	10	0	1	1	3	23	3%
	Total	95	78	52	329	77	75	79	79	864	
14-02	For	75	63	34	246	65	59	70	60	672	78%
Lawyer Referal Service Rules	Against	20	14	18	78	12	16	9	18	185	22%
	Total	95	77	52	324	77	75	79	78	857	
14-03	For	81	75	48	297	76	73	72	70	792	92%
National High School Mock Trial	Against	12	3	6	28	1	1	7	8	66	8%
	Total	93	78	54	325	77	74	79	78	858	

* Out of State Active

National High School Mock Trial Championship, the Foundation will seek funding for the event from educational institutions, court community education grants, legal associations, Bar Sections, District Bar Associations, corporate sponsorships, private foundations, law firms and individuals.

Idaho lawyers and judges have long served as mock trial coaches, judges and volunteers in all regions of the state, and hosting National High School Mock Trial provides an unprecedented opportunity for them to showcase the civic engagement of the Idaho Law Foundation and the Idaho State Bar, while demonstrating a unified commitment to the civic educational values that National High School Mock Trial inculcates.

Through the resolution, the Idaho State Bar expressed its support for the Idaho Law Foundation's efforts to host a National High School Mock Trial Championship in 2016, and encouraged its members to promote and participate in this important event.

Thanks to those of you that took the time to attend the resolution meeting in your district. We appreciate the opportunity to meet with lawyers throughout the state to honor your colleagues, discuss the proposed resolutions and find out what is going on around the state.

Hosting National High School Mock Trial provides an unprecedented opportunity for them to showcase the civic engagement of the Idaho Law Foundation and the Idaho State Bar.

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Welcome to the Employment and Labor Law Issue

Mark DeMeester

Employment law has expanded significantly in recent decades. And government has shown an increased willingness to regulate the employment relationship. Government priorities change, leading to new legislation or more aggressive enforcement of existing laws. Technology has altered most workplaces, presenting new circumstances for laws that are sometimes many decades old. New legal theories gain traction: Who would have predicted 25 years ago that the largest number of class action cases in federal courts would concern wage and hour matters? Or, that in the 2014-15 term, the U.S. Supreme Court would revisit many different employment laws, including the Fair Labor Standards Act, the Labor Management Relations Act, Title VII of the Civil Rights Act, and the Pregnancy Discrimination Act?

The Employment and Labor Law Section appreciates the opportunity to sponsor this issue of *The Advocate*. Section members generously devoted their time and energy to update, clarify, and expand on five different areas of employment law. Bren Mollerup describes public policy protections for employees; Clayton Gill advises on government wage and hour audits; John Ashby covers recent pregnancy discrimination enforcement guidance; Kara Heikkila reviews changed employment law requirements for federal contractors; and Theodore Reuter outlines some challenges of paying employees with Bitcoin. The Section hopes that you will enjoy these articles and benefit from their analysis. Having practiced employment law for some 20 years, I can attest that most of these topics are bread and butter issues.

Employment and labor law remains a lively practice area with new developments every year. For those interested in employment law, we urge you to attend our monthly CLEs, and join the Section if you are not already a member. The Section meets the fourth Wednesday of most months at the ISB offices, with an option to phone in. In the upcoming year, we anticipate CLEs from state lawmakers, the Idaho Human Rights Commission, possibly the bench, and legal specialists who provide unique perspectives, review trends, and share recent experiences not captured elsewhere. We hope to see you there!

About the Author

Mark DeMeester *is Associate General Counsel in the Hewlett-Packard Office of General Counsel. The views expressed in this article are his alone and do not reflect the position of HP.*

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Look Before You Leap: The 'Public Policy' Exception to At-Will Employment

Bren E. Mollerup

I frequently represent business people who wrestle with making sound decisions when disciplining or terminating their employees. "What do you mean I can't fire her?" or "He can sue me for that?" are common questions asked regarding termination of an employee. This confusion usually arises from the misconception that an at-will employee can be terminated under any circumstance. However, employers should be aware that there are exceptions to at-will employment. One of these is the public policy exception.

Idaho's public policy exception to at-will employment exists for employees who engage in certain protected employee activities. These protected activities are identified in case law and include an employee's refusal to commit an unlawful act, an employee's performance of an important public obligation, or an employee's exercise of certain legal rights and privileges.[1] An employer cannot lawfully terminate an employee in these situations.

It has been my experience that both business owners and attorneys who do not practice frequently in the area of employment law often overlook situations where the termination of an employee violates public policy and is therefore wrongful. Accordingly, the aim of this article is to introduce the reader to a few situations where such a violation could be present. Additionally, some suggestions are offered to prevent these claims from arising in the first place.

The public policy exception to at-will status

In general, an employee who is not under a contract for a specific duration of employment is considered to be "at-will."[2] Typically, this means that an employer is free to terminate its employees for any reason or no reason at all.[3] However, there are several exceptions to this general rule, one of which is that termination cannot be in violation of public policy.[4] If a violation of public policy is implicated, the typical rules governing an at-will employee no longer apply.[5]

The determination of whether a protected activity exists, sufficient to allow the exception to apply, is a question of law.[10]

Over the years, many employee activities have been identified as qualifying for protection under the public policy exception to at-will employment status. Filing for worker's compensation claims, reporting unlawful conduct or issues affecting public safety, and participating in union activity are just a few situations in which this exception can apply.[6]

The elements of a wrongful termination in violation of public policy are similar to many federally based employment regulations such as Title VII. However, while under federal law and regulations, the acts that violate the law are specifically defined, the acts that may violate public policy under state law vary from state to state.

In the public policy exception to at-will employment under Idaho law, the plaintiff employee bears the burden of convincing a court that there is a public policy at stake that justifies the exception to at-will employment and that the employee acted in a manner intended to further that policy.[7] In order to qualify as a cognizable public policy that gives rise to the exception, the claimed public policy must have its roots in case law or statute.[8] Further, it is not enough for an employee to establish his or her conduct qualifies as protected activity under a recognized public policy; he must also show that the termination or adverse employment action was in fact motivated by his participation in the protected activity.[9] The determination of whether a protected activity exists, sufficient to allow the exception to apply, is a question of law.[10] Likewise, the question of motivation/causation may be decided as a matter of law where no genuine issue of fact exists.[11]

Violations qualifying under the public policy exception need not be terminations. Claims for constructive discharge also fall under the protections of the public policy exception. While not addressed in detail in Idaho, most states recognize that constructive discharge or other adverse employment action after an employee has engaged in protected activity will support a claim for wrongful termination in violation of public policy.[12] Constructive discharge arises when a reasonable person in a similar situation would

feel that he or she was forced to quit because of intolerable and discriminatory working conditions.[13] Stated another way, the legal inquiry is whether the words or actions of the employer would logically lead a prudent employee to believe his employment had effectively been terminated.[14] When applied in other employment contexts, courts have widely held that "an employer cannot do constructively what the act prohibits his doing directly."[15] This rationale would also seem to apply to employers when making decisions with respect to an employee who has engaged in protected activity. For example, if an employer takes adverse employment action, such as demotion or unwarranted discipline, after an employee has engaged in protected activity that effectively eliminates the benefits of being employed, the employer opens itself to liability.

Once an employee engages in protected activity, the employer must proceed cautiously. It always amazes me that employers seem to identify a bad employee about the time the employee files a worker's compensation claim or complains about the safety standards at their workplace. Even if the employer has an objective reason for termination, it may not be enough to avoid a claim. In some cases, close proximity between the protected activity and discipline or termination may be enough to allow a claim to survive summary judgment. Employers cannot afford a kneejerk reaction when an employee has engaged in conduct that may be considered protected activity.

Where are the lines?

What conduct falls within the public policy exception to protect an employee and what conduct may an employer engage in without running afoul of the exception? The answer is the same as with many legal topics: it depends on the facts of the case. However, some basic guidelines have been established by our courts.

If an employee cannot point to a specific protected activity, there is no claim. For example in *Bollinger v. Fall River Rural Elec. Coop., Inc.*,[16] an employee made the general allegation that she was fired due to reporting safety violations.[17] The Idaho Supreme Court recognized that while reports of safety violations may constitute protected activity, identification of the source of the policy that would bring the exception into play is required.[18] The Plaintiff mentioned OSHA in deposition testimony but never associated her complaints with a specific violation of law, regulation, or statute.[19]

The Court held that the public policy exception would be too broad if general safety suggestions fell within the exception.[20] The Court also held that there was no issue of fact with respect to the motivation for the Plaintiff's termination. Specifically, the Court concluded that no facts supported a reasonable inference that the employee's termination was motivated by any reason other than economic consolidation.[21]

The teaching of the Bollinger case is that the content of the employee's complaint or disagreement is critical. Without specific reference to regulation, case law, or statute, the activity may not be protected. The exception is narrow and not to be treated as a catchall. Bollinger also stands for the proposition that an employer will not be held liable for wrongful discharge in violation of public policy where the employer provides an objective reason for termination and the employee cannot produce evidence of an alternative motivation for the termination. The message to both employers and employees is to be specific about the actions they are taking and the reasoning behind them.

On the other hand, in *Thomas v. Medical Ctr. Physicians, P.A.*,[22] the Idaho Supreme Court held that a doctor who reported fellow doctors for falsifying medical records engaged in protected activity.[23] The court reasoned that this was protected under the public policy exception because the conduct reported was unlawful and such conduct implicates the health and welfare of the public.[24] Here, the Court announces a clear policy that if conduct is objectively unlawful and objectively implicates the health and welfare of the community, it will be protected.

As such, the *Thomas* case tells us that there are nearly bright-line situations where the employee would be protected and the employer should be on notice the activity is protected by the exception. Of course, there are situations such as filing worker's compensation claim and complying with court orders that are absolutely protected.

It always amazes me that employers seem to identify a bad employee about the time the employee files a worker's compensation claim or complains about the safety standards at their workplace.

In actuality, most cases fall somewhere in between the scenarios discussed in the *Bollinger* and *Thomas* case.

However, these cases and others do provide valuable lessons for both the employer and employee. Employers must think twice when making the decision to terminate or discipline an employee. Likewise, if employees expect the protection of the exception they must be specific about their complaint and make sure that a foundation in law exists for the same.

Avoiding termination in violation of public policy

Perhaps one reason why these claims arise is human nature. For those in management positions the public policy rule requires a great deal of restraint. No one wants to hear that bad things are happening on their watch. Treating someone who points out the company's faults, and therefore managerial faults, as if no complaint was made can be very difficult. It is human nature to want to strike back at people who accuse us of wrongdoing. For the employer, the answer to this problem is multifaceted. Policies must be put into place dealing with employees engaging in protected activity, training must be provided, and recordkeeping and review procedures must be established.

Instituting a policy for identifying protected activity and properly handling it functions as notice to management, and training provides management the tools to implement the policy. Without training, a policy is nothing more than a printed page that gets filed away after the first day of employment. Consistent recordkeeping regarding an employee's performance, job reviews, and behavior provides the employer objective proof regarding the motivation for termination of an employee. Finally, a review process that ensures that a disciplinary decision is consistent with the employer's actual practices when compared to similar employee behavior and performance is essential. This will help ensure that an employee is not being discharged or disciplined for an improper purpose. While these procedures seem simple, I am always amazed at how few employers have them in place. The old saying that an ounce of prevention is worth a pound of cure is especially true for employers. While these procedures take a little time and effort to implement, the time and effort invested is well worth it if even one claim is avoided.

Employees should be aware that the public policy provision is not a catchall. The employee is not entitled to engage in unprofessional behavior or to constantly nag management about random suggestions or concerns and expect to be provided the protections of the public policy exception. Even when an employee makes such a complaint or report, the report must be specific about the improper or unlawful conduct.

In most cases, if an employee wishes to have these protections the complaints submitted must have a foundation in case law, statute, or regulation. The activity or complaint must have an objective and important social function that has roots in the law.

However, this does not mean that the activity must be defined by case law or statute. Absent such a foundation, no protection is provided by this doctrine. Employees should make sure that they document notifications to their employers regarding protected activity and put them on notice if they feel an issue has been presented. As with their employers, consistency and good recordkeeping are necessary for employees to protect their rights.

In sum, both parties have a great deal to lose or gain in the employment relationship. While most employers and employees know their rights with respect to the Title VII claims and the like, the public policy exception may not be on their radar.

Any employment relationship is a two-way street. An employer who wishes to get the most out of its employees must make them feel appreciated and safe. Likewise, an em-

Practice point — performance reviews and termination

In advising employers on termination of employees, the most important guideline to remind a client of is that termination should not be a surprise to either the employee or the employer. There should be a clear paper trail of performance reviews or discipline to fall back on. A policy that incorporates progressive discipline related to objective job performance is the best way for an employer to insulate itself against wrongful termination claims of all types.

For example, a policy could require a three-step process. At first the employee is given a verbal warning that is documented by his supervisor in his employment file. If the behavior or lack of performance continues, a further counseling and written warning can be issued. If the behavior persists, the employee may be terminated.

Regardless of any protected activity the employee has engaged in, the employer now has an objective unrelated and documented basis for termination.

Most employers are not out to discourage employees from engaging in protected activity. However, an employer who fails to implement specific discipline and performance policies may appear to have an ulterior motive when it cannot produce objective documentation supporting the claimed reasons for a termination.

ployee who wishes to be recognized and appreciated must show the employer respect and appreciation. Most employees are not looking for a way to cause their employers a headache, and most employers want to retain quality employees. If the necessary lines of communication remain open, many of these claims can be avoided.

Endnotes

1. *See Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990); *Watson v. Idaho Falls Consol. Hosps., Inc.*, 111 Idaho 44, 720 P.2d 632 (1986); *Ray v. Nampa Sch. Dist. No. 131*, 120 Idaho 117, 814 P.2d 17 (1991).

2. *Nilsson v. Mapco*, 115 Idaho 18, 22, 764 P.2d 95, 99 (Ct. App. 1988).

3. *Thomas v. Medical Ctr. Physicians*, *P.A.*, 138 Idaho 200, 206, 61 P.3d 557, 553 (2002).

4. While not discussed in this article, other exceptions to at-will employment include termination based on race, color, religion, sex, and national origin in violation of Title VII of the Civil Rights Act. Likewise, some cities and counties have adopted laws protecting LGBT employees. Whistleblower laws and special exceptions for public employees must also be considered.

5. *Id.* at 208, 61 P.3d at 565.

6. *See Sorensen*, 118 Idaho at 668, 799 P.2d at 74; *Watson.,* 111 Idaho 44, 720 P.2d 632; *Ray*, 120 Idaho 117, 814 P.2d 17.

7. *Id.*, *citing Thomas v. Med. Center Physicians, P.A.*, 138 Idaho 200, 208, 61 P.3d 557, 565 (2002).

8. *Id.*, *citing Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 177, 75 P.3d 733, 738 (2003).

9. *Edmondson*, 139 Idaho at 177, 75 P.3d at 738.

10. *Bollinger,* 152 Idaho at 641, 272 P.3d at 1272.

11. *Id.*, *citing Thomas*, 138 Idaho at 208, 61 P.3d at 265.

12. *Korslund v. DynCorp Tri-Cities Servs.*, 156 Wn. 2d 168, 125 P.3d 119 (Wash. 2005); *Touchard v. La Z-Boy, Inc.*, 2006 UT 71, 148 P.3d 945 (Utah 2006); *Banaitis v. Mitsubishi Bank*, 129 Ore. App. 371, 879 P.2d 1288 (Or. Ct. App.1994).

13. *See Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984).

14. *Knee v. School Dist.,* 106 Idaho 152, 154, 676 P.2d 727, 729 (Ct. App.1984) (citations omitted).

15. *NLRB v. Holly Bra of California, Inc.*, 405 F.2d 870, 872 (9th Cir. 1969).

16. *Bollinger,* 152 Idaho 632, 272 P.3d 1263.

17. *Id.* at 641, 272 P.3d at 1272.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Thomas*, 138 Idaho 200, 61 P.3d 557.

23. *Id.* at 208, 61 P.3d at 565.

24. *Id.*

About the Author

Bren E. Mollerup *is a partner at the law offices of Benoit, Alexander, Harwood & High, LLP and focuses his practice on civil defense work in the areas of employment liability, product liability, personal injury, and worker's compensation.*

Are Your Clients Ready for a Wage and Hour Audit?

C. Clayton Gill

The United States Department of Labor's (DOL) wage and hour audits are on the rise.[1] Why should your client care about a DOL audit? First, the DOL can order your clients to pay a double damage penalty for failing to comply with the law. Second, owners and managers can be held personally liable for unpaid wages.

This article is intended to: (1) provide you with a general overview of the Fair Labor Standards Act (FLSA); (2) help you understand why it is beneficial to make a good faith effort to comply with the FLSA at the outset; (3) provide an overview of the DOL wage and hour audit process; and (4) provide details and suggestions for your clients so they can avoid some of the more problematic areas with the FLSA.

These recent headlines should provide plenty of reasons for your clients to sharpen their wage and hour practices:[2]

- Tulare, California, cabinet company to pay nearly $250,000 in back wages, damages and penalties following U.S. Labor Department investigation.
- Sacramento, California, landscaper to pay more than $185,000 in back wages and damages to employees.
- The U.S. Department of Labor has ordered the owners of two Boise restaurants, Eddie's Restaurant and Eddie's Diner, to pay $26,000 to employees in back wages.

An employer's good faith attempt to comply with the law can reduce the statute of limitations from three years to two, help the employer avoid liquidated damages, and avoid personal liability.

The basics of the FLSA

The FLSA applies to all enterprises that are engaged in interstate commerce, all enterprises whose annual revenues exceed $500,000, hospitals, businesses providing medical or nursing care for residents, and schools and preschools.[3] Thus, almost all companies are subject to the FLSA.

As a general rule, the FLSA requires non-exempt (hourly) employees to be paid at least the prevailing state or federal minimum wage, whichever is higher.[4] The FLSA also generally requires non-exempt (hourly) employees to be paid overtime if they work more than 40 hours in the defined work week.[5]

So the basic legal framework of the FLSA is: (1) each employee must be classified as exempt (salaried) or non-exempt (hourly); and (2) if an employee is classified as non-exempt (hourly), they must be paid at least the minimum wage and overtime pay for every hour they worked beyond 40 hours during the work week.[6]

The importance of making a good faith effort to comply with the law at the outset

Making a good faith effort to comply with the law has definite advantages in wage and hour audits. The statute of limitations for a willful violation of the FLSA is three years.[7] The statute of limitations for a non-willful violation is two years.[8] When a manager actively engages in all pertinent aspects of a company's employment practices, he or she can be held personally liable for any unpaid wages owing under the FLSA.[9]

A successful wage claimant can recover two times the wages he or she is owed.[10] This is called "liquidated damages" in the FLSA vernacular.[11] Employers can avoid liquidated damages by acting in subjective good faith with objectively reasonable grounds for believing that their conduct complied with the FLSA.[12] I have seen this applied in my own practice. The DOL commonly waives any claim for liquidated damages when the employer makes a good faith effort to comply with the law and supports its position with substantial legal authority.

Thus, an employer's good faith attempt to comply with the law can reduce the statute of limitations from three years to two, help the employer avoid liquidated damages, and avoid personal liability.

An overview of the DOL wage and hour audit process[13]

The FLSA gives the DOL the power to investigate and audit companies to ensure compliance with the FLSA.[14] These investigations may be conducted by the federal DOL or the Idaho DOL.[15] Typically, the investigation is headed by an investigator from the federal DOL, with oversight by an attorney from the Department of Justice (DOJ). The investigator determines the facts and consults with the DOJ attorney

about the application of those facts to the law. The DOL's interpretation of the law is found in its regulations, the DOL Wage and Hour Administrator's Interpretation Letters and Opinion Letters, and the DOL Field Handbook, all of which are available on the DOL's website.[16]

If the investigator determines a violation has occurred, the employer and investigator will begin negotiations to reach a settlement.[17] While this may sound discouraging, there is one advantage: settling with the DOL allows the employer to pay a compromised sum in exchange for a release of all unpaid wage claims.[18] This is the only time that an employer can obtain a release of all unpaid wage claims in exchange for a payment of a compromised sum, absent court approval.[19]

If no agreement is reached, the DOL will determine whether or not to file suit against the employer.[20] Litigating against the DOL is difficult and costly. The DOL has a much larger war chest than most employers. If an employer loses an action against the DOL, they will have to pay the DOL's attorney fees in addition to any damages awarded in the action.[21]

Common Pitfalls with the FLSA

Failure to document the reasons supporting the exemption

The FLSA sets forth a number of different exemptions.[22] The primary exemptions from the FLSA's minimum wage and overtime requirements are the executive, administrative, professional, outside sales, and computer employee exemptions.[23] The FLSA regulations provide additional guidance on what proof employers should have to support the exemption.[24]

Many employers operate under a misconception that all of their front office employees are exempt under the administrative exemption because they service the organization. Many folks also believe that all employees involved in important managerial decisions are exempt under either the executive or administrative exemptions. Neither of those assumptions is correct. Rather, each exemption comes with multiple factors that must be established in order for the exemption to apply.

Misclassifying an employee as exempt creates multiple problems when faced with a DOL audit. First, if an employee is misclassified as exempt, the DOL will generally calculate the employee's hourly rate by determining the total number of hours worked and then divide that number into the total compensation paid to that employee for that same period of time. If that hourly rate falls below the minimum wage, the employer must pay the amount that is required to bring the hourly rate up to the minimum wage. Second, if the employee worked more than 40 hours in any defined workweek, the employer is liable for an amount that equals every hour worked above 40 hours in any defined workweek multiplied by one half of the determined hourly rate. And if liquidated damages are assessed, those amounts are multiplied by two.

Most DOL audits are trying to determine if a certain category of employees have been misclassified as exempt. Thus, at the beginning of an audit the DOL will often ask for a job description for a certain category of employees who work more than 40 hours a week and who are paid a flat salary regardless of the number of hours worked. This poses problems for many small and medium-sized employers because they usually do not have job descriptions for their employees.

A well-written job description identifies the primary duties of the job, consistent with the requirements for the exemption.[25] For example, a job description for an administrative employee should establish that: (a) the employee's primary duties are servicing the business and not building, selling, or providing the products or services of the company; (b) the employee makes significant decisions for the company without consulting their supervisor or company management; and (c) the employee makes independent decisions on matters that significantly impact the company's overall wellbeing.[26]

In addition to a job description, an employer should document the employee's regular daily tasks, with a breakdown of the percentage of time spent on each of those tasks. The employee should be asked to verify the accuracy of the percentages allocated to each task. If that document suggests that the employee is spending too much time on non-exempt tasks, consider shifting those duties to other non-exempt employees.[27]

Finally, document all reasons supporting the exemption claimed, with citations to the relevant regulations

Settling with the DOL allows the employer to pay a compromised sum in exchange for a release of all unpaid wage claims.[18]

and any applicable DOL interpretation or opinion letter. The FLSA expressly states: " . . . no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the [FLSA], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of . . . the Administrator of the Wage and Hour Division of the Department of Labor . . . ."[28] Consultation with an attorney can also help avoid liability for liquidated damages.[29]

Because the DOL usually sides with the employee over the employer in an audit, it is difficult to defend the allegations without some contemporaneous written documentation supporting the exemption. Without documentation, employers also may not avoid liquidated damages.

Failure to define the work week

An employer can define its work week under the FLSA.[30] Employers must notify their employees, in writing, about the day and hour when the work week begins.[31]

Defining the work week is critical because an employer is only responsible for paying overtime if employees work more than 40 hours during that defined work week.[32] Your clients are only liable for overtime pay for those hours worked in excess of 40 hours.[33] Thus, vacation hours, sick leave hours, holiday hours, and personal time hours should not be credited toward the 40-hour threshold.

Failure to properly calculate the regular rate of pay that is used to determine overtime pay

The FLSA and its regulations provide extensive guidance on the calculation of the regular rate of pay.[34] Once the regular rate of pay is determined, it must then be multiplied by 1.5 to determine the employee's overtime pay.[35] Getting the regular rate wrong can lead to claims for underpayment of overtime wages.

The most common error in calculating the regular rate of pay is the failure to include nondiscretionary bonuses. As a general rule, bonuses that are purely discretionary are not included in the regular rate of pay.[36] Bonuses that are promised to employees upon hiring or that are announced to employees to encourage them to work more rapidly or efficiently are included in the regular rate of pay.[37] Similarly, bonuses that are paid for attendance, for group or individual production rates, for quality and accuracy of work, to encourage employment for a specified period of time, or that are contingent upon the employee's continuing in employment until the bonus is paid, are also included in the regular rate of pay.[38]

Failure to keep accurate records of the hours worked by the non-exempt employees

Employers must track the hours worked by their non-exempt (hourly) employees for each work week.[39] The best pay records require the employee to sign off or acknowledge the hours they worked during the work week. This helps prevent the employee from later claiming that their own personal records are more accurate than the employer's records.

Whether exempt (salaried) employees should keep time records is a hotly debated issue. On one hand, time records will come in handy if the DOL determines that an employee was improperly classified as exempt. On the other hand, using the records for an improper purpose, such as reducing their pay if they worked less than 40 hours during the work week, can result in the loss of the exemption.[40] An exempt employee must be paid a fixed salary — currently at least $455 per week — no matter how few or how many hours they worked, so long as they worked some period during that work week.[41]

Making improper deductions from an exempt employee's pay

Generally speaking, deductions can only be made from an exempt (salaried) employee's pay when: (1) no work is performed in a week; (2) the employee is absent for a full day for personal reasons other than illness or disability; (3) the employee is absent for a full day under a bona fide plan or policy, such as sick leave; (4) the employee violates a safety rule of major significance; (5) the employee is given an unpaid disciplinary suspension imposed, in good faith, for infractions of workplace conduct rules; (6) the employee is on approved Family and Medical Leave Act (FMLA) leave; or (7) it is the first or final week of the employee's employment.[42]

As a general rule, employers should avoid partial day deductions for its exempt employees, with the only exceptions being partial day deductions for violations of safety rules of major significance and intermit-

Tips to avoid a DOL wage and hour audit

1. Document the employee's primary duties in the job description.
2. Document the reasons supporting an exemption.
3. Define the work week.
4. Keep accurate time records.
5. Double-check your calculation of the regular rate of pay.
6. Double-check any deductions to an exempt employee's pay; and
7. Periodically audit your wage and hour practices.

tent leave taken under the FMLA.[43]

If an employer engages in a regular practice of making improper deductions, the employer may lose the exemption for that particular employee as well as other employees in that same job classification working for the same manager responsible for the improper deduction.[44]

Conclusion

Most employers facing a DOL wage and hour audit try to close the barn door after the cows have left the barn. Too often I am brought into the process at the conclusion of the investigation, after the investigator has interviewed management and the employees and calculated the alleged unpaid wages and liquidated damages.

While I have been successful in reducing the amounts sought by the DOL, the employer's money would have been better spent on preventative measures such as drafting accurate job descriptions, documenting all reasons supporting the exemption, defining the work week, getting employees to acknowledge the accuracy of their time records, double-checking the regular rate of pay used to calculate overtime wages, double-checking any pay deductions for the exempt employees, and every so often auditing its wage and hour practices. When those measures are put in place and documented properly, if the DOL comes knocking on the door, they will not stay long.

Endnotes

1. Between 2008 and 2013, the DOL's enforcement hours for alleged wage and hour violations grew by more than 50%, and its recovery of back wages increased by 35%. *See* http://www.dol.gov/whd/statistics/.

2. http://www.dol.gov/whd/media/press/Western/default.asp; http://www.idahostatesman.com/2014/11/07/3474194/eddies-restaurant-and-eddies-diner.html.

3. 29 U.S.C. § 203(s)(1).

4. 29 U.S.C. § 206(a)(1).

5. 29 U.S.C. § 207(a); but note that there can be different overtime thresholds for different types of employees such as firefighters and police officers (*see, e.g.*, 29 U.S.C. § 207(k)).

6. 29 U.S.C. § 206(a)(1) and 29 U.S.C. § 207(a).

7. 29 U.S.C. § 255(a).

8. *Id*.

9. *Boucher v. Shaw*, 572 F.3d 1087, 1090-91 (9th Cir. 2009).

10. 29 U.S.C. § 216(b).

11. *Id*.

12. 29 U.S.C. § 260; *Serv. Emps. Int'l Union, Local 102 v. Cnty. of San Diego*, 60 F.3d 1346, 1355-56 (9th Cir. 1994), *cert. denied*, 516 U.S. 1072 (1996); *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003); *Goody v. Jefferson Cnty.*, 2011 WL 2582323, at *4-7 (D. Idaho 2011).

13. For a more detailed summary of the DOL wage and hour audit process, please review DOL's Fact Sheet #44 that is publicly available on the DOL's website. http://www.dol.gov/whd/regs/compliance/whdfs44.htm.

14. 29 U.S.C. § 211(a).

15. 29 U.S.C. § 211(b).

16. http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm;http://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm; http://www.dol.gov/whd/opinion/flsa.htm; http://www.dol.gov/whd/FOH/.

17. 29 U.S.C. § 216(c).

18. *Id*.

19. *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 704 (1945).

20. 29 U.S.C. § 216(c).

21. 29 U.S.C. § 216(b).

22. 29 U.S.C. § 213.

23. 29 U.S.C. § 213(a)(1) and (17).

24. 29 C.F.R. Section 541 defines and delimits the proof required for the executive, administrative, professional, computer, and outside sales employee exemptions.

25. "Primary duty" is defined as "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a).

26. 29 C.F.R. §§ 201 and 202; DOL Field Operations Handbook, ch. 22c.

27. 29 C.F.R. § 541.700(b) ("Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement."). Legal experts expect this 50 percent threshold to become more of a bright line text in the DOL's anticipated revised FLSA regulations. http://www.huntonlaborblog.com/2014/04/articles/employment-policies/president-obama-directs-department-of-labor-to-revise-flsa-overtime-exemptions/

28. 29 U.S.C. § 259(a) and (b).

29. *Service Employees Intern. Union, Local 102*, 60 F.3d at 1355.

30. 29 C.F.R. § 778.105.

31. 29 C.F.R. § 516.2(a)(5).

32. 29 U.S.C. § 207(a); 29 C.F.R. § 778.103.

33. 29 C.F.R. §§ 778.223 and 778.315.

34. 29 U.S.C. § 207(e); 29 C.F.R. § 778, subpts. B – E.

35. 29 U.S.C. § 207(a); 29 C.F.R. § 778.107.

36. 29 U.S.C. § 207(e)(3); 29 C.F.R. § 778.211(b).

37. 29 C.F.R. § 778.211(c).

38. *Id.*

39. 29 C.F.R. § 516.2(a)(7).

40. 29 C.F.R. § 541.603.

41. 29 C.F.R. §§ 541.600 and 541.602. Most legal experts expect the DOL to increase the minimum salary requirement in its amended regulations. Tammy D. McCuthcen and S. Libby Henninger, *President Obama Directs the Department of Labor to Revise Overtime Regulations*, http://www.littler.com/publication-press/publication/president-obama-directs-department-labor-revise-federal-overtime-regul.

42. 29 C.F.R. § 541.602.

43. 29 C.F.R. §§ 541.602(b)(7) and 541.502(c).

44. 29 C.F.R. § 541.603(b).

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EEOC Enforcement Guidance Expands Protections Against Pregnancy Discrimination

John Ashby

The Equal Employment Opportunity Commission (EEOC) recently released enforcement guidance related to pregnancy discrimination (the "Guidance")[1] over the vocal dissent of two commissioners. The Guidance, which offers the EEOC's interpretation of the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), represents the first time since 1983 that the EEOC has offered its official position on the obligations imposed on employers with regard to pregnancy in the workplace.

The Guidance includes a number of controversial positions and interpretations that have generated much commentary and criticism. Most significantly, the Guidance takes the position that employers may be required to provide reasonable accommodations to pregnant employees, even if they do not have a disability as defined by the ADA.

The Guidance confirms the EEOC's focus on pregnancy discrimination — a focus specifically identified as a national enforcement priority in the EEOC's 2012-2016 Strategic Enforcement Plan.[2] As part of that plan, the EEOC has recently devoted much of its litigation efforts on suits alleging sex and pregnancy discrimination. Thus, claims of pregnancy discrimination will likely continue to be a major basis for EEOC enforcement lawsuits in the foreseeable future.

Given the EEOC's emphasis on pregnancy discrimination, employers and attorneys who advise employers should become familiar with the Guidance. This article starts with an explanation of the statutory background of the ADA and the PDA. It then describes the genesis and timing of the Guidance and summarizes some of the important and controversial aspects of the Guidance.

Statutory background

The ADA[3] provides protections against employment discrimination for qualified individuals with disabilities. The ADA further requires employers to provide reasonable accommodations to an employee with a disability that will enable the employee to perform the essential functions of his or her job. Courts have generally concluded that normal pregnancy does not constitute a "disability" under the ADA.[4]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, that was not always the case. In *General Electric v. Gilbert*[5], the United States Supreme Court held that discrimination based on pregnancy was not prohibited by Title VII.

Given the EEOC's emphasis on pregnancy discrimination, employers and attorneys who advise employers should become familiar with the Guidance.

In 1978, Congress enacted the Pregnancy Discrimination Act,[6] an amendment to Title VII, for the express purpose of repudiating *Gilbert*. The Pregnancy Discrimination Act contains two key provisions. First, it provides that unlawful sex discrimination under Title VII includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Second, it provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for

all employment-related purposes… as other persons not so affected but similar in their ability or inability to work." Unlike the ADA, however, the Pregnancy Discrimination Act does not contain a reasonable accommodations provision.

Timing of the guidance

The general purpose of EEOC guidance is to advise the public on current interpretation of the law. Thus, EEOC guidance generally summarizes the law, as interpreted by the courts, as opposed to advocating a change in the law. Some of the EEOC's new pregnancy Guidance follows this approach. However, the Guidance also takes some controversial positions more consistent with advocacy for a change in the law. In fact, as explained in more detail below, the most controversial position taken in the Guidance — that employers may be required to provide reasonable accommodations to pregnant employees, regardless of disability — has been rejected by courts.

In this regard, the timing of the Guidance has been soundly criticized as attempting to jump the gun on Congress and expand the Pregnancy Discrimination Act to accomplish what proposed legislation would accomplish. Members of Congress have introduced the Pregnant Workers Fairness Act[7], which would expand the Pregnancy Discrimination Act to require that pregnant employees be granted reasonable accommodations.

The EEOC's Guidance does not have the force of law. It is entitled to deference from courts only "to the extent of its persuasive power."[8] Some of the key aspects of the Guidance are discussed below.

Pregnancy Discrimination Act coverage

In addition to protecting women who are currently pregnant, the Pregnancy Discrimination Act provides protection based on past pregnancy, the potential to become pregnant and pregnancy-related medical conditions. The Guidance provides examples of conduct that the EEOC would find to be discriminatory, as follows:

Current Pregnancy. An employer may not fire, refuse to hire, demote or take any other adverse action against an employee if pregnancy is a motivating factor in that decision. This is true even if the employer believes it is acting in the employee's or the fetus's best interests.

Past Pregnancy. An employer may not discriminate against an employee based on a past pregnancy. Close timing between childbirth and an adverse employment action, for example, may give rise to an inference of illegal discrimination.

Potential Pregnancy. An employer may not discriminate based on an employee's intent to become pregnant or her decision to use contraceptives.

Related Medical Conditions. An employer may not discriminate against an employee because of a medical condition related to pregnancy and must treat the employee the same as similarly situated, non-pregnant employees with medical conditions. For example, because lactation is a pregnancy-related medical condition, an employer may not discriminate against an employee because of her need to take breaks to express breast milk. Lactating employees must have the same freedom to address lactation-related needs that other workers would have to address other similarly limiting medical conditions.

Light duty and other accommodations

The most controversial aspect of the Guidance is the EEOC's position on pregnant employees' entitlement to light duty work and other accommodations. The Guidance takes the position that, even if they do not have a disability under the ADA, pregnant employees may be entitled to "workplace adjustments similar to accommodations provided to individuals with disabilities," including light-duty work.

Many employers provide light duty work for employees who suffer on-the-job injuries. These light duty programs are generally designed to control workers' compensation costs by returning injured employees to the workplace as soon as possible. Often, employers have implemented policies providing that light duty opportunities are available only to employees injured on the job or employees with disabilities as defined by the ADA. According to the EEOC, such policies violate the Pregnancy Discrimination Act. No federal Court of Appeals has adopted this position, however, and several have rejected it.

Because lactation is a pregnancy-related medical condition, an employer may not discriminate against an employee because of her need to take breaks to express breast milk.

For example, in *Young v. United Parcel Services, Inc.*,[9] a female UPS driver, Peggy Young, requested light duty work after becoming pregnant. UPS requires that its drivers be able to lift up to 70 pounds. After becoming pregnant, Young presented UPS with a note from her doctor stating that Young would not be able to lift more than 20 pounds during the first half of her pregnancy and no more than 10 pounds during the second half of her pregnancy. UPS has a policy limiting light duty work to (1) employees who have been injured on the job and (2) employees who have a disability as defined by the ADA. Young did not fit into any of these categories. As such, she was denied light duty and was instead provided with an extended leave of absence. Young returned to work after giving birth.

Notwithstanding that UPS granted Young leave far in excess of her entitlement under the Family and Medical Leave Act, she filed suit against UPS, alleging that it discriminated against her on the basis of pregnancy in violation of the Pregnancy Discrimination Act. Specifically, Young argued that the Pregnancy Discrimination Act required that UPS provide her with the same light duty opportunities that it gives to employees who have been injured on the job or who have ADA qualifying disabilities.

The Fourth Circuit Court of Appeals rejected Young's argument and affirmed an order of summary judgment in favor of UPS. Specifically, the Fourth Circuit Court of Appeals concluded that UPS did not discriminate against Young on the basis of her pregnancy because UPS's light duty policy was pregnancy-neutral (i.e., neither pregnant nor non-pregnant employees are entitled to light duty unless they have suffered an on-the job injury or have an ADA qualifying disability).

The Guidance reaches the opposite conclusion. Specifically, the Guidance "rejects the position that the [Pregnancy Discrimination Act] does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA." This interpretation could have far-reaching implications as it provides a pregnant worker with the basis for any accommodation, regardless of disability, that an ADA-disabled worker of similar limitations receives.

The Guidance explains that the threshold for "disability" was substantially reduced by the ADA Amendments Act of 2008 ("ADAAA"), making it much easier for an employee with a pregnancy-related impairment to establish that she has a disability.

The United States Supreme Court has agreed to review the *Young* decision. In connection with its review of *Young*, the Supreme Court is expected to address whether and to what extent the Pregnancy Discrimination Act requires employers to provide reasonable accommodations for employees who have work restrictions because of their pregnancy. Until that time, employers are in a difficult position. They must decide whether to follow the EEOC's Guidance now or wait for final word from the United States Supreme Court.

The immediate question for employers and employment lawyers is whether to revise light duty and accommodation policies consistent with the EEOC's position. Given that the United States Supreme Court will address these important issues soon, such policy changes are probably premature. The better approach is to address accommodation requests from pregnant employees on a case-by-case basis and then revisit broader policy issues after the Court issues a decision in *Young*.

Application of the ADA to pregnancy-related disabilities

The Guidance acknowledges that "pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability." However, the Guidance explains that the threshold for "disability" was substantially reduced by the ADA Amendments Act of 2008 ("ADAAA"), making it much easier for an employee with a pregnancy-related impairment to establish that she has a disability for which she may be entitled to a reasonable accommodation under the ADA. According to the EEOC, examples of pregnancy-related disabilities may include preeclampsia, pregnancy-related sciatica, gestational diabetes, nausea, swelling and depression.

The Guidance provides the following examples of reasonable accommodations that may be necessary to accommodate a pregnancy-related disability:

- Redistributing marginal or non-essential functions (e.g., occasional lifting) that a pregnant employee cannot perform, or altering how an essential or marginal function is performed;
- Modifying workplace policies by allowing a pregnant employee more frequent breaks;

• Modifying a work schedule so that a pregnant employee experiencing severe morning sickness can arrive later than her usual start time and leave later to make up the time;

• Allowing a pregnant employee placed on bed rest to telework where feasible;

• Granting leave in addition to what an employer would normally provide under a sick leave policy;

• Purchasing or modifying equipment, such as a stool for a pregnant employee who needs to sit while performing job tasks typically performed while standing; and

• Temporary assignment to a light duty position

Medical and parental leave

The Guidance provides that pregnant employees must be granted medical leave on the same basis as employees affected by other medical conditions.

Except in very rare circumstances where the employer can show that not being pregnant is a bona fide occupational qualification, an employer cannot require a pregnant employee to take leave as long as she is able to perform her job. At the same time, the EEOC takes aim at restrictive leave policies, suggesting that limits on length of sick leave or policies denying sick leave during the first year of employment may have a disparate impact on pregnant employees.[10]

Finally, the Guidance warns that employers should carefully distinguish between pregnancy-related medical leave and "parental leave," i.e., leave for purposes of bonding with a child and or/providing care for a child. Medical leave related to pregnancy, childbirth or related medical conditions can be limited to women affected by those conditions. However, parental leave must be provided to similarly situated men and women on the same terms. If, for example, an employer provides parental leave to new mothers beyond the period of recuperation from childbirth, it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

The EEOC takes aim at restrictive leave policies, suggesting that limits on length of sick leave or policies denying sick leave during the first year of employment may have a disparate impact on pregnant employees.[10]

Conclusion

The EEOC has sent a strong message that it will broadly interpret the law to expand protections against pregnancy discrimination in the workplace. It further takes the controversial position that pregnant employees are entitled to certain accommodations, including light duty assignments, even if they do not have a disability as defined by the ADA. This creates significant risk for employers that do not offer such accommodations to pregnant employees.

In light of the EEOC's Guidance, employers should review their leave, light duty and accommodation policies for compliance with the ADA and the Pregnancy Discrimination Act. Employers should also pay close attention to the United States Supreme Court's upcoming decision in *Young* and any further direction from the courts.

Endnotes

1. *See* EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

2. The EEOC's Strategic Enforcement Plan is available at http://www.eeoc.gov/eeoc/plan/sep.cfm

3. 42 U.S.C. 12101 *et seq*.

4. *See Martinez v. NBC Inc.*, 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.'").

5. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

6. Pub. L. No. 95-955, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

7. Pregnant Worker's Fairness Act, S. 942, 113th Cong. (2014).

8. *EEOC v. Sundance Rehab. Corp*., 466 F.3d 490, 500 (6th Cir. 2006); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference.")

9. 707 F.3d 437 (4th Cir. 2013), cert. granted, 81 U.S.L.W. 3602 (U.S. July 1, 2014).

10. *See Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (10-day absolute ceiling on sick leave drastically affected female employees of childbearing age, an impact males would not encounter); *EEOC v. Warshawsky & Co*., 768 F. Supp. 647, 655 (N.D. Ill. 1991) (requiring employees to work for a full year before being eligible for sick leave had a disparate impact on pregnant workers and was not justified by business necessity).

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A Sea-Change Year for Federal Contractor Employers: Revised Regulations and New Executive Order Obligations

Kara Heikkila

Federal contractor employers have special obligations — not just with nondiscrimination and equal employment laws that are including Title VII of the Civil Rights Act of 1964,[1] — but also equal employment and affirmative action laws. They were put in place to improve employment opportunities for individuals who were traditionally underrepresented in various employment positions, including women, minorities, individuals with disabilities, and protected veterans.[2]

Based on substantial changes to those nondiscrimination and affirmative action laws that were phased in during 2014, along with a series of employment-based Executive Orders issued by President Obama, 2014 was a sea-change year for employers that are federal contractors. While some changes were predicted by way of updated regulations associated with two of the three major laws applicable to federal contractors, other changes that came by way of a series of Executive Orders were less predicted and have presented challenges with respect to implementation. When finalized, regulations associated with five separate employment-based Executive Orders issued in 2014 will impact a range of issues from minimum wage and compensation protections to the extension of protections for sexual orientation and gender identity to employees of federal contractors. Attorneys working with federal contractors as employers should be aware of these changes in order to assure consistent and full compliance. This article will cover the laws applicable to employers as federal contractors and will overview the significant recent changes to these laws.

Regulations associated with five separate employment-based Executive Orders issued in 2014 will impact a range of issues.

Laws applicable to federal contractor employers

There are three federal laws that uniquely apply to federal contractors:

- Executive Order 11246, as amended, which was first issued in 1965 and prohibits federal contractors from discriminating on the basis of race, color, religion, sex,[3] or national origin (associated plans have become known as plans for "women and minorities");[4]
- Section 503 of the Rehabilitation Act (Section 503), as amended,[5] which was enacted in 1973 and prohibits discrimination against individuals with disabilities; and
- The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), as amended,[6] which was first passed in 1974 and protects certain groups of protected veterans including those who are disabled or recently separated.[7]

The United States Department of Labor is responsible for oversight and development of implementing regulations associated with these federal laws.[8] The division within the Department of Labor responsible for enforcement of these laws applicable to federal contractors is the Office of Federal Contract Compliance Programs (OFCCP). The OFCCP's mission "is to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government."[9]

Employers as federal contractors

Jurisdiction for various federal and state employment laws is normally based on the number of employees who are employed at particular points in time for the employer in question. The same holds true, in part, for various aspects of the nondiscrimination and affirmative action laws applicable to federal contractors. But jurisdiction is first premised on the volume of work that a company contracts with the federal government.

Generally, federal government employers with a government contract of a certain threshold amount, varying from $10,000 - $100,000 on an annual basis, must take certain

steps to not discriminate and take affirmative action to improve the pool of qualified women, minorities, disabled individuals, and protected veterans for application and promotion.[10] Federal contractors with 50 or more employees and meeting certain annual dollar volume threshold requirements must prepare an annual written affirmative action plan that sets out, among other things, its prior effort at improving this pool and its progress toward goals it may set.

Compliance with tracking data, formalizing plans, and preparing for occasional audits by the OFCCP can be quite onerous and, as such, when a private sector employer considers contracting with the federal government, these ongoing management and personnel tasks must be evaluated as a part of the business decision to become a federal contractor. For certain employers, such as a financial institution or bank, compliance with these laws is an inherent part of doing business.[11]

Notably, not just prime contractors of the federal government are subject to these obligations. Subcontractors that meet the various threshold tests may also be required to comply with these nondiscrimination and affirmative action obligations.[12] For example, the Boeing Company is federal prime contractor. A company in turn providing certain supplies or services at a minimum level to Boeing might be a subcontractor also subject to these laws. According to the various regulations, a subcontract that would trigger jurisdiction would be

"any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed."[13]

The need for change

In September 2013, the OFCCP published long-discussed final rules that substantially changed regulations applicable to Section 503 and VEVRAA. These changes were necessary to update regulations that had remained substantially unchanged since the 1970s. The changes were also necessary to mirror current statutory definitions in other disability laws, specifically the 2008 amendments to the Americans with Disabilities Act (now known as the Americans with Disabilities Act Amendments Act or "ADAAA"),[14] and to address the continued high unemployment rates for both individuals with disabilities and protected veterans. Certain requirements outside of the formal affirmative action plans went into place on March 24, 2014, and affirmative action plan changes will take effect with the federal contactor's next affirmative action plan period after March 24, 2014. For example, for contractors with January 1 affirmative action plan dates, these changes must be in place January 1, 2015.

Changes in these regulations now require, among other things, that federal employer contractors collect and analyze the number of protected veterans hired and compare those numbers with an annual hiring benchmark for those veterans. The federal contractor can establish its own benchmark based on certain criteria or can use the national percentage number (equal to the national percentage of veterans in the civilian workforce) that will be updated annually by the OFCCP (in 2014, the national benchmark was set at 7.2%). To accomplish this, federal contractors will be required to ask applicants both before and after an offer of employment to self-identify as a protected veteran.

Similar changes in the Rehabilitation Act's Section 503 regulations require federal contractors to set utilization goals, currently set at 7%, for individuals with disabilities. In a controversial final part of the regulation and contrary to traditional ADAAA compliance requirements, federal contractors will also

Federal employer contractors must collect and analyze the number of protected veterans hired and compare those numbers with an annual hiring benchmark for those veterans.

be required to ask applicants both before and after an offer of employment to self-identify (on a mandated federal form) as an individual with a disability.[15] Failure to meet the benchmarks and goals is not itself a violation, but federal contractor employers are now required to evaluate the effectiveness of their outreach programs to meet these benchmarks and goals.

Additional updates in the regulations mandated changes to forms, advertisements, processes, and recordkeeping, among other things.

And still more change through executive orders

As if substantial change to two of the three major laws governing federal contractors was not enough, a series of Executive Orders issued by President Obama in 2014, with more expected, will also impact federal contractors in 2015 and beyond. In his January 28, 2014 State of the Union address, President Obama declared this the "Year of Action."[16] Federal contractors have seen that promise play out through a series of Executive Orders issued by the President to address a number of employment law topics that have over recent years stalled in Congress.[17]

For each of the Executive Orders and one Presidential Memorandum, the President ordered the Secretary of Labor to issue regulations through the normal rulemaking process to provide further guidance and interpretation.

A summary of each of these Executive Orders and the Memorandum, along with the status of the regulatory rule making process for each, follows:[18]

• Executive Order 13658. This Executive Order was signed in February 2014 and established a new minimum wage for federal contractors. That minimum wage, $10.10/hour, applies to covered contracts where solicitation for the contract takes place on or after January 1, 2015. Final rules were published in October 2014.[19]

• Executive Order 13665. This Executive Order was signed in April 2014. It is intended to promote pay transparency by prohibiting retaliation by federal contractors against their employees for discussing their compensation with fellow employees or inquiring about their compensation. A Notice of Proposed Rulemaking was published in September 2014 and the regulations will go into effect after the rules are published.

The proposed regulations would require federal contractors to maintain and submit additional data on compensation that could indicate pay gap trends between men and women.

• Presidential Memorandum on Pay Equity. This Memorandum was published in April 2014 and a Notice of Proposed Rulemaking was published in August 2014. As of the submission of this article in November 2014, the comment period was extended to early January 2015. The purpose of this Memorandum was to increase attention to and enforcement of actions to close the pay gap between men and women. The proposed regulations would require federal contractors to maintain and submit additional data on compensation that could indicate pay gap trends.

• Executive Order 13672. This Executive Order was signed in July 2014 and added sexual orientation and gender identity to the list of protected statuses for federal contractors. It will apply to contracts entered into on or after the effective date of the implementing regulations and as of the submission of this article, proposed or potential final rules have not been published. The OFCCP also published a directive related to gender identity and sex discrimination, Directive 2014-02, on August 19, 2014, providing guidance — without legally binding effect — with respect to these added protected statuses.

• Executive Order 13673. This Executive Order was also signed in July 2014 and Notice of Proposed Rulemaking is pending as of the submission of this article in November 2014. According to the Department of Labor's news release with respect to this Executive Order, "As part of his Year of Action, President Obama signed an executive order on July 31 that requires companies competing for federal contracts to disclose labor law violations [across all agencies, not just the OFCCP, to include EEOC, Wage and Hour, and OSHA violations, among others] and gives agencies more guidance on how to consider labor law violations when awarding federal contracts."[20]

These Executive Orders and the largely pending implementing regulations have added even more complexity to the heightened compliance requirements for federal contractors.

Conclusion

Federal contractor employers are required to comply with separate and unique affirmative action obligations as a part of the benefit and bargain of contracting with the federal government. Attorneys representing federal contractors should ensure that their clients are fully apprised of those affirmative action obligations. The last year has been a year of considerable change — and confusion — with respect to compliance with significant new regulations and with a series of Executive Orders. As we begin 2015, we anticipate these many changes will continue to take shape and to present particular challenges for these employers.

The last year has been a year of considerable change — and confusion — with respect to compliance with significant new regulations and with a series of Executive Orders.

Endnotes

1. 42 U.S.C. 2000e *et seq*.

2. Affirmative action is an enhanced obligation beyond the nondiscrimination obligations found in the various equal employment laws and is applicable only to the federal government and certain contractors of the federal government. By definition, affirmative action is a systematic process of improving the pool of qualified applicants for hire and promotion comprised of women, minorities, individuals with disabilities, and protected veterans.

3. As will be referenced later in this article, a July 2014 Executive Order amended Executive Order 11246 to include sexual orientation and gender identity.

4. Exec. Order No. 11246, 30 Fed. Reg. 12319, 12935 (Sept. 24, 1965).

5. 29 U.S.C. § 793 *et seq*.

6. 38 U.S.C. § 2012 *et seq*.

7. "A protected veteran means a veteran who is protected under the non-discrimination provisions of the Act; specifically, a veteran who may be classified as a 'disabled veteran,' 'recently separated veteran,' 'active duty wartime or campaign badge veteran,' or an 'Armed Forces service medal veteran,' as defined by this section." *See* 41 C.F.R. § 60-300.2(q).

8. Current regulations interpreting Executive Order 11246 can be found at 41 C.F.R. § 60-1.1 *et seq*.; regulations for Section 503 are found at 41 C.F.R. § 60-741.1 *et seq*.; and those for VEVRRA are found at 41 C.F.R. § 60-300 *et seq*.

9. The OFCCP's website can be found at: http://www.dol.gov/ofccp (last accessed Nov. 11, 2014).

10. This generally describes supply and service contracts as defined in 41 C.F.R. § 60-1.3. Construction contractors, for example, are covered by separate regulations.

11. Financial institutions with federal share and deposit insurance, i.e., covered by the Federal Deposit Insurance Corporation, or that are an issuing and paying agent for U.S. savings bonds and savings notes, are considered federal contractors. *See, e.g.,* 41 C.F.R. § § 60-1.40(a) and 60-2.1(b).

12. As such, references to federal contractors in this article would also apply to federal subcontractors.

13. 41 CFR § 60-1.3; 41 CFR § 60-250.2; and 41 CFR § 60-741.2.

14. 42 U.S.C. § 12101 *et seq*.

15. Only federal contractors should solicit such information on a pre-offer basis in compliance with these affirmative action regulations. Private-sector employers in compliance with the ADAAA should never solicit disability status on a pre-offer basis.

16. President Barrack Obama's State of the Union Address, Office of the Press Secretary, January 28, 2014, *available at* www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address (last accessed Nov. 11, 2014).

17. Executive Orders dealing with employment obligations apply only to the federal government, but, assuming appropriate legislative or constitutional authorization, federal contractors are subject to these Executive Orders and their implementing regulations. *See, e.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.").

18. This status of the rulemaking process is current as of the submission of this article in November 2014.

19. These regulations can be found at 29 C.F.R. § 10.

20. Leveling the Playing Field for Federal Contracts, Dept. of Labor News Briefs, July 31, 2014, *available at* www.dol.gov/_sec/newsletter/2014/20140731.htm#.VGFnwVJ0zlU (last accessed Nov. 11, 2014).

About the Author

Kara Heikkila *has worked for more than 25 years in human resource and attorney roles advising employers on personnel and employment law matters. She is a member of Hawley Troxell's employment and litigation practice groups and heads a specialty group for the firm offering employment support to federal contractors, including development of affirmative action plans and administrative practice before federal administrative agencies and in federal court.*

Pitfalls of Paying Employees in Bitcoin

Theodore W. Reuter

Over the last few years, digital currency has become more widely used. Bitcoin, the most widely used of the open system digital currencies, has a market capitalization of over $5 billion.[1] More businesses are beginning to accept Bitcoin for their services.[2] Last August, BYU Idaho announced that it would accept rent payments in two of its housing complexes in Bitcoin.[3] Some companies have begun paying employees in Bitcoin.[4] Tech savvy startups, in particular, are finding their employees are demanding Bitcoin salaries or are choosing to pay employees in Bitcoin as a way to signal commitment to this new medium.

However, there are significant hurdles to paying employees in Bitcoin and continuing to comply with current regulations. There is a relatively simple fix to many of these concerns, but that fix also highlights a major hurdle that Bitcoin must overcome if it is to fully come into its own as an alternative currency.

This article briefly recaps what Bitcoin is and then points out some of the obvious obstacles to paying employees in Bitcoin. It reviews the most common solution that companies are using to circumvent these obstacles and then analyzes costs of these solutions to the acceptance of Bitcoin as an alternative currency.

What is Bitcoin?

Functionally, Bitcoin is a digital currency. It started in 2009,[5] but gained notoriety in November of 2013, after toping $1,000 per coin. These days its value fluctuates, but it is generally much lower. I wrote about Bitcoin at some length in a previous edition of *The Advocate* an article discussing, among other things, what is Bitcoin, how it works and the potential applications of Bitcoin.[6] For the purposes of this article, it is enough to understand that Bitcoin operates as a decentralized ledger, spread across many different platforms that allows for safe, relatively anonymous, verified transactions. For the end user, Bitcoin functions much like a Paypal account. You have a "wallet" that keeps track of how many Bitcoins you have. When you find a person or business that will accept your Bitcoin for something you want to purchase you send an order to your wallet to transfer a certain number of Bitcoins from your wallet to that person's wallet. Your wallet is debited, the person who you are paying receives a credit and the transaction is complete. Bitcoin has some advantages over more conventional digital payment methods: Payment happens immediately, there are no particular third parties who are necessary to complete the transaction and unless you link personally identifiable information to your account, you are fairly anonymous. These advantages have, no doubt, been an important factor in its widespread adoption. It also has some disadvantages, there is no third party to help a vendor and a buyer settle disputes or recover funds stolen from an account, the value of Bitcoin changes by the hour, and so far, many less vendors will accept Bitcoin as compared to traditional currency. Despite these disadvantages, Bitcoin use appears to be growing.

There is no third party to help a vendor and a buyer settle disputes or recover funds stolen from an account.

Paying employees in Bitcoin

Many companies that are heavily invested in Bitcoin see paying their employees in Bitcoin as a method of putting their money where their mouth is and supporting the growth of the Bitcoin economy.[7] In fact, companies paying employees in Bitcoin often encourage nearby companies to begin accepting payment in Bitcoin.[8] Employees in some sectors have also started demanding payment in Bitcoin as part of favorable employment packages.[9] Paying employees in Bitcoin presents at least four challenges. First, paying employees in Bitcoin complicates the employer's withholding and payroll tax to the Internal Revenue Service, (IRS). Second, paying employees in Bitcoin complicates the nature of the transaction between the employer and employee. Third, paying employees in Bitcoin complicates the employees' income. Fourth, paying employees in Bitcoin could create cash flow problems for a company that does not regularly trade in Bitcoin.

Employer obligations to the IRS: Payroll tax and withholding

Employers have a number of tax obligations that are based on the amount of wages that they are paying employees. Social Security, Medicaid, as well as state and federal income tax all require withholding based on the value of wages paid in US dollars.[10] The value of wages also may figure into the cost of workers' compensation insurance. As noted above, the value of Bitcoin has historically been fairly volatile. A commitment to pay employees in Bitcoins means that the company's withholding obligations and wage related taxes and expenses are likely to fluctuate with each pay period. For example, suppose a company was obligated to pay an employee 4 Bitcoin per pay period, with paydays on the 15th and 30th day of each month. On the 15th, of October 2014, that company would owe its employee the equivalent of $1,563.08 in wages, but on October 30th that company would owe its employee the equivalent of $1,337.12 in wages.[11] That represents a drop of roughly 14.5%. So long as Bitcoin continues to fluctuate, the employer's obligation to the IRS each pay period will be unpredictable.

Bitcoins complicate the nature of the taxable interaction between employers and employees

When paying an employee in conventional currency only the employee has income. If Bitcoin had been treated as a currency by the IRS, then this would also be true for paying employees in Bitcoin. However, the IRS has ruled that Bitcoin should be treated as property.[12] For this reason, paying an employee in Bitcoin is treated as a barter transaction. This means that both the employer and the employee have income each time an employee is paid. Further, this requires an employer to keep track of its basis (i.e. its buying price) for the Bitcoin and also track the reasonable value of the market price of Bitcoin on pay day. If the Bitcoin's value on payday is greater than the employers' basis in the Bitcoin, the employer will have income.

Bitcoins complicate an employee's income

Employees paid in Bitcoin will have a similar problem to their employers when it comes to spending their Bitcoin salaries. An employee will have a basis in each Bitcoin or fraction of a Bitcoin that an employee earns based on the reasonable value of the services traded for that Bitcoin. When an employee spends a portion of a Bitcoin, that employee will need to track the value of the thing which he or she purchased to determine whether the Bitcoin's value changed from the time that the employee received the Bitcoin to the time that the Bitcoin was spent. An example may be useful to clarify this point. Suppose Emily Employee receives 2.5 Bitcoins for computer programing services worth $1,000. This gives her a basis of $400 per bitcoin. One week later, Emily goes to Phil the falafel seller and purchases a falafel and a drink for one hundredth of a Bitcoin. At that time, the market value of a Bitcoin has increase from $400 to $500, so Phil is selling his falafel combo for the equivalent of $5. Emily had a basis of $4 in her hundredth of a Bitcoin. Her purchase of a falafel has netted her a profit of $1! Obviously, keeping track of these sorts of micro-profits presents a serious accounting challenge for Emily Employee.

Bitcoin creates potential cash flow challenges for an employer

The volatility of Bitcoin creates an added difficulty for responsible employers attempting to keep enough Bitcoins on hand to adequately meet its obligations to employees. The instability of a Bitcoin price means that a company has to forecast the probable price of Bitcoin to ensure that it has enough on hand. Failing to do so could leave the company at the mercy of a price spike in the Bitcoin market, which, in turn, could severely tax its cash reserves. On the other hand, buying too much when the market is on its way down could end up creating a serious loss. In addition, the better job that an employer does in hedging its Bitcoin, the more income an employer will create for itself when actually paying its employees.

Buying too much when the market is on its way down could end up creating a serious loss.

Minimum wage compliance

Because of the exceptional volatility of Bitcoin, the value of a Bitcoin salary or even hourly rate can fluctuate from week to week. Because minimum wage rules in the United States are tied to dollars, setting a salary in Bitcoin means that any given pay period could dip below the statutory requirements. In addition, the structure of the Fair Labor Standards Act is such that even if the employee is satisfied, the government can step in and prosecute a case on that employee's behalf.

The solution

The solution to the employer's problems is relatively simple, and is already being implemented by at least one payroll solutions company.[13] Rather than contracting to pay an employee in Bitcoin, an employer should set the employee's wages in dollars and only agree to pay an equivalent amount of Bitcoin calculated on the day that the wages come due. The amount of the dollar wage can easily be analyzed to ensure that it complies with the minimum wage requirements. This solves the tax issue by setting a stable amount of money to base withholding and other taxes on. It solves the issue of Bitcoin payments creating income for the employer because the Bitcoins will be purchased and disbursed for the same price, eliminating the possibility of income. It also solves the problem of cash flow, because the employer will only have obligated itself to purchase an amount of Bitcoin equal to the amount of cash that it already had set aside for paying salary. Unfortunately, it does little to help the employee's problem vis-à-vis the creation of income in future purchases with that Bitcoin, but it does have the benefit of establishing a firm basis in the Bitcoin that can be used in future calculations. Given its advantages, it should come as no surprise that many of the companies that are paying employees in Bitcoin are already using this method.[14]

Why this solution undermines Bitcoin

The problem with this solution is that it undermines the purpose of Bitcoin. Bitcoin is supposed to be currency rather than property. By pegging Bitcoin payments to the dollar, employers keep Bitcoin transactions dependent on the dollar. This undermines Bitcoin's viability as an independent medium of exchange. So long as Bitcoin is pegged to dollars, transactions in Bitcoin will always create taxable income or losses for both parties involved, meaning that there is an added administrative burden for both parties. This undermines two of the basic advantages of Bitcoin transactions: the ease of such transactions as well as their anonymity. Unfortunately, with the current tax treatment and Bitcoin's volatility, this may be the best solution possible for the time being.

An employer should set the employee's wages in dollars and only agree to pay an equivalent amount of Bitcoin calculated on the day that the wages come due.

Conclusion

Paying employees with Bitcoin is increasingly popular among certain segments of the workforce and encourages the growth of the Bitcoin market. However, the fluctuation in Bitcoin price, coupled with the tax consequences of Bitcoin transactions severely limit the viability of contracts that base a salary on a certain number of Bitcoin per pay period. Until these issues are dealt with, Employers who want to offer employees the option of being paid in Bitcoin should pin the amount of Bitcoin offered to a particular dollar amount. While this decision undermines the independence of Bitcoin as a medium of exchange, it is probably the safest option until the Bitcoin market is large enough that it stabilizes and the IRS begins treating it as a currency rather than as property.

Endnotes

1. http://www.coindesk.com/price/ Accessed on November 14, 2014. At that time, the market capitalization of Bitcoin was approximately 5.3 billion dollars.

2. Caulderwood, Kathleen, International Business Times, "PayPal Joins Dell, DISH, Expedia, Overstock To Accept Bitcoins As Payment"September 9, 2014; http://www.ibtimes.com/paypal-joins-dell-dish-expedia-overstock-accept-bitcoins-payment-1682812; Accessed on November 14, 2014.

3. Hofman, Adam Bitcoin Magazine, "BYU Idaho Accepts Bitcoin in Select Student Housing Developments" August 6, 2013; http://bitcoinmagazine.com/6155/byu-idaho-accepts-bitcoin-in-select- student-housing-developments/; Accessed on November 24, 2014.

4. Lou, Ethan, CTV News, "Growing Number of Workers choosing to be paid with Bitcoin, payroll firm says" CTV News; Sep-

tember 1, 2014; http://www.ctvnews.ca/sci-tech/growing-number-of-workers-choosing-to-be-paid-with-bitcoin-payroll-firm-says-1.1985660 ; Accessed on Nov. 15, 2014.

5. Bitcoinwiki, "History," https://en.bitcoin.it/wiki/History; Accessed November 25, 2014.

6. Reuter, Theodore W. "Ditcoins Ditigal Enterprise Creates Alternative Business Transactions", The Advocate Volume 57, No. 8 (August 2014).

7. Shandow, Kim, Entrepreneur.com, "Blockchain.info CEO: We Pay Employees in Bitcoin. And Someday You Might, Too." Written June 2, 2014; http://www.entrepreneur.com/article/234463 Accessed on Nov. 15, 2014.

8. Kirby, Carrie, CoinDesk. "What it's actually like to get paid exclusively in bitcoins" September 25, 2013. http://www.coindesk.com/getting-paid-in-bitcoins/ Accessed on Nov. 15, 2014.

9. Lou, Ibid.

10. IRS Notice 2014-21 available at http://www.irs.gov/pub/irs-drop/n-14-21.pdf

11. The Prices are based on CoinDesk's pricing tool at the close of business on each day. (http://www.coindesk.com/price/) It is worth noting that the price of Bitcoin also can vary by a few dollars depending on what exchange one is using.

12. Notice 2014-21, Id.

13. Bradbary, Danny, CoinDesk, "More Companies Are Paying Employees in Bitcoin" September 7, 2014. http://www.coindesk.com/companies-paying-employees-bitcoin/ Accessed Nov. 15, 2014.

14. Id.

So long as Bitcoin is pegged to dollars, transactions in Bitcoin will always create taxable income or losses for both parties involved.

About the Author

Theodore W. Reuter *is the managing attorney for the Ontario office of the Oregon Law Center. He graduated from Willamette College of Law's joint degree program with a J.D. and a Masters in Business Administration. Mr. Reuter has particular interest in the areas of litigation and employment law.*

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Jim Jones
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Joel D. Horton

Regular Spring Term for 2015
1st Amended – 11/28/14

Boise ..... January 12, 14, 16, 20 ~~and 21~~
Boise ..... February 13, 17 and 18
Boise (Concordia University School of Law--501 W. Front Street) ..... February 20
Boise ..... April 1 and 14
Coeur d'Alene ..... April 7 and 8
Lewiston ..... April 9
Boise ..... May 4, 6 and 8
Idaho Falls ..... May 12
Pocatello ..... May 13
Boise ..... June 1, 3 and 5
Twin Falls ..... June 9 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2015 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Court of Appeals
Oral Argument for January 2015

Tuesday, January 13, 2015 – BOISE
9:00 a.m. *State v. Gonzales* ..... #40038
10:30 a.m. *Grist v. State* ..... #41409

Thursday, January 15, 2015 – BOISE
9:00 a.m. *State v. Armstrong* ..... #41458
10:30 a.m. *State v. Watt* ..... #41870
1:30 p.m. *State v. Boehm* ..... #41594

Thursday, January 22, 2015 – BOISE
9:00 a.m. *State v. Bower* ..... #41336
10:30 a.m. ..... *Vacated*
1:30 p.m. *Keserovic v. State* ..... #41890

OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO

Chief Judge
John M. Melanson
Judges
Karen L. Lansing
Sergio A. Gutierrez
David W. Gratton

Regular Spring Term for 2015
1st Amendment – 12/01/14

Boise ..... January 13, 15 and 22
Boise ..... February 5, 19, 24 and 26
Boise ..... March 3 and 5
Moscow ..... March 16 thru 20
Boise ..... April 9, 16, 21 and 23
Boise ..... May 12, 14, 19 and 21
Boise ..... June 9, 11, 16 and 18

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2015 Spring Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court
Oral Argument for January 2015

Monday, January 12, 2015 – BOISE
8:50 a.m. *Shubert v. Macy's* (Industrial Commission) ..... #41467
10:00 a.m. *State v. Olivas, Jr.* ..... #41644
11:10 a.m. ..... Open

Wednesday, January 14, 2015 – BOISE
8:50 a.m. *N. Idaho Building Contractors v. City of Hayden* ..... #41316
10:00 a.m. *Sherman Storage v. Global Signal Acquisitions* ..... #41077
11:10 a.m. *Nix v. Elmore County* ..... #41524

Friday, January 16, 2015 – BOISE
8:50 a.m. *Mueller v. Hill* ..... #41452
10:00 a.m. *Thrall v. St. Luke's* (Industrial Commission) ..... #41991
11:10 a.m. *State v. Thiel* ..... #41811

Tuesday, January 20, 2015 – BOISE
8:50 a.m. *State v. Philip Morris* ..... #41679
10:00 a.m. *Hennefer v. Blaine County School District* ..... #41286
11:10 a.m. ..... Open

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 12/1/14)

CIVIL APPEALS

Divorce, custody, and support

1. Did the district court err in affirming the decision to dismiss a motion to modify the child support provision in the decree that was entered by agreement of both parties, when that the provision failed to comply with the Guidelines and when there was a substantial difference between the support agreed upon and the amount under the Guidelines?

Garner v. Garner
S.Ct. No. 41898
Supreme Court

2. Whether the district court correctly applied Idaho law in determining there had been a transmutation of the real property of the parties on Gwen Street, and in determining the possible joint equity of the parties.

Kawamura v. Kawamura
S.Ct. No. 42112
Supreme Court

License revocation

1. Whether the Board's application of the statutes and regulations to revoke Pine's license was supported by substantial evidence, when there was no evidence that the source of any trust that existed between Pines and the males involved arose from a doctor-patient relationship.

Pines v. Idaho State Board of Medicine
S.Ct. No. 41972
Supreme Court

Medical indigency

1. Whether the medical indigency applications were "completed applications" under I.C. § 31-3502(7) without signatures of the patients.

St. Alphonsus Regional Medical Center v. Elmore County
S.Ct. No. 42175
Supreme Court

Post-conviction relief

1. Did the court err by summarily dismissing Heilman's successive petition for post-conviction relief as untimely?

Heilman v. State
S.Ct. No. 41240
Court of Appeals

Procedure

1. Did the district court err by remanding this case with instruction to treat defendant's appearance at the summary judgment hearing as a request for a continuance under I.R.C.P. 56(f)?

Action Collection Service v. McCullough
S.Ct. No. 41928
Court of Appeals

2. Whether the court erred in finding Mr. Lytle's motion for relief from an alleged void judgment, brought twenty years after the judgment, was not brought within a reasonable time.

Lytle v. Lytle
S.Ct. No. 42128
Court of Appeals

Res judicata

1. Did the district court commit reversible error as a matter of law in its application of I.R.C.P. 13(a) and its conclusion that Stilwyn was required to assert compulsory counterclaims and third party claims in a prior federal case?

Stilwyn, Inc. v. Rokan Corp.
S.Ct. No. 41451
Supreme Court

Standing

1. Did the district court err in dismissing the petition for declaratory judgment for lack of a justiciable controversy?

Lawson v. State of Idaho
S.Ct. No. 42372
Supreme Court

Summary judgment

1. Did the court err in ruling that neither Mary Steele nor Amber Steele owed any duty to Boswell to protect him from their vicious dog?

Boswell v. Steele
S.Ct. No. 41684
Court of Appeals

Witnesses

1. Did the court abuse its discretion in excluding the testimony of plaintiffs' experts DeLong and Arruda, based on the language of the court's pre-trial order and notice of trial setting?

Lepper v. Eastern Idaho Health Services, Inc.
S.Ct. No. 42004
Supreme Court

CRIMINAL APPEALS

Evidence

1. Was there sufficient evidence to find beyond a reasonable doubt that Hopkins had the requisite intent to maliciously injure or destroy the property of another?

State v. Hopkins
S.Ct. No. 41824
Court of Appeals

2. Whether there was sufficient evidence to support Yermola's conviction for felony concealment of evidence.

State v. Yermola
S.Ct. No. 41435
Court of Appeals

3. Did the court abuse its discretion in admitting two audiotaped phone calls and in overruling Bradley's foundation objection?

State v. Bradley
S.Ct. No. 41539
Court of Appeals

Instructions

1. Whether the court erred by not instructing the jury as to the necessity defense.

State v. Detwiler
S.Ct. No. 41125
Court of Appeals

Jurisdiction

1. Was there any defect in the document charging contempt that was fatal to conferring subject matter jurisdiction?

State v. McClure
S.Ct. No. 41571
Court of Appeals

Mistrial

1. Did the court err in denying Pratt's motion for mistrial based on a prospective juror's comment made during voir dire?

State v. Pratt
S.Ct. No. 41603
Court of Appeals

Search and seizure – suppression of evidence

1. Did the court err by interpreting the Idaho Constitution differently from the United States Constitution and suppressing evidence discovered incident to Green's constitutionally reasonable arrest?

State v. Green
S.Ct. No. 41736
Supreme Court

2. Whether *State v. Besaw*, 306 P.3d 219 (Idaho Ct. App. 2013), is manifestly wrong and should be overruled.

State v. Haynes
S.Ct. No. 41924
Supreme Court

3. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.

State v. Riendeau
S.Ct. No. 41982
Supreme Court

Summarized by:
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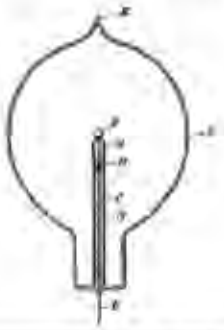

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Idaho's New Judiciary in 2014

Hon. Michael McLaughlin

As of December 9, 2014 there have been nine new Idaho judges appointed: four new District Judges and five new Judges of the Magistrate Division.

In the First Judicial District

Hon. Anna Eckhart was appointed as a Magistrate Judge for the First Judicial District, effective June 30, 2014 filling the vacancy created by the retirement of Judge Penny Friedlander. Judge Eckhart graduated Magna Cum Laude from Lewis and Clark State College in 1997 and she received her Juris Doctor degree from Gonzaga University in 2000, graduating cum laude. She practiced with the firm of Dodson and Raeon from 2000-2003 and then served as a deputy prosecutor with the city of Coeur d'Alene, for 11 years.

Hon. Anna Eckhart

Hon. James Combo was appointed as a Magistrate Judge for the First Judicial District, effective January 1, 2015 filling the vacancy created by the retirement of Judge Barry Watson. Mr. Combo graduated cum laude from Linfield College in 1979 and obtained his Juris Doctor degree from the University of Idaho in 1983. Mr. Combo is a native of Idaho and has been married to his wife, Sandy, for 25 years. They have four children and are active in the local community and athletic programs.

Hon. James Combo

In the Second Judicial District

Hon. Jay Gaskill was appointed as a District Judge for the Second Judicial District, effective February 28, 2014 filling the vacancy created by Judge Carl Kerrick's retirement. Gaskill, 59, a Magistrate Judge since 2001, practiced law for 19 years as a private attorney. He earned his undergraduate as well as his Juris Doctor degree from the University of Idaho

Hon. Jay Gaskill

Hon. Michelle Evans was appointed as a Magistrate Judge for the Second Judicial District, effective June 30, 2014 filling the vacancy created by Judge Jay Gaskill's appointment to the District bench. Judge Evans graduated Magna Cum Laude with a degree in Psychology from the University of Idaho in 1989 and a Juris Doctor degree from the University of Idaho in 1993. Judge Evans was formally a senior deputy prosecutor for Latah county.

Hon. Michelle Evans

In the Fourth Judicial District

Hon. Samuel Hoagland was elected as a District Judge for the Fourth Judicial District, effective January 5, 2015 filling the vacancy created by the retirement of Judge Michael Wetherell. Hoagland received a B.S. in pharmacy from Idaho State University in 1976, and a Juris Doctor from the University of

Idaho College of Law in 1982. Hoagland has worked in private practice since 1982. Prior to earning his law degree, he worked in the pharmaceutical industry and was an adjunct professor teaching clinical pharmacy and pharmacy law at Idaho State University.


Hon. Samuel Hoagland

Hon. Jason D. Scott was appointed as a District Judge for the Fourth Judicial District, effective March 17, 2014 filling the vacancy created by Judge Ron Wilper's retirement. Judge Scott received his undergraduate degree from Idaho State University and his Juris Doctor from Duke University. He clerked for Judge Lynn Winmill and then was a partner with Hawley Troxell Ennis & Hawley from 2007 to 2014.


Hon. Jason D. Scott

Hon. Diane Walker was appointed as a Magistrate Judge for the Fourth Judicial District, effective July 1, 2014 filling the vacancy created by the retirement of Judge Terry McDaniel. For the past nine years, Walker has served as Deputy State Appellate Public Defender. Walker served as law clerk to Idaho Supreme Court Justice Roger Burdick from 2003 through 2005. Prior that she worked as a private practice attorney. Walker holds a Bachelor of Science degree from California Polytechnic University and a Juris Doctor from Gonzaga University School of Law.


Hon. Diane Walker

In the Fifth Judicial District

Hon. Jennifer Haemmerle was appointed as a Magistrate Judge for the Fifth Judicial District, effective January 1, 2015 filling the vacancy created by the retirement of Judge R. Ted Israel. Haemmerle was in private practice with her husband, Fritz Haemmerle, in the Hailey law firm of Haemmerle & Haemmerle, PLLC. Before that she worked for the Roark Law Firm from 1993-2001. Prior to that, she was an associate attorney with the firm of Roark, Donovan, Praggastis, Rivers & Phillips in Hailey and with the Elam, Burke & Boyd law firm in Boise. She has an undergraduate degree from the University of Idaho and Juris Doctor degree from the UI College of Law.


Hon. Jennifer Haemmerle

In the Seventh Judicial District

Hon. Bruce Pickett was Elected as a District Judge for the Seventh Judicial District, effective January 5, 2015 filling the vacancy created by the retirement of Judge Jon Shindurling. Judge Pickett earned his Juris Doctorate from BYU in 1997. He served as a Bonneville County Deputy Prosecutor and then became the Chief Deputy Prosecutor in 2003. In 2010, Bruce was appointed by the Bonneville County Commissioners to serve as the Prosecuting Attorney and then was elected in 2012. practice attorney. Walker holds a Bachelor of Science degree from California Polytechnic University and a Juris Doctor from Gonzaga University School of Law.


Hon. Bruce Pickett

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The Uniform Electronic Legal Material Act Comes to Idaho

Michael Greenlee

In 2014, the Idaho Legislature passed the Uniform Electronic Legal Material Act (UELMA), making Idaho the first state to enact UELMA in 2014 and the sixth state in our region after California, Colorado, Hawaii, Nevada, and Oregon.[1] By enacting UELMA, Idaho joins a progressive group of state governments that have recognized that official, electronic legal material must be authenticated, preserved, and made permanently accessible to the public.

When legal researchers use traditional print resources, the authenticity of the material is usually not questioned. "We don't have cause to wonder whether the United States Code volumes from the Government Printing Office (GPO) provide an authentic version of the primary source material. We know who created the material, who published it, and who sent it."[2]

The same assurances are not so easily available in the online world. UELMA ensures that anyone — whether a citizen, judge, legislator, attorney, or researcher — will be able to verify the trustworthiness of the state legal material available to them online. UELMA also addresses issues concerning the ongoing preservation of, and permanent access to, official versions of primary legal materials that exist only in an online format.

The survey revealed that, "a significant number of state online legal resources are official but none are authenticated or afford ready authentication by standard methods.

History of UELMA

The push to develop UELMA started with the American Association of Law Libraries (AALL). In 2007, AALL recognized that a growing number of states were favoring the electronic publication of primary legal information (such as constitutions, session laws, codified laws, and agency regulations) as a means of cutting costs associated with print publication and expanding access. However, the majority of the states were giving little to no guidance about how to ensure permanent access to an authentic version of these materials.

AALL initiated a review of all 50 states and reported its findings in the *State-by-State Report on Authentication of Online Legal Resources*.[3] The survey revealed that, "a significant number of state online legal resources are *official* but none are *authenticated* or afford ready authentication by standard methods. State online primary legal resources are therefore not sufficiently trustworthy" as substitutes for the official print versions.[4]

Shortly after the publication of the *State-by-State Report* in 2007, AALL held a National Summit on Authentication of Digital Legal Information. It was here that AALL developed the recommendation to draft a uniform act to help address the problems identified in the report and subsequently submitted a request to the Uniform Law Commission (ULC) to review the need for such an act. The ULC agreed with AALL's findings and implemented a Drafting Committee which, over the course of two years, developed what eventually became UELMA. Advisors from the American Bar Association and observers from several interested organizations were invited to assist the drafting committee, including the U.S. Government Printing Office, the National Archives and Records Administration, the Society of American Archivists, the National Center for State Courts, and the Association of Reporters of Judicial Decisions. UELMA was passed by the ULC in its final form in July 2011, and later approved by the ABA House of Delegates in February 2012.[5]

How UELMA works

UELMA is a uniform law that provides states with an outcomes-based approach to the authentication and preservation of electronic legal material.[6] The act does not require specific technologies, leaving the choice of technology for authentication and preservation up to each state.[7] Allowing states the flexibility to choose any technology that meets the required outcomes permits each state publisher to choose the best and most cost-effective method for that state.[8] In addition, this flexible approach recognizes that technologies will change over time and allows states to adapt as needed.

The requirements of UELMA are triggered in two situations: 1) when

a state designates an online version of one of the statutorily designated legal materials as the "official" version, or; 2) when a state eliminates the official print version of a designated material and the only remaining source for the material is an online version. In the second situation, the online version becomes official even without an explicit designation by the state; it is "official" by default as the only source of the legal information in question.

Once triggered, UELMA requires that the state publisher take steps to ensure that the material is authenticated and preserved for permanent public access. ***Authentication*** is a process that gives the user an assurance of trustworthiness for the legal material in question. If the material is authenticated, then it is presumed to be an accurate copy of the legal information provided, the content of which has been verified by a government entity to be complete and unaltered. Technologies for authentication include such tools as issuing a digital certificate of authority, the creation of e-signatures, and the use of secure websites.

Preservation and ***permanent public access*** require state publishers to ensure that prior versions of legal material will continue to be available to the public. Each state can choose how it will preserve the legal material in question, either in print or electronic form. However, if a state chooses to preserve legal material electronically, it must provide for back-up and recovery and it must ensure the integrity and continued usability of the material. Accessibility is also left to state discretion. Ensuring permanent public access does not require the state to provide immediate access, 24-hours a day. Access could be provided continuously online to the required materials or the state could choose to provide access to materials either in print or electronic format at specific locations (such as law libraries, archives, or courthouses) throughout the state.

For each type of legal material, the state must name the government agency or official responsible for publishing the material as the "official publisher," a designation that may vary from state to state. The official state publisher for online material will typically be the same as the state publisher of the print version of legal material. The designated official publisher has the responsibility to authenticate, preserve, and provide permanent public access to the legal material they publish.

Typically, UELMA applies prospectively, to official electronic legal material that is first published on or after the effective date of the act. Each state has the flexibility to choose an effective date that works best for that jurisdiction. A state can also choose to apply UELMA retrospectively. For example, if a state designated an online version of legal material as the official version before enacting UELMA, the state could choose to impose UELMA's requirements for authentication, preservation, and permanent public access on the pre-UELMA material.

The adoption of UELMA by state governments has no effect on the relationship between an official state publisher and a commercial vendor that produces the legal material, leaving such relationships to contract law. UELMA also has no effect on any copyright asserted by state publishers of legal materials, and the act has no effect upon the rules of evidence concerning whether legal material is admissible in courtrooms.

How UELMA applies in Idaho

Idaho Senate Bill 1356 was signed into law on March 26, 2014.[9] The effective date is set for July 1, 2015. The effective date was delayed to allow state publishers sufficient time to investigate how UELMA may affect the online publication of legal materials and anticipate any costs connected to the authentication, preservation, and continuing public access to those materials. The bill passed with nearly unanimous support: 33-0-2 in the Senate and 67-1-2 in the House.

Several types of legal materials are identified in the act, including the Idaho Constitution, session laws, statutory code, Administrative Code and Bulletin, decisions of the Idaho Supreme Court and Court of Appeals, and court rules.[10] As of March 26, 2014, the only legal material that would trigger UELMA's requirements is the Idaho Administrative Code and Administrative Bulletin. Although there are online versions of the Idaho Constitution, session laws,

For each type of legal material, the state must name the government agency or official responsible for publishing the material as the "official publisher," a designation that may vary from state to state.

statutes, court rules, and court opinions, none of these has been designated as an "official" version — either explicitly or through default. However, in 2010, the official print publications of the Idaho Administrative Code and Administrative Bulletin ceased and the online versions were statutorily designated as the official versions.[11] As enacted in Idaho, UELMA's requirements for authentication, preservation, and public access will apply to all versions of the Administrative Code and Bulletin published since 2010.[12]

State	Constitution	Session Laws	Statutory Codes	Court Rules	Supreme Court	Intermediate App. Court	Trial Court	Admin. Regs/Rules	Agency Decisions	Register/Other
CA	X	X	X							
CO	X	X	X					X		
CT	X		X		X	X	X	X		
DE	X	X	X					X		
HI	X	X	X	X	X	X		X		
ID	X	X	X	X	X	X		X		X
IL	X	X	X	X	X	X		X	X	
MN	X	X	X					X		
NV	X	X	X					X		
ND	X	X	X					X		
OR	X	X	X					X		
PA	X	X	X	X	X	X		X		

Fiscal impacts of implementing UELMA

Among the states that have enacted UELMA, the fiscal impact has varied. For most states, the fiscal impact has been minimal or none.[13] This is due mainly to the fact that in these states none of the covered legal materials has been designated as *official* in an electronic format, so the provisions of UELMA do not yet apply. There also exist a variety of technologies for the authentication of primary legal materials, the combination of which will ultimately determine the end cost. The California Office of Legislative Counsel prepared a white paper in 2011 examining five methods of electronic authentication and six sample solutions with their relative costs.[14]

In California, the fiscal impact of implementing UELMA is estimated at $135,000 to $165,000 for set-up, authentication, archiving, and onsite storage, with annual ongoing costs in the range of $40,000 to $70,000.[15] UELMA will be effective in California in July 2015 and the legal materials covered will include the California Constitution, statutes, and codes; all of which will be designated as official in an online format.

In Colorado, the fiscal impact for implementing UELMA was estimated at $198,912, with an effective date of March 2014.[16] The covered legal materials include the constitution, session laws, revised statutes, and agency rules. However, only the Colorado Code of Regulations has been designated as official in an online format. Colorado uses the third-party certification company Entrust CA for authentication purposes.

Minnesota has taken the proactive step of implementing an authentication system for its online legal materials, even though none of the legal materials covered by UELMA has been designated as official. After conducting an internal audit of its existing technology and resources, the Office of the Revisor of Statutes for the Minnesota Legislature concluded that it would be possible for Minnesota to implement an in-house system of authentication, meeting UELMA's requirements, for no new costs to the office.[17] The system went live on January 17, 2014, for authentication of Minnesota administrative rules.[18]

In Idaho, the fiscal impact of UELMA remains to be seen. When UELMA becomes effective in July 2015, it will immediately impact the publication of the Idaho Administrative Code and Administrative Bulletin. The Idaho Department of Administration has already taken steps to address the requirements of preservation and public access. The current Idaho Administrative Code and Administrative Bulletin are available online, as well as archived Administrative Codes beginning in 1996 and Bulletins beginning in 1995.[19] Both the Code and Bulletin are published using Adobe PDF. The Office of the Administrative Rules Coordinator is currently researching which methods of authentication will be most compatible with its existing technology and software.

Endnotes

1. In all, 12 states have enacted UELMA: California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Minnesota, Nevada, North Dakota, Oregon, and

Pennsylvania.

2. Anna Russell and Jane Larrington, *Authenticating the John Hancock of Online Primary Legal Materials: The technical and policy concerns at play*, AALL Spectrum (June 2013), 17.

3. *State-by-State Report on Authentication of Online Legal Resources* (2007), http://www.aallnet.org/Documents/Government-Relations/authen_rprt/authenfinalreport.pdf.

4. *Id.* at 3.

5. Uniform Electronic Legal Material Act (October 4, 2011), http://www.uniformlaws.org/shared/docs/electronic%20legal%20material/uelma_final_2011.pdf.

6. Uniform Electronic Legal Material Act – Summary, http://www.uniformlaws.org/ActSummary.aspx?title=Electronic Legal Material Act

7. *Id*.

8. *Id*.

9. Uniform Electronic Legal Material Act, 2014 Idaho Sess. Laws 702 (codified at Idaho Code Ann. §§60-301- 311).

10. Idaho Code Ann. §60-302 (Supp. 2014).

11. Idaho Code Ann. §§67-5203- 5204 (2014).

12. Idaho Code Ann. §60-303 (Supp. 2014).

13. States indicating no or minimal fiscal impact include Connecticut, Delaware, Hawaii, Idaho, Illinois, Minnesota, Nevada, Oregon, and Pennsylvania.

14. Office of Legislative Counsel, *Authentication of Primary Legal Materials and Pricing Options* (December 2011), http://www.mnhs.org/preserve/records/legislativerecords/docs_pdfs/CA_Authentication_WhitePaper_Dec2011.pdf.

15. American Association of Law Libraries, *UELMA Enactments* (Sept. 25, 2014), http://www.aallnet.org/Documents/Government-Relations/UELMA/UELMAenactments.pdf.

16. *Id.*

17. Office of the Revisor of Statutes, *Prototype for Authentication of Official Electronic Record and Pricing* (August 2012), http://www.aallnet.org/Documents/Government-Relations/UELMA/MNAuthPrototype082012.pdf.

18. Chicago Association of Law Libraries, *Revisor Michele Timmons and the Minnesota In-house UELMA Authentication System* (March 6, 2014), http://new.chicagolawlib.org/blog/2014/03/06/revisor-michele-timmons-and-the-minnesota-in-house-uelma-authentication-system/.

19. Office of the Administrative Rules Coordinator, http://adminrules.idaho.gov/.

About the Author

Michael Greenlee *is the Associate Law Librarian for the University of Idaho-College of Law, overseeing the collaborative management of the Idaho State Law Library. He is an active member of the Idaho Library Association, the Western Pacific Association of Law Libraries, and the American Association of Law Libraries.*

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Confusing Word Pairs III: *D* Words

Tenielle Fordyce-Ruff

The beginning of the year seems to bring out in me a longing to know more about words. Perhaps it is my tendency when the weather is cold and the nights are dark to read more as I curl up by the fire with a good book and a nice glass of Idaho wine after work. Maybe it's that my students are thinking more about word choice as we dig into persuasive writing.

Whatever the cause, I have started several New Years off with columns on confusing words.

Sticking with that theme, this month we are going to delve into *D* words. So sit back (maybe by a nice fire with a cozy beverage) and prepare to be dazzled as we dig into an array of confusing word pairs that all begin with *D*.

Decimate/Destroy

Writers tend to switch the meaning of these two words. Both *decimate* and *destroy* mean to damage. The difference is in the amount of damage.

To *decimate* is to damage something greatly, but not to completely destroy it. *Decimate* is derived from the Latin word for one-tenth.[1] To *destroy* is to damage something until it no longer exists. Writers tend to switch the meaning of these two words.

Thus, when you want to convey serious damage (but not complete destruction) use *decimate*.

The accident *decimated* the front of the truck, but the rear was intact.

If something is gone use *destroy*.

The car was a total loss; the accident *destroyed* it.

Deduce/Deduct

This word pair creates confusion because the noun form of these two verbs is the same: deduction. *Deduce* and *deduct* as verbs, however, have very different meanings.

To *deduce* is to arrive at a conclusion through the use of logic, to apply general rules to specific facts.

The police *deduced* the truck was travelling too fast.

To *deduct* is to subtract.

One step in the editing process is to *deduct* unnecessary words.

Defective/Deficient

Deficient may mean *defective*, and that can create confusion. *Defective* means a thing is faulty. *Deficient* means that a number or amount is insufficient. *Deficient* can mean *defective* only in the sense that something is missing, not that the design is flawed or faulty.

Thus, a notice the missing critical information is both *deficient* and *defective*. (The design of the notice is fine, but the missing information makes it both faulty and insufficient.)

Definite/Definitive

Writers err with this word pair when they try to elevate the ordinary word *definite*. *Definite* means clear and exact. *Definitive* means done with authority and conclusively, or the most authoritative of its kind.

Suppose a court reached a decision, but the writing in its opinion was almost impenetrable. You could write: "The court's decision was *definitive*, but not so *definite*."

Don't make the mistake, however, of using definitive to mean definite. For instance, lay witnesses can give only *definite* answers (or indefinite if they aren't very clear), but not *definitive*.

Deprecate/Depreciate

To *deprecate* something is to express disapproval. To *depreciate*

something is to disparage or belittle it. If you dislike something, you can *deprecate* it without *depreciating* it — in fact, that's more polite.

So don't use *depreciate* to mean simple disapproval.

The judge *deprecated* the party's argument.

Detract/Distract

Detract means to reduce or take away something's worth or value. *Distract* means to prevent someone from paying full attention to something. *Detract* should be used as an intransitive verb; *Distract* should be used as a transitive verb.

In case you forgot that verb lesson from grammar school, here's a refresher. Transitive verbs require both a subject and an object: The truck struck a car. The verb *struck* has both a subject (truck) and an object (car). Intransitive verbs require only a subject: The truck drove. The verb *drove* has only a subject: truck. Many verbs can be both transitive and intransitive.

But to use *detract* correctly, you should include only a subject.

Grammar errors *detract* from a brief's impact.

Distract, on the other hand, should have both a subject and an object.

Grammar errors *distract* my attention from the message.

Discrete/Discreet

Oh yes, a confusing pair of homophone adjectives! A *discrete* thing is distinct or separate from others.

The book had several *discrete* chapters.

A *discreet* person is careful, unobtrusive, tactful, or circumspectly confidential.

I am *discreet* when discussing student performance.

Discreet can also be used to describe things.

She gave a *discreet* cough.

To remember which to use, think about this — the *e*'s in *discrete* are separate from each other.

Dominant/Dominate

Dominant is an adjective. It is used to describe a noun.

The car company had a *dominant* market position.

Dominate is a verb.

The car company *dominates* the market for mid-sized sedans.

Writers err when they use *dominate* as an adjective to describe a verb: *He had a* dominant *personality.*

As a reminder the end of dominate ("ate") is also a verb.

Conclusion

I hope I delighted you with this selection of *D* words. I'm off to start a fire, find my book, and curl up for a lovely evening read!

Sources

• Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 231-235 (2d ed. West 2006).

Endnotes

1. "[*D*]*ecimate* was originally a repressive tactic in which every tenth person in a rebellious village or a defeated army was put to death." Bryan A. Garner, *The Redbook: A Manual on Style*, 231 (2d ed. West 2006).

About the Author

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February 2014 Idaho State Bar Examination Applicants
(as of December 1, 2014)

Maren Elizabeth Adams
aka Maren Elizabeth Winterrowd
Boise, ID
Brigham Young University

Michelle Annette Adams
aka Michelle Annette Walker
Boise, ID
Regent University School of Law

Mitchell Reyes Aguilar
Coeur d'Alene, ID
University of Arizona

Dylan K. Anderson
Blackfoot, ID
Vermont Law School

Shane Leo Andrews
Lewiston, ID
University of South Dakota School of Law

Derek Jason Athey
Savoy, IL
University of Illinois College of Law

Todd Matthew Baker
Boise, ID
University of Virginia School of Law

Diane Kathryn Beaufait
aka Diane Kathryn Cheponis
Boise, ID
Golden Gate University School of Law

Kaleena Marlys Bluemer
Mountain Home, ID
University of Idaho College of Law

Matthew Joseph Brewer
Boise, ID
Willamette University College of Law

Austin Roan Buttars
Idaho Falls, ID
Case Western Reserve University School of Law

Lesley Nicole Casner
aka Lesley Nicole Turner
Rexburg, ID
Liberty University School of Law

Beverly A. Chaney
Boise, ID
University of California-Los Angeles

Stephanie Christensen
Boise, ID
Brigham Young University

Cassandra Fawn Cooper
Boise, ID
Willamette University College of Law

Kammie Cuneo
aka Kamand Cuneo
aka Kamand Mohamadzadeh
Star, ID
The George Washington University Law School

Tricia J'nean Daigle
Boise, ID
University of Idaho College of Law

Michael David Danielson
Twin Falls, ID
University of North Carolina School of Law

Jeremy Geoff DeVries
Meridian, ID
Louisiana State University, Paul M. Hebert Law Center

Samuel Benjamin Dotters-Katz
Eugene, OR
University of Oregon School of Law

Lindsay Ellen Dressler
Boise, ID
Catholic University of America, Columbus School of Law

Casey Elizabeth Drews
Osburn, ID
University of Idaho College of Law

Jessica Lyn DuBose
aka Jessica Lyn Bruton
Lubbock, TX
Texas Tech University School of Law

John William Durman
Pocatello, ID
University of Idaho College of Law

Justin Matthew Findlay
Las Vegas, NV
University of Nevada, Las Vegas, Wm S Boyd School of Law

Rodger Paul Fisher
Boise, ID
University of Idaho College of Law

Michael C. Florian
Star, ID
University of Idaho College of Law

Travis S. Futas
Caldwell, ID
Drake University Law School

Eric Anthony Gale
Eagle, ID
Golden Gate University School of Law

Peter Kristian Godderz
Kalispell, MT
Gonzaga University

Esperanza Granados
Blackfoot, ID
University of Utah S.J. Quinney College of Law

Gregory Thomas Haller
Portland, OR
University of Idaho College of Law

Samantha Rae Hammond
Coeur d'Alene, ID
University of Idaho College of Law

Walter Angus Holliday III
Moscow, ID
University of Idaho College of Law

Reginald K. Holmquist
Kuna, ID
University of Idaho College of Law

Lindy Maxine Hornberger
aka Lindy Maxine Lauder
Boise, ID
University of Idaho College of Law

Nathan Handley Jones
Boise, ID
University of Idaho College of Law

Zachary Wayne Jones
Sandpoint, ID
University of Idaho College of Law

Keith Braden Klahr
aka Brad Klahr
Boise, ID
University of Idaho College of Law

Caitlin D. Kling
Boise, ID
University of Idaho College of Law

Jona Ann Lagerstrom
Hamilton, MT
University of Montana School of Law

Ariana Fiori Laurino
Coeur d'Alene, ID
University of Idaho College of Law

Robert Stone Lee
Boise, ID
University of California, Hastings College of Law

P. Alexandria Lewis
aka Penny Lynn Lewis
Coeur d'Alene, ID
University of Idaho College of Law

Rebecca Arleen Mares
Sandpoint, ID
University of Idaho College of Law

Brian Curtis McComas
San Francisco, CA
University of San Francisco School of Law

Sarah Angel McCormack
Eugene, OR
University of Oregon School of Law

Caryn McInerney
aka Caryn Lynn McInerney
aka Caryn Lynn Dubke
aka Caryn McInerney Dubke
Coeur d'Alene, ID
University of the Pacific, McGeorge School of Law

James David Meaders
Boise, ID
University of Akron

Allison Stephanie Michalski
Victor, ID
Vermont Law School

Jacob K. Munk
Idaho Falls, ID
Florida Coastal School of Law

Deven Lynn Munns
Boise, ID
University of Idaho College of Law

Terry A. Nelson
Huntington Beach, CA
Western State University-College of Law

Katrina M. Parra
Boise, ID
Whittier Law School

True Pearce
New Plymouth, ID
University of Idaho College of Law

Andrew Joseph Phillips
Boise, ID
University of Idaho College of Law

Dallin J. Phillips
North Logan, UT
University of Idaho College of Law

Michael Jon Plank
Las Vegas, NV
University of Nevada, Las Vegas, Wm S Boyd School of Law

February 2014 Idaho State Bar Examination Applicants
(as of December 1, 2014)

Brittany Mae Leonard Ratelle
aka Brittany Mae Leonard
Provo, UT
Brigham Young University

Bobby L. Reynolds
Gulfport, FL
Stetson University College of Law

Tadayoshi L. Sakota
Meridian, ID
University of Idaho College of Law

Thomas Kilburn Shanner
aka Toby Kilburn Shanner
San Diego, CA
California Western School of Law

Jessica Genevieve Sosa
Portage, IN
Indiana University School of Law-Bloomington

Jerry T. Stenquist
Ammon, ID
The George Washington University Law School

Daniel Wolff Taylor
Boise, ID
Golden Gate University School of Law

Eric Steven Taylor
Boise, ID
University of Idaho College of Law

Donald Garrett Terry
Moscow, ID
University of Idaho College of Law

Laura Beatrice Thomas
aka Laura Arment
aka Laura Dessau
Oxnard, CA
University of the Pacific, McGeorge School of Law

Aaron A. Tracy
aka Aaron Asaal Rijhoff
aka Aaron Asaal Righoff
Meridian, ID
University of Idaho College of Law

Tegan M. Troutner
Salt Lake City, UT
University of Utah S.J. Quinney College of Law

Matthew Curtis Watts
Boise, ID
University of Southern California, Gould School of Law

Hadley Webster
aka Butch Webster
Moscow, ID
University of Idaho College of Law

Marie Ellen Young Wetherell
Boise, ID
University of Idaho College of Law

Joshua Douglas Wetzel
Minneapolis, MN
University of Minnesota Law School

William Steven Wilson
Sagle, ID
University of San Diego

OF INTEREST

Montana Judge Thomas named Chief Judge of the Ninth Circuit

SAN FRANCISCO – Judges of the United States Court of Appeals for the Ninth Circuit convened a special session Dec. 5 to mark the elevation of new Chief Judge Sidney R. Thomas of Billings.

Judge Thomas, recently assumed his new duties and succeeds former Chief Judge Alex Kozinski of Pasadena, Calif., who had held the office since 2007. A ceremonial passing of the gavel marked the change in court leadership. The ceremony was streamed live for viewing via the Internet.

By law, selection of the chief judge of a federal circuit or district court is based on seniority and age. The most senior active judge under the age of 65 is eligible to serve as chief judge for a term of up to seven years. As chief judge, Judge Thomas, 61, assumes a variety of administrative responsibilities in addition to hearing cases. Technology savvy, he serves on both the Ninth Circuit Information Technology Committee and the Committee on Information Technology of the U.S. Judicial Conference.


Hon. Sidney R. Thomas

Heart Association names three attorneys to board

BOISE – The Boise American Heart Association announced the addition of six new board members, including three attorneys, J. Walter Sinclair, Christine Neuhoff and Joel Poppen.

J. Walter "Walt" Sinclair was selected to serve as Chairman of the Board from 2014-2016. Walt is a past national chair of the American Heart Association and member of the Board of Directors. He was awarded both the Meritorious Achievement Award (1995) and the Gold Heart Award (2004). He is also a current member of the St. Luke's Regional Medical Center Strategic Initiatives Committee.


J. Walter "Walt" Sinclair

Christine Neuhoff will serve as the Leadership Development Chair in 2014-2015, and is the Leadership Development Chair Elect 2015-2017. Ms. Neuhoff currently serves as Vice President and General Counsel for St. Luke's Health System, where she provides guidance on legislative and regulatory proposals and advocacy. She currently chairs the Healthcare Subcommittee for the Idaho.


Christine Neuhoff

Joel Poppen is vice president of legal affairs, general counsel, and

corporate secretary at Micron Technology. Mr. Poppen serves on the board of directors of several nonprofit organizations and is a founder of One Stone, a student-run nonprofit organization that helps students learn business and leadership skills through community service learning projects.


Joel Poppen

Givens Pursley announces new roles

BOISE – Givens Pursley is pleased to announce that Michael O. Roe has joined the firm as a partner in its commercial litigation, corporate and real estate practice groups. Mr. Roe represents individuals and entities in a wide variety of business matters, transactions and business-related litigation.


Michael O. Roe

Also at Givens Pursley, LLP, David Lombardi has expanded the scope of his practice to include mediation services for litigated civil cases. David started practicing in 1976 and litigated a broad variety of cases before attending the Strauss Institute for Dispute Resolution at Pepperdine University School of Law in August 2013. While he continues to litigate, Mr. Lombardi will also offer mediation services in commercial and business disputes, medical and hospital liability cases, professional peer review, licensing and privileging issues, personal injury and environmental cases. Mr. Lombardi is on the Federal Court and Supreme Court rosters of mediators, is a certified Civil Trial Specialist and a member of American Inns of Court No. 130, the International Society of Barristers and American Board of Trial Advocates.


David Lombardi

Alex P. McLaughlin was recently appointed partner with Givens Pursley, LLP. Mr. McLaughlin's practice focuses primarily on commercial litigation, at the trial and appellate levels. He is an honors graduate of the University of Idaho College of Law.


Alex P. McLaughlin

Hawley Troxell names new managing partner

BOISE – Hawley Troxell is pleased to announce that partner and board member Nicholas G. Miller has been elected as the firm's managing partner. Mr. Miller has been a member of Hawley Troxell's Board of Partners for the past six years, and also holds the position as the Chair of its Business and Finance Practice Group.

Working with the firm's board of partners and its Executive Director, Mr. Miller, as the Chief Executive Officer of the firm, will be responsible for the overall strategic direction. Steven W. Berenter, Hawley Troxell's managing partner for the past six years will work closely with Miller during the two-month transition. Miller's term is for three years and will commence on February 1, 2015.


Nicholas G. Miller

Mr. Miller is active in the community and has chaired the Boise Metro Chamber's Intermountain Venture Forum from 1999-2004, was Chair of the Boise Valley Economic Partnership, served as Boise Metro Chamber of Commerce Board member and Executive Committee from 2004-2009, served as Chairman of the Board for the Idaho Board of Corrections from 1991-1994, served on Idaho Public Television's Board of Trustees from 1995-2001 and was its Board President from 1999-2001, served as Idaho Shakespeare Festival Board President from 2003 to 2005 and has been on its Board of Trustees from 2000 to present.

Joe Borton given Meridian's 2014 "Man of the Year"

MERIDIAN – Joe Borton, managing partner for the Meridian law office of Borton-Lakey Law & Policy, was named Meridian's 2014 "Man of the Year" at Meridian's annual Chamber of Commerce banquet. Joe was honored for his support to local business groups, the legal community, and several charities.


Joe Borton

Mr. Borton served for many years as a board member and president of the Meridian Education Foundation, helping raise funds for grants to local teachers. Joe has also served as president of Big Brothers/Big Sisters of Southwest Idaho, where he was a youth mentor (a "big") for 11 years. Mr. Borton also served as a board member of the Meridian Chamber of Commerce, including a term as its president in 2001-2002.

In 2013 he served as President of the 4th District Bar Association, Idaho's largest judicial district with more than 1,800 attorneys. In the fall of 2013 Joe was elected to a second term as a Meridian City Councilman. Mr. Borton is currently working as a founding member of the newly formed Meridian Arts Foundation, seeking to develop funding opportunities for local artists.

Reginald R. Reeves honored by military

SUN VALLEY – At a special ceremony at the American Legion Hall at Ketchum in November, Lt. Col. (Ret.) Reginald R. Reeves, of Sun Valley and Idaho Falls, received from the Chairman of the Joint Chiefs of Staff, the prestigious Outstanding Public Service Award. The medal, presented by Lt. Col. Richard Goodman, commander of the 389th Fighter Squadron at Mountain Home Air Force Base, was accompanied by a citation. It reads in part,

> Lt. Col. Reginal R. Reeves, U.S. Army (Ret.) distinguished himself through extraordinary public service and humanitarian services and accomplishments devoted to local, national and international humanitarian activities. As a retired U.S. Army Lt. Col. Reeves continues to serve military personnel. He initiated a Military Medicine Program assisting disabled and other military retirees, spouses and windows, in having thousands of prescriptions filled, when unable to travel long distances to a military hospital. He provides pro bono legal services to veterans, amounting to over 180 hours annually.
>
> In 2005 he provided personal care products to deployed National Guard troops amounting to more than $53,000 in value. He provided food, clothing, toys, personal care products, furniture, and other merchandise, to families of deployed National Guard troops and continues to provide to National Guard families, merchandise valued at $2,600 weekly.


Reginald R. Reeves

> For the Idaho Veterans Home he provided food, clothing, linens, books and personal care products valued at $6,130. He collected medical and dental equipment and supplies for shipment to developing countries and provided hundreds of computers for schools which he caused to be constructed and staffed in Guatemala. When he was informed of a great need in Vietnam, he gathered and shipped $1,550,000 worth of hospital equipment and supplies to a hospital at Cao Bang, Vietnam.
>
> Brigadier General (Ret.) Timothy Lake of Washington D.C. first nominated Col. Reeves for the honor. After investigating his qualifications, General Dempsey, Chairman of the Joint Chiefs of Staff determined Reeves was entitled to the Outstanding Public Service Award, the second highest honor which the Chairman can bestow.

David S. Jensen joins Parsons Behle & Latimer's real estate law practice group

BOISE – David S. Jensen has joined the real estate law practice at Parsons Behle & Latimer as a shareholder. Jensen, who has represented numerous banks and other institutions in various multi-million dollar real estate and lending transactions will operate out of the firm's Boise office.


David S. Jensen

Jensen's practice emphasizes client representation in real estate, commercial and consumer lending, business entity formation, mergers and acquisitions, and general business planning. He received his J. D. in 1989 from University of Minnesota Law School, and completed his undergraduate work at Carlton College. He is a frequent speaker at real estate, business and lending seminars.

Parsons Behle & Latimer is home to the largest intellectual property legal team in Idaho and employs more than 35 attorneys, paralegals and support staff in Boise.

Foley Freeman, PLLC announces Matthew G. Bennett has joined the firm

MERIDIAN – Matthew G. Bennett is the newest member of Foley Freeman, PLLC. Mr. Bennett graduated

first in his class from the University of Idaho College of Law and received several prestigious awards including the College of Law's Award of Legal Achievement (2014) and the University of Idaho's Alumni Award for Excellence (2013).


Matthew G. Bennett

He holds a master's degree in social work from Boise State University and is a Licensed Masters Social Worker (LMSW). Mr. Bennett's practice focuses on civil litigation, family law, personal injury, and bankruptcy. He works with both Spanish and English speaking clients and is proficient in reading, writing, and speaking Spanish.

University of Idaho College of Law adds faculty

MOSCOW – Professor Helane Davis has joined the faculty of the University of Idaho College of Law as director of the law library after more than a decade of work in public libraries, academic libraries and academic law libraries. Davis comes from the Albany Law School where she served as associate dean, associate professor of law, and library director of the Schaffer Law Library.


Prof. Helane Davis

Professor Aliza Cover also joined the faculty of the University of Idaho College of Law. Her teaching and scholarly interests focus on criminal law and procedure, capital punishment, evidence and constitutional law. Previously, Cover was a Westerfield Fellow at Loyola University New Orleans College of Law, where she taught Legal Research and Writing, Moot Court, and a course on the death penalty.


Prof. Aliza Cover

Four University of Idaho College of Law Faculty transfer to Boise for second-year option

With the recent expansion of the University of Idaho College of Law's Boise option for second-year law students, three faculty have transferred to Boise, with another joining them in January. This option increases efforts to broaden and deepen the existing Juris Doctor curriculum with emphases correlated to the Moscow land-grant campus and Boise's commercial and governmental assets.

Associate Professor John Rumel teaches Introduction to Law and Civil Procedure, Evidence, Introduction to Law of the Workplace and Education Law. When he first came to Idaho, Rumel practiced law with a firm that emphasized products liability, professional malpractice, education and employment law.


Assoc. Prof. John Rumel

Associate Professor Shaakirrah Sanders teaches subjects related to government structure and individual rights and liberties under the U.S. Constitution, including Constitutional Law I and II, Criminal Procedure, Freedom of Speech and Press, and Advanced Criminal Procedure. Sanders also co-coaches the National Moot Court Competition Boise Team and serves as faculty advisor for the crit, a student-edited critical legal studies journal published by the College of Law.


Assoc. Prof. Shaakirrah Sanders

Associate Professor Sarah Haan teaches Business Associations, Advanced Topics in Business Law, and Professional Responsibility. She writes about corporate political speech and disclosure.


Assoc. Prof. Sarah Haan

Professor Annemarie Bridy will transfer to the Boise center in January. Bridy specializes in Internet and Intellectual Property Law, with specific attention to the impact of disruptive technologies on existing frameworks for the protection of intellectual property and the enforcement of intellectual property rights.


Prof. Annemarie Bridy

Deborah Ferguson and Craig Durham start firm

BOISE – A new firm, Ferguson Durham, PLLC, is operating at 223 N. 6th Street, Suite 325 Boise.

The firm focuses on federal and state litigation, including civil rights, environmental and criminal law. Deborah Ferguson has litigated complex cases for 28 years, including 20 years with the United States Attorney's Office in Idaho and Chicago. Craig Durham worked for nine years as the Death Penalty Law Clerk for the federal District Court of Idaho, where he assisted judges in managing all phases of death penalty habeas corpus cases and civil rights cases brought under 42 U.S.C. § 1983. Before his term at the Court, Craig has served as both a trial and appellate public defender in Kansas and Idaho.

In a federal civil rights case that drew national attention, Ms. Ferguson and Mr. Durham recently successfully challenged Idaho's constitutional same sex marriage ban, before the District of Idaho and the Ninth Circuit Court of Appeals.

Photo courtesy of Ferguson Durham, PLLC

Deborah Ferguson and Craig Durham have opened their own firm.

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Richard J. "Tug" Worst
John O. Fitzgerald, II
Timothy J. Stover
David W. Gadd
Kara M. Gleckler
Louis V. Spiker
Kirk A. Melton

Attorneys at Law

WILSON & McCOLL
Jeffrey M. Wilson
Brian F. McColl

Of Counsel

The firms of Worst, Fitzgerald & Stover, PLLC and Wilson & McColl are pleased to announce that effective October 1, 2014 they have merged. The new firm will have offices in Twin Falls and Boise. The new firm will continue to provide representation in matters involving litigation, creditor's rights, bankruptcy, personal injury, employment, commercial litigation, real estate, business transactions and formation, estate planning and probate and municipal representation.

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905 Shoshone Street North, Twin Falls, ID 83301
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Boise Office
3858 North Garden Center Way, Suite 200, Boise, ID 83703
P.O. Box 1544, Boise, ID 83701
Phone: (208) 345-9100 | Facsimile: (208) 384-0442

H. Reynold George
1924 - 2014

Hilmer Reynold George, 89, of Idaho Falls, passed away Jan. 20, 2014, at his home. He was under the care of his family and Hands of Hope Hospice. Reynold was born April 17, 1924, in Rigby, Idaho, to Hilmer Melvin George and Edith Kinghorn George. He grew up and attended schools in Rigby and graduated from Rigby High School. He also attended Idaho State Academy Midshipman School, University of Utah, and the University of Idaho College of Law in 1951. He served his country as an Ensign in the U. S. Navy during World War II. On May 21, 1947, he married Donnetta Smith in the Idaho Falls LDS Temple. They had eight children and made their home in Rigby, where Reynold practiced law, then moved to Idaho Falls, where he served as a district judge in the Seventh Judicial District of Idaho for 20 years. He retired in 1993. An active member of The Church of Jesus Christ of Latter-day Saints, he served in various capacities over the years, including Bishop, High Councilman, Stake Mission President, and three full-time missions. He enjoyed golfing, hunting, and fishing. A devoted family man, he loved being with his family. Reynold is survived by his loving wife of 66 years, Donnetta George of Idaho Falls, ID; Son, Ronald (Nica) George of Pocatello, ID; Daughter, Elizabeth (Jay) Crandall of Idaho Falls; Daughter, Sylvia (Martin) Harris of Boise, ID; (currently serving in the Montevideo, Uruguay LDS Mission); Son, Bruce (Julie) George of Vista, CA; Daughter, Julie Rigby of Idaho Falls, ID; Daughter, Diana (Dale) Veenendaal of Draper, UT; Son, Bradley (Kelly) George of Idaho Falls, ID; Daughter, Jeanette (James) Cole of Idaho Falls, ID; Brother, Dennis George of Boise, ID; 63 grandchildren (including spouses), and 63 great grandchildren He was preceded in death by his parents and three brothers, Donald Melvin George, Joseph C. George, and Donal K. George.


H. Reynold George

Sean Collins Beaver
1983 - 2014

Sean Collins Beaver was born on February 21, 1983 in Marin County, Calif., and died of natural causes on Nov. 21, 2014 in Boise. Sean grew up in Boise and, on a debate scholarship, entered Whitman College in Walla Walla, Wash. He graduated with a History degree in 2005, and then graduated from Drake Law School in Des Moines, Iowa in 2009. After passing the bar exam, he worked for Cox Law in Boise, briefly worked for Powers Tolman in Twin Falls, and taught in the paralegal program at Broadview University in Meridian. He finally landed his dream job at the Ada County Public Defender's Office in 2013. Sean was always rooting for the underdog, and was more motivated by helping others than helping himself. As an ardent music lover, he hosted a college radio show and was famous for his gifts of "mixed tapes." He could always pick the perfect song to express anything. Sean is survived by his parents, Craig and Carolyn Beaver; sister Kristen Beaver; former spouse Janelle Gates; grandparents Rich and Polly Collins and Sharon Beaver.


Sean Collins Beaver

Edwin Brent Small
1940 – 2014

Edwin Brent Small died on Sept. 10, 2014, after a valiant battle against cancer. Born on Nov. 19, 1940 in Brigham City, Utah, to Edwin Kent Small and Veressa Margaret Hunsaker, he was reared in Brigham City and in Salt Lake City. Instrumental in his upbringing were his beloved grandparents, Oscar and Peal Hunsaker, and aunt and uncle, Irvin and Zenda Hull.

He attended the University of Utah, where he was a member of the SAE fraternity. There he received his bachelor's degree and his MBA. Edwin later received his J.D. from Gonzaga University in Spokane, where he was the editor of Law Review.


Edwin Brent Small

He married Frances Diane Simmons (later divorced) and they had three children: Ann, E. Brent, Jr. and David. Edwin married Marie Cason in 1999.

Brent worked hard all the days of his life. He was employed by Firestone Tire and Rubber, Key Bank and most recently was in private practice as a family law attorney. He was a tal-

ented athlete and an avid sports fan. Brent was a devout member of the Church of Jesus Christ of Latter-day Saints and served in many callings over the years.

He was preceded in death by his grandparents, parents and recently, by both of his sons, Brent and David.

He is survived by his wife Marie, his sister Sandra (Skip) Dopp, his daughter Ann (Gray) Achiu, his grandchildren: Audra, Emma, Spencer, Elise, and Kendall and his great-grandson, Preston.

W.W. "Bill" Nixon
1942 - 2014

W. W. "Bill" Nixon passed away on Thanksgiving Day at the age of 82. He was born to William James and Eva Jane (Wilson) Nixon on Feb. 12, 1932, in Payette, Idaho, the middle child of three boys. Proud of his native Idaho, Bill could lay claim to being a third-generation Idahoan.

At the age of two, the family moved from Southern Idaho to Bonners Ferry where Bill's parents raised and showed Shorthorn cattle, and his father practiced law. Later, his mom would return to teach at Bonners Ferry High School.


W.W."Bill" Nixon

Bill attended all 12 years of his formal education in Bonners Ferry, graduating from Bonners Ferry High School in 1950.

Bill attended the University of Idaho where he pledged the Sigma Chi fraternity and filled his college years serving in various organizations, singing with the Vandaleers, playing intramural sports, and participating in the Young Republicans and debate.

He graduated from law school in 1956 and joined his father in the practice of law in Bonners Ferry. During this time he was elected as Boundary County Prosecutor. He moved to Coeur d'Alene in 1972 and remained active in practicing law until shortly before his passing.

At one time or another Bill was a member of the Sandpoint Elks, Bonners Ferry Kiwanis, Moyie Springs Shriners, Royal Order of Jesters of Lewiston, Coeur d'Alene Rotary and Hayden Lake County Club.

Bill assisted the Brown family of Sandpoint in starting Schweitzer Ski area and served as legal counsel for Pack River Lumber Company of Sandpoint.

He served on the Kootenai Medical Center Foundation, North Idaho College Foundation, North Idaho College Board of Trustees (and as chairman of the Board), University of Idaho School of Law Advisory Board, University of Idaho Vandal Booster Board, and Bank of Idaho (now Wells Fargo Bank) Board of Directors.

He was honored with the Professionalism Award from the Idaho State Bar.

He is survived by his wife of 40 years, Judy; children Grant (Marla) Nixon of Hayden Lake, Janna (Rik) Willmering of Spokane, Wash., and Jed (Meagan) Nixon of Coeur d'Alene; grandchildren and his nieces and nephews.

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H.E. "Gene" Jones

IDAHO LAW FOUNDATION

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Forty Years Strong: Idaho Law Foundation Making a Difference

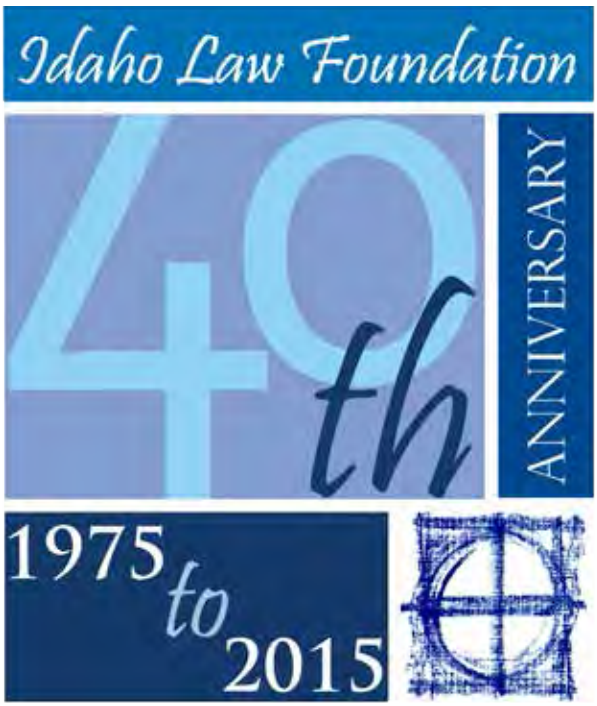
Michael Felton

The May 1975 edition of *The Advocate* included an article with the title "Idaho Law Foundation Is Formed; Idaho State Bar Changes Headquarters." And with that article nearly 40 years ago, Idaho's legal community was introduced to the Idaho Law Foundation.

The article explained how the Foundation "was formed in order to make it possible to work more closely with the public in education and other eleemosynary activities." For those of you who, like me, have no idea what eleemosynary means, it's just a more sophisticated way of saying charitable activities. I guess people around here were a little fancier with their words in 1975! Interestingly, the article indicated that the initial project for the Law Foundation would be a class called Law-For-Laymen. This idea eventually developed into the Bar and Foundation's long running adult education course, Citizens' Law Academy.

The article also introduced the first officers of the Foundation, which included Jess Hawley as Chairman, Allyn Dingel as Vice-Chairman, and Mack Redford as Secretary. I have to say I feel honored to be an officer for an organization that has included such legal greats.

Michael Felton



Of course, since 1975, the Idaho Law Foundation has grown and changed a lot. In the first five years of operation the Law Foundation focused on education. The Continuing Legal Education Committee was established in 1976 with a goal to provide programs and services that enhance the competence of members of the Bar. The first Idaho Law Foundation sponsored CLE seminars were offered in 1978. That year also saw the emergence of the Law Related Education Committee, whose mission was to enhance public understanding of our legal system. The first Teacher Civic Institute was offered that summer.

The 1980's brought Interest on Lawyers Trust Accounts and Idaho Volunteer Lawyers Programs into the Law Foundation fold. The Idaho Supreme Court established Idaho's IOLTA Program, one of the first such programs in the nation, in 1982 and IOLTA began offering public service grants in 1985. 1982 also saw the establishment of IVLP as the first statewide pro bono program in Idaho, but it wasn't until 1988 that IVLP became

Our organization has been doing great work since 1975 and I am proud to be president of an institution that undertakes so much wonderful public service on behalf of our legal profession.

a program of the Idaho Law Foundation.

So, there's a small piece of Idaho Law Foundation history in a nutshell. Going back to the 1970's, there used to be a pretty popular slogan that said, "You've Come a Long Way, Baby!" It's unfortunate that a great saying was attached to a brand of cigarettes, but setting that aside, it was still a wonderful way to cheer on growth and progress.

As the Law Foundation begins 2015 celebrating our 40th Anniversary, I believe that old adage holds true for us. We have come a long way. Our organization has been doing great work since 1975 and I am proud to be president of an institution that undertakes so much wonderful public service on behalf of our legal profession.

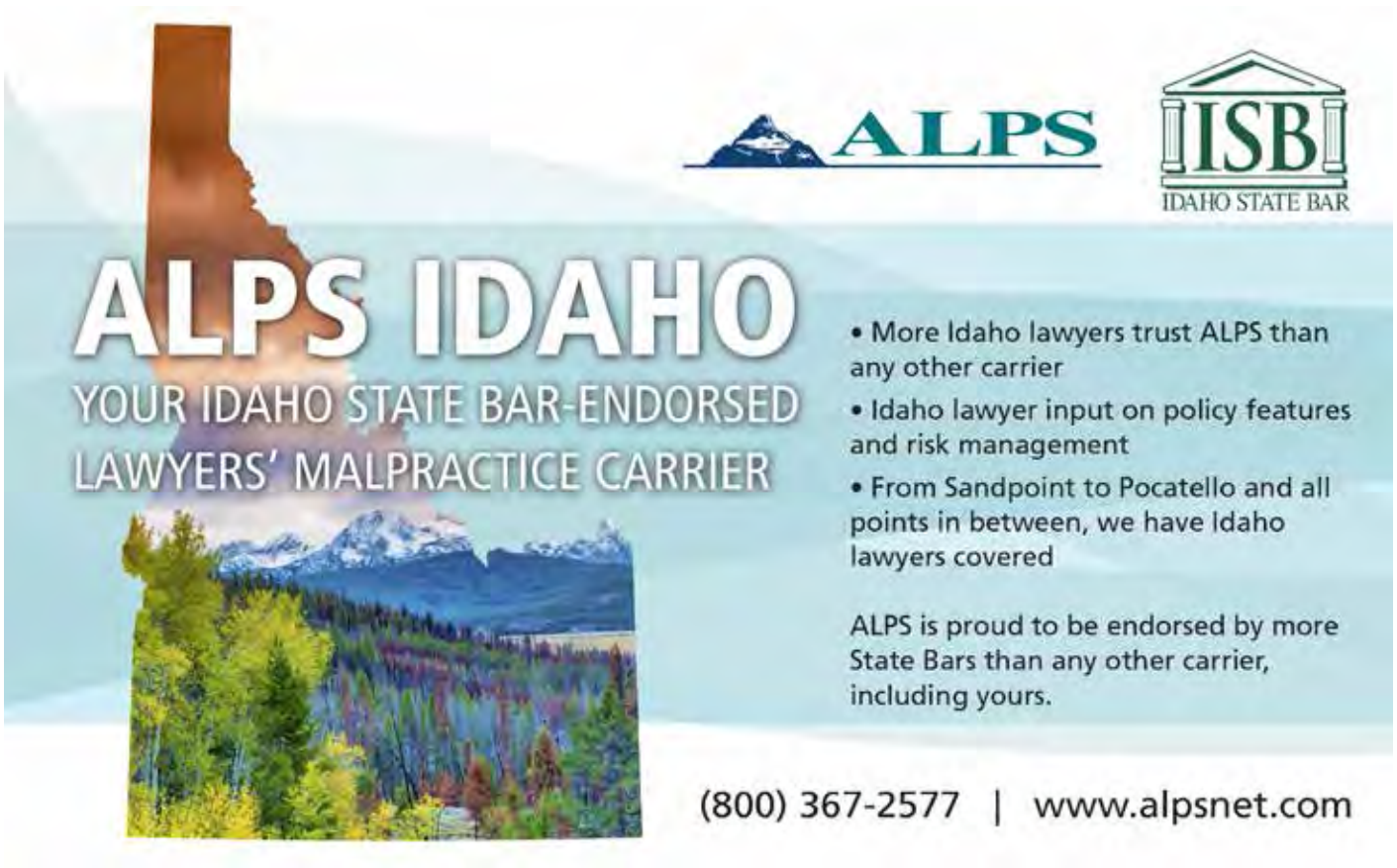
Throughout 2015, the Law Foundation will offer ways to commemorate our 40th birthday. And when I say our birthday I mean "our" in the sense of all of us. The Idaho Law Foundation is a member organization, so it truly encompasses all who are Idaho attorneys. Stay tuned throughout the year to celebrate the Idaho Law Foundation and, what I now know are its eleemosynary endeavors.

Photo by Dan Black

High school students get a taste for trial work in the mock trial competition.

About the Author

Michael Felton *is the current President of the Idaho Law Foundation. Michael is an attorney in private practice in Buhl, Idaho.*



Access to Justice Campaign Donors Came Through

Access to Justice Leadership Committee

In 2014, Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, and DisAbility Rights Idaho joined together to form Access to Justice Idaho, an annual fundraising campaign. Our goal is to provide critical legal services to vulnerable Idahoans by raising funds from Idaho attorneys and community members who understand the essential role that attorneys and the judicial system play in improving lives.

We are thrilled to announce that, in its inaugural year, Access to Justice Idaho raised over $178,000. This funding will increase access to services that include helping family members secure guardianship of minor children and vulnerable adults, assisting victims of domestic violence and their children with divorce and custody proceedings, and providing representation for people with chronic mental illness and developmental disabilities.

The success of this campaign would not have been possible without our Leadership Committee, composed of attorneys from across the state, volunteering their time to make Idaho a better place. This group of dedicated individuals is Denny Davis and Fonda Jovick from the First Judicial District; Jim Westberg and Dana Johnson from the Second Judicial District; Kerry Michaelson and Teri Whilden from the Third Judicial District; Keely Duke, Walt Sinclair (Committee Chair), Scott McKay, and Sheli Fulcher Koontz from the Fourth Judicial District; Tom High and Lisa Rodriguez from the Fifth Judicial District; Mary Huneycutt and Reed Larsen from the Sixth Judicial District; and Chuck Homer and Curt Thomsen from the Seventh Judicial District.

With the generous sponsorship of our donors, Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, and DisAbility Rights Idaho will be able to help more disadvantaged Idahoans navigate the legal steps necessary to make their lives safer, healthier, and happier. We would like to express our sincere gratitude to each and every one of you who donated. To give you a sense of your support in action, we will be keeping in touch to share with you Access to Justice Idaho program updates and client stories.

To our 2014 Access to Justice Idaho contributors, once again, from the bottom of our hearts, thank you!

We are thrilled to announce that, in its inaugural year, Access to Justice Idaho raised over $178,000.

Visionaries: $5,000 and up

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University of Idaho College of Law Annual Idaho Law Review Symposium

Friday, April 3, 2015 - Idaho Water Center, Boise

Plan now to join keynote speaker, David Medine, Chairman of the White House Privacy and Civil Liberties Oversight Board (PCLOB) and renowned privacy and security experts from academic disciplines, including law, mass communications, and computer science, as they explore the nature and reach of contemporary surveillance technologies and the challenges they pose for maintaining personal privacy and security.

Registration and details will be available soon
www.uidaho.edu/law/law-review/symposium

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