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# Employment & The Law

Labor & Employment Practice Group

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## Breaking News: New Hazard Communication Standard

***By Katie Birmingham and Laura D. Windsor***

On March 20, 2012, the Department of Labor announced a final rule updating the Occupational Safety and Health Administration ("OSHA") Hazard Communication Standard ("HCS"), which is used to classify and identify chemicals according to their health and physical hazards. The existing standard was revised to align with the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals. The revised HCS establishes consistent labels and safety data sheets for chemicals produced in the United States or imported from abroad, with the goal of making classifications and safety data sheets more easily understood and more consistent on an international basis. The revised HCS will be fully implemented in 2016, but manufacturers, importers, distributors, and employers who utilize hazardous chemicals must meet more immediate training and compliance deadlines. The following is a summary of the changes and applicable deadlines:

- **New Classification Criteria:** The revised HCS provides specific criteria for health and physical hazards to help chemical manufacturers and importers classify chemical hazards. Those new criteria may be found here: http://www.osha.gov/dsg/hazcom/ghs.html#3.0.

- **New Labels:** Chemical manufacturers and importers will be required to use new labels, which include a harmonized signal word, pictogram, and hazard statement based upon the hazard classification for the chemical or product. A sample of the new label format is available here: http://www.osha.gov/Publications/HazComm_QuickCard_Labels.html.

- **New Safety Data Sheets:** Under the revised HCS, safety data sheets will follow a specified 16-section format, which is detailed here: http://www.osha.gov/Publications/HazComm_QuickCard_SafetyData.html.

- **New Pictograms:** The revised HCS utilizes eight new pictograms to convey the health and physical hazards of chemicals, such as toxicity and flammability. Those pictograms, as well as an optional environmental hazard pictogram (environmental hazards are not within OSHA's jurisdiction), are available here: http://www.osha.gov/Publications/HazComm_QuickCard_Pictogram.html.

- **Training Deadline:** Employers must train their workers on the new label elements, pictograms, and safety data sheet format by December 1, 2013.

- **Compliance Deadline:** Chemical manufacturers, importers, distributors, and employers must comply with all modified provisions of the HCS final rule by

## Sharing Our Insight: Visit the TS Blogosphere

**Take a look at a few Troutman Sanders blogs with unique and interesting subject matter affecting employers and HR professionals.**

**For details, turn to page 15**

June 1, 2015. However, distributors may ship products labeled under the old system until December 1, 2015. By June 1, 2016, employers must update workplace labeling and hazard communication programs as needed and provide additional worker training for any newly-identified physical and health hazards. During the transition period, chemical manufacturers, importers, distributors, and employers may comply with the new HCS, the current standard, or both.

If you have any questions regarding compliance with these requirements and deadlines, simply contact any member of the Troutman Sanders LLP Labor & Employment Group.

# Overtime Update: New Cases May Provide Clarity on Key Wage And Hour Issues

***By Brandon V. Dhande and Jimmy F. Robinson, Jr.***

As we mentioned in our last newsletter, even the most diligent employers are finding it difficult to keep track of emerging wage and hour issues. Your inbox is likely bombarded by wage and hour updates, decisions, articles, alerts, and reminders. We hope that our *Overtime Update* feature provides a helpful way for you to identify the most important new wage and hour issues that are currently affecting employers. In this edition, we identify three topics that have recently emerged as need-to-know issues.

## New Lawsuits Are Targeting Unpaid Interns

As the job market for recent college graduates remains difficult at best, more students are turning to internships to gain job experience. Certain internships with prestigious or well-known organizations can be so valuable that students are willing to take unpaid positions. Yet, even interns are subject to the Fair Labor Standards Act ("FLSA"), which requires employers to pay minimum wage and overtime to non-exempt employees. Some industries, including the media and entertainment industry, derive significant value from unpaid interns. However, three recent multi-plaintiff lawsuits against Fox Searchlight Pictures, the Charlie Rose Show, and the Hearst Corporation may change employers' views on unpaid interns. In these lawsuits, the interns allege that their employers took advantage of their intern status to essentially obtain free labor, in violation of the minimum wage and overtime requirements of the FLSA.

So, what can employers with unpaid interns do to avoid liability? According to the Supreme Court, employers should consider the following criteria:

1. The internship should be similar to training that would be given in a vocational school;

2. The internship should be set up for the benefit of the intern;

3. The internship should not displace regular employees;

4. The employer should not derive immediate advantage from the activities of the intern, and on occasion, the internship may actually impede the employer's operations;

5. The intern is not necessarily entitled to a job at the end of the internship; and

6. The intern must clearly understand that he or she is not entitled to wages for the time spent in the internship.

Do your unpaid interns meet the above criteria? If not, you should consider paying your interns (at least minimum wage) to avoid potential future claims. Employers may wonder whether any unpaid internship at a for-profit company will satisfy the fourth item, which requires that the employer "derive no immediate advantage" from the internship. Stay tuned for more guidance on this issue as these new lawsuits work their way through the courts.

## Internal Complaints Regarding Wages Are Protected

Can you legally fire an employee for making internal complaints about overtime? In two recent decisions, the Fourth Circuit Court of Appeals answered "no" because internal complaints are protected by the anti-retaliation provisions of the FLSA. According to the FLSA, employees are protected only when they "file a complaint." In the past, federal courts held that an employee's oral or informal complaint to management about wage and hour issues did not constitute a "filing" within the meaning of the statute. However, in two recent decisions (*Minor v. Bostwick Labs* and *Jafari v. Old Dominion Transit Management*) the Fourth Circuit made clear that internal complaints constitute protected activity under the FLSA. In both cases, the Court found that the employees gave "fair notice" to their employers that they were

making protected statements under the FLSA. Employers should keep these decisions in mind whenever an employee makes a complaint about working conditions – including wage and hour issues. Internal complaints should always be taken seriously and investigated, and employers are prohibited from terminating employees for making internal complaints about wages, alleged discrimination or harassment, safety issues, or any other topic that may be protected by federal or state law.

### Arbitration Agreements Remain a Hot Topic

In our previous installment of *Overtime Update (http://www.troutmansanders.com/overtime-update-supreme-court-decisions-play-pivotal-role-02-23-2012/)*, we explained how the National Labor Relations Board ("NLRB" or "Board") decided in *In re D.R. Horton, Inc*. that employees have a statutory right to file class action lawsuits against their employers regarding conditions of employment. As a result, the NLRB decision invalidated certain anti-class action provisions in arbitration agreements. However, the Board's opinion in *D.R. Horton* appears to conflict with *AT&T Mobility v. Conception*, a recent Supreme Court decision that was generally seen as reinforcing the validity and power of arbitration agreements. Now, lower courts are attempting to reconcile these two decisions. In Wisconsin, a federal judge rejected arguments that the *D.R. Horton* decision conflicts with *Conception*. Yet in California and Georgia, courts have recently reached the opposite conclusion, holding that the Supreme Court's broad language in *Conception* should prevail over the Board's decision in *D.R. Horton*. We expect to see more court decisions (and more clarity and guidance for employers, we hope) this year regarding the viability of *D.R. Horton* and anti-class action agreements.

As you can see, recent lower court cases and decisions have a significant impact on how employers should approach wage and hour issues. In some cases, the court decisions have provided helpful guidance for employers dealing with issues such as internal complaints regarding wage issues. On the other hand, employers are still waiting for direction on how to treat unpaid interns and whether federal labor law prohibits anti-class action arbitration agreements. We will pay close attention to these issues and keep you informed in our next edition of *Overtime Update*. Until then, please do not hesitate to contact any member of the Troutman Sanders LLP Labor & Employment Group with your questions.

## To Inquire, or Not to Inquire – The Risks of Asking Job Applicants About Prior Arrests and Convictions

***By Christina H. Bost Seaton and David N. Anthony***

Your company takes great pride in hiring an efficient, productive, and safe workforce. In an effort to ensure the safety of your employees and customers, your initial application form requires all job applicants to check a box "yes" or "no" to the following question: "**Have you ever been convicted of a crime?**" When reviewing a stack of applications, you notice that 10 applicants checked "yes" to this question. Because you still have hundreds of applications to choose from, you remove those applicants from consideration based on their prior conviction history. Has your company just violated the law?

The answer to this question varies significantly from state to state. In some states, the law imposes very few restrictions on inquiries into an applicant's arrest and conviction history. In others, there is no doubt that the conduct described in the above example is prohibited. Of course, most states fall somewhere in the middle, allowing employers to ask certain narrowly tailored questions, but also requiring them to show some reasonable connection between the conviction or arrest and the denial of the position sought. However, as the EEOC recently made clear, your company could face potential liability even in the *complete absence* of state laws restricting such inquiries.

In 2011 the EEOC entered into a $3.1 million settlement with a company that disqualified applicants based on their arrest and conviction history. The problem with this practice, according to the EEOC, is that it may disproportionately affect minority applicants, giving rise to an adverse impact claim for race discrimination in violation of Title VII of the Civil Rights Act of 1964. Specifically, the EEOC alleged that the company's practice disproportionately excluded minority applicants – over three hundred of them.

This article addresses the current state of the law concerning inquiries into applicants' arrest and conviction history and provides practical guidance and recommendations to help employers avoid potential claims.

### The EEOC Discourages Inquiries into Arrests and Convictions

Although there is no federal law that clearly prohibits employers

from asking about arrests and convictions, the EEOC has consistently advised that "using such records as an absolute measure to prevent an individual from being hired could limit the employment opportunities of some protected groups and thus cannot be used in this way." However, some inquiries may be appropriate if they are job-related and relate to convictions or arrests that are relatively recent.

In April 2012, the EEOC issued new guidance concerning the use of arrest and conviction records and potential liability under Title VII. While a pre-employment inquiry concerning criminal records does not in itself violate Title VII, the use of criminal record information as part of the screening process may violate Title VII if it disproportionately excludes protected class members from consideration for employment. If a screening policy has a disparate impact on protected class members (i.e., if it tends to exclude certain protected classes from further consideration) the EEOC claims that the policy must be job-related and consistent with business necessity in order to be lawful.

**The EEOC's Position on Conviction Inquiries**

The EEOC has questioned the value of inquiring into an applicant's conviction history, noting that "there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction." Accordingly, the EEOC recommends that "employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

Employers can satisfy the "job related and consistent with business necessity defense," by using targeted inquiries that consider at least (a) the nature of the crime; (b) the time elapsed since conviction; and (c) the nature of the job in relation to the crime. In addition, the EEOC has advised that employers should perform an "individualized assessment" for applicants who are excluded as a result of the conviction inquiry. An "individualized assessment" means that (i) the applicant is notified that he has been screened out because of a criminal conviction; (ii) he is given an opportunity to demonstrate that the exclusion should not be applied due to his particular circumstances; and (iii) the employer must consider whether the additional information provided by the applicant warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity. The EEOC's recent guidance clarifies, however, that an employer may be able to justify a targeted criminal records screen solely by considering (a) the nature of the crime; (b) the time elapsed; and (c) the nature of the job, although "[s]uch a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."

**The EEOC's Position on Arrest Inquiries**

The EEOC has noted that "[t]he fact of an arrest does not establish that criminal conduct has occurred." However, the EEOC has also noted that "[a]lthough an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes."

## State Laws Relating to Criminal Inquiries by Employers Vary Widely

The laws relating to criminal inquiries are markedly different from state to state. Although you should be aware of the law in each state in which your company recruits employees, here are just a few examples of what can and cannot be asked during the application and hiring process:

- **California:** Employers are prohibited from asking about an applicant's arrest or detention that did not result in a conviction. Although employers are allowed to inquire into certain convictions, they cannot seek any information concerning the following: (1) convictions for which the record has been sealed or expunged; (2) any misdemeanor conviction as to which probation has been completed; or (3) certain marijuana-related convictions that are more than 2 years old.

- **District of Columbia:** It is unlawful for employers to "require the production of any arrest record or any copy, extract, or statement thereof, at the monetary expense of any [applicant]." To the extent such information is requested, it may only relate to convictions or arrests that have occurred within the prior 10 years.

- **Georgia:** In Georgia, employers are generally not prohibited from inquiring into arrests or convictions. However, Georgia law affords some protection to first offenders. Under the so-called "first offender law," certain first offenses are not considered "convictions" and may not be used to disqualify a person in any application for employment.

- **Illinois:** Employers cannot inquire into or use the facts of an arrest or criminal history record that has been expunged, sealed, or impounded as a basis to refuse to recruit or hire an applicant. Also, applications must contain specific language that states that the applicant is not obligated to disclose sealed or expunged records of conviction or arrest.

- **New York:** Employment cannot be denied on the basis of a prior conviction, unless (1) there is a direct relationship between one or more of the offenses and the specific employment sought by the applicant; or (2) the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. As such, employers in New York cannot simply deny employment on the basis of a prior conviction standing alone. Instead, there are eight statutory factors that must be considered to determine the fitness of an applicant, including, among other things, the bearing the criminal offenses have on the individual's ability to perform the job; the time that has elapsed since the criminal offense; the age of the individual at the time they committed the offense, the seriousness of the offense; and the individual's rehabilitation record.

- **Virginia:** Pre-employment inquiries concerning convictions are not prohibited under Virginia law. However, an employer cannot, in any application, require an applicant to disclose information about an arrest or criminal charge that has been expunged.

As you can see, the law regarding criminal inquiries is not always consistent or predictable from state to state. Some states, such as North Carolina and Texas, place very few limitations on such inquiries. Other states take a much more restrictive position, such as Hawaii, which has implemented a complete ban on inquiries relating to arrest history or convictions during the application process.

What is the lesson here? Make sure that your company understands the law of each state in which it recruits workers. Complying with the restrictions of state law can become particularly burdensome for employers who recruit online, as applicants from multiple states might apply for available positions. Under these circumstances, you should assume that the most restrictive laws apply, be prepared to show that the inquiry is job-related, and make your inquiries as narrow as possible.

## Criminal Inquiries by Employers Are Sometimes Subject to Local Ordinances

Knowing the law of each state is crucial, but it may not always be enough. Employers should also be mindful of local laws relating to criminal inquiries.

For instance, under Pennsylvania state law, employers may inquire into misdemeanor and felony convictions, but only to the extent they relate to the applicant's suitability for employment in the particular position sought. There are no state laws relating to arrests. However, a recently-enacted ordinance in the City of Philadelphia restricts employers from inquiring into arrests that did not result in conviction. The ordinance also prohibits employers from seeking information about convictions until after the employer has conducted a "first interview."

Similarly, a New York City law prohibits city employers and agencies from asking about an applicant's criminal history on initial job application documents, or in the initial interview. When an agency does review an applicant's criminal history, it is limited to considering felony convictions, unsealed misdemeanor convictions, and pending charges.

## Compliance with Criminal Inquiry Laws May Also Implicate Other Federal and State Laws

Before employment can be denied on the basis of a prior conviction, many states, like New York, require employers to show a reasonable relationship between the prior offense and the specific type of employment sought. Consider, for instance, the example from the beginning of this article. If an applicant in New York State replied "yes," indicating that he or she had a prior conviction, the employer would then need to learn more about the particular offense to see if it bears any relation to the position. One way to obtain such information is through a criminal background report, which may implicate the Fair Credit Reporting Act ("FCRA") or related state laws.

The FCRA imposes numerous technical, procedural, notice and timing obligations on employers who use credit reporting agencies to obtain criminal background reports. Among other things, employers must provide a clear, written notice disclosing the intention to obtain a consumer report for employment purposes. Employers must also obtain written authorization from applicants, and allow sufficient time for applicants to contest any of the information contained in a consumer report prior to denying employment or taking some other type of "adverse action" against the individual. If the employer takes an "adverse action" based upon the information contained in a consumer report, the

employer then must provide the applicant or employee with notice (an "adverse action notice") of this fact as well as including other disclosures. Failure to do so may lead to claims from individual applicants or, worse yet, an entire class of applicants, alleging that their rights under the FCRA were violated.

### Recommendations for Employers

Criminal inquiries remain an important tool for employers. They are a necessary and vital means by which employers may protect themselves against various forms of liability, including negligent hiring claims. Indeed, some states require employers to inquire into conviction and arrest histories for jobs that involve caring for elderly individuals or children.

Given the increasing risk of liability, however, employers should proceed with caution throughout the application process. Accordingly, employers should keep the following points in mind when inquiring into conviction and arrest histories:

- Understand the law of the states (and, if possible, the localities) in which your company recruits prospective employees.
- Avoid the use of broad questions such as "Have you ever been convicted of a crime?" if possible and, in accordance with the laws of your state and locality, try to narrow these questions with time limitations and/or the degree or nature of the crime (i.e., certain classes of felonies or misdemeanors).
- If you discover that an applicant has a criminal history, obtain additional information so that you can make an informed decision regarding the possible relationship of the crime to the position sought. If you are hiring someone as a bank teller, it might not be reasonable to deny employment based on a single DUI conviction from 1985. On the other hand, if the conviction was for embezzlement from a prior employer during 2011, you may have a legitimate basis for denying employment.

If in doubt, contact any member of the Troutman Sanders LLP Labor & Employment Group to discuss the law in your area. For general information concerning compliance with related federal laws, such as the Fair Credit Reporting Act, contact David Anthony, John Lynch, or Alan Wingfield of the Troutman Sanders LLP Financial Services Litigation Group.

## Requesting Facebook Login Information a Risky Choice for Employers

***By Lindsay S. Marks and Ashley Z. Hager***

By now you have likely heard that some companies are demanding that applicants provide access to their Facebook pages during employee interviews. The rationale is that for the safety and security of their employees and customers, it is important to know whether potential employees (for example) participate in gang activity, engage in risky behavior, are members of racist or sexist groups, or simply use poor judgment. Wouldn't it make hiring so much simpler if we could just get a glimpse into these individuals' private lives and determine who they really are?

Not exactly. If, as a hiring manager, you request an applicant's username and password, and she is willing to provide it, you might log onto Facebook and see pictures of her smoking a cigarette at a raucous party and boasting about her dating life. You may conclude that she is unprofessional, reckless, disorganized, and not good hiring material. Even worse, you might learn that the applicant is pregnant, has cancer, is Muslim, or supports Planned Parenthood, and then make a judgment that she is not qualified to work at your company. These actions may expose your company to liability for an invasion of privacy – not just a violation of the applicant's privacy rights but also of every "friend" connected to that person. Additionally, you may be engaging in discrimination based on pregnancy, disability, religion, genetic information, or some other protected category. In some states, you could also be violating laws prohibiting employers from taking action against employees for lawful off-duty conduct, such as tobacco and alcohol use.

In response to what appears to be a growing trend of employers requiring applicants to provide Facebook access, representatives from several states and even the federal government now contend that this type of inquiry should be explicitly prohibited. As some Senators analogize, peeking at an applicant's Facebook status updates and photos is akin to rifling through his mail or listening to phone calls. In March, two U.S. Senators asked the Equal Employment Opportunity Commission and Department of Justice to investigate to "help remedy ongoing intrusions and coercive practices, while we draft new statutory protections to

clarify and strengthen the law. With few exceptions, employers do not have the need or the right to demand access to applicants' private, password-protected information." In April, Maryland was the first state to pass legislation prohibiting employers from accessing applicants' and employees' social media webpages. This law responds to the American Civil Liberties Union's outcry when a corrections officer was required to provide his Facebook login as a condition of re-employment because the state agency insisted they needed the information to ensure he did not have a connection to organized crime or gang activity. Similar bans have been proposed in at least four more states. On April 27, federal legislation was introduced to prohibit this type of inquiry. The Social Networking Online Protection Act, introduced by Representative Eliot Engel (D-N.Y.) would prohibit employers, schools, and universities from requiring passwords for social networking sites or from denying employment or penalizing candidates, employees, or students for refusing to turn over such information. Even Facebook announced that this type of conduct is against its policy.

In light of the current and potential legal risks, it is simply imprudent for employers – no matter what the industry – to request social media login information from applicants and employees. Even if you believe it is important to ensure that the person you are hiring poses no security threat or legal risk, personal information gleaned from Facebook is not the answer. Not only would making decisions based on private Facebook information be potentially unlawful, but such conduct would also be premature and often unfair, according to Dr. Gene Barger, a corporate psychologist who has studied the American workforce for over 25 years. As Dr. Barger points out, the information available on one's Facebook page may be distorted or false. Individuals have little control over photos of them that are posted on their social media pages or messages posted on their Facebook "wall."

According to Dr. Barger, a social media webpage is an "unreliable basis for making a hiring decision. There is a high likelihood of misinterpretation and rushing to judgment." Dr. Barger compares making Facebook-based employment decisions to peeping through an applicant's home window, seeing a messy living room, and assuming that she lacks organizational skills. Simply because a home is untidy, he says, does not mean the person will lack organization or structure at work. This perspective may initially seem counterintuitive. If a manager logs onto a candidate's private Facebook page and sees a candidate wearing revealing clothing, or postings containing misspellings and crude language, he may believe that this information is directly relevant to the candidate's professionalism and her writing skills. However, this information may not be as relevant, and certainly is not as reliable, as employers think.

"It is human nature to try to find dirt on someone, but generalizing and rushing to judgment about a person's job qualifications based on her Facebook page is inadvisable," says Dr. Barger. Better alternatives are to contact employment references, to utilize a behaviorally-oriented interview technique, or to employ a consultant or psychologist to administer pre-employment validated testing to determine whether the person is the right fit. Licensed professionals can oversee validated tests measuring physical skills or cognitive abilities to evaluate job qualifications. Employers may complain that in-depth pre-employment investigation and testing is too time-consuming and expensive. However, according to Dr. Barger, if an employer is willing to spend a little extra time and money on the front end, it will pay off down the road. Especially in a mid- to upper-level management role, or a safety-sensitive position, "a poor, or even mediocre, hiring decision based on unreliable data can cost the company a lot of money."

So, resist that temptation to snoop around. Don't invade an applicant's privacy or set your company up for a discrimination lawsuit. Allow Facebook to remain within an applicant's private realm and instead aim to make your employment decisions based on valid, reliable information that is directly relevant to the job. If you can't resist searching for electronic "dirt" on a candidate, it is better to limit your snooping to publicly available social media and make sure that the information you find only supplements – but does not replace – information gathered from a thoughtful interview process, test results, and reference check.

## Risky Business: The Dangers of Overbroad Confidentiality Agreements

***By Gary Knopf and Charlie Hawkins***

A confidentiality or non-disclosure agreement (NDA) is a contract that requires an employee to protect trade secrets and other confidential information provided to an employee during his or her employment. An NDA restricts disclosure both during employment and for a time after the employment relationships ends. NDAs are particularly valuable in protecting information

which may not meet all of the requirements of a trade secret under applicable law, but which the employer nevertheless has a legitimate interest in protecting. Like other post-employment restrictions such as non-competition or non-solicitation agreements, NDAs must be tailored to protect the reasonable interests of the employer and may not be enforced if they are overbroad. But, while NDAs can provide employers with an extra layer of protection above and beyond trade secret statutes, they have their limits.

Like all post-employment restrictive covenants, the enforcement of an NDA will depend on which state's law applies to its interpretation and enforcement – and state law requirements vary widely. The majority of states do not require either time limits or a geographic scope for an NDA. Georgia recently liberalized its law to aid enforcement of NDAs and other covenants and no longer requires a post-termination time limit. Even states that generally do not recognize non-competes and customer non-solicits at all, such as California, still recognize and enforce NDAs. This is partly because NDAs do not prohibit competition per se – they merely prohibit misappropriation and use of the employer's confidential information.

Apart from possible time and geographic limits in a few jurisdictions, the types of information subject to an NDA must be truly confidential and the restrictions must be reasonably limited to serve the legitimate business interest of the employer. In order to claim something is confidential, an employer must take reasonable steps to protect and preserve the claimed information from unauthorized access and use. Generally speaking, an employee's skills, general methods of performing work, and general industry knowledge, even when learned exclusively in connection with a particular job, are not protectable as confidential information. Things such as pricing information may be confidential, but not if the employer freely distributes that information to customers and other third parties without any agreement that the client will keep that information confidential.

Employers commonly make the mistake of using sweeping definitions of confidential information to include all sorts of things that either are obviously not confidential or are not subject to reasonable efforts to maintain their confidential character. An employer cannot make information confidential by decree – it must always be able to show that information included in the definition of "confidential" has, in fact, been treated as confidential. General prohibitions against using methods and manners learned during employment following termination of that employment will not be enforced except in unusual situations where the methods and manners are truly unique and zealously guarded.

For example, in *Trailer Leasing Co. v. Associates Commercial Corp.*, an Illinois federal court refused to enforce an NDA that sought to protect "any methods and manners by which Employer leases, rents, sells, finances, or deals with its products and its customers." In addition, in *Lasership, Inc. v. Watson*, a Virginia state court invalidated an NDA that attempted to preclude an employee from disclosing any information concerning the business of the employer to any person, finding that it was "not narrowly tailored to protect the legitimate business interests" of the employer. The court explained that the provision was so overbroad that, as written, it prohibited the employee from telling a neighbor *anything* about the employer – including information that was not proprietary in nature or worthy of confidence – for the rest of her life.

While drafting broad provisions may appear to be a logical approach to deterring an employee from disclosing confidential information, it could also defeat the entire purpose of the agreement if a court finds the agreement unenforceable. Moreover, while some states such as Georgia, New York, and Illinois allow for "blue-penciling" or judicial modification of overbroad restrictive covenants, counting on a Court to save an overbroad provision is a risky proposition. A judge will have very broad discretion to modify the covenant the way he or she sees fit, or may choose not to modify it at all and simply refuse to enforce any part of it. For example, in the Northern District of Illinois case above, the Court refused to modify the agreement because it would have required the Court to "rewrite the defining terms of the restrictive covenant."

The bottom line is that an overly broad NDA runs a higher risk of being invalidated by a court if it is ever challenged by one of your former employees. If other restrictive covenants in an agreement are also invalidated, you may be left without any protections beyond that of the relevant state's trade secrets laws. But even with regard to these statutory protections, employers should be careful not to limit trade secret protection by offering a definition of a trade secret in an NDA. This definition is already stated in the applicable statute, and, by offering an alternative definition, you might inadvertently narrow the scope of the information you want to protect.

Employers should follow these simple guidelines to avoid drafting overbroad NDAs:

**Avoid "Kitchen Sink" Provisions:** As a general rule, the narrower the scope of the confidentiality provision, the more likely the employer will be able to show the agreement serves its legitimate business interests. In that regard, the employer should specifically

define the nature of the confidential information to be disclosed (i.e., don't include everything but the kitchen sink) and only include information that you honestly and diligently treat as confidential.

**Identify the Purpose of the NDA:** Consider including a short paragraph defining the context in which the information will be disclosed and why the parties want to make the information the subject of a contract.

**List Exclusions from Confidential Information:** Finally, NDAs should contain various exclusion clauses that outline the types of information deemed not to be confidential within the terms of the agreement. Generally, these types of exclusions will include:

- information that is publicly available or readily ascertainable from public information;
- information that is already known to the employee at the time of its disclosure;
- information that is received by the employee from a third party who is not in breach of any confidentiality obligations; and
- information that is developed by the employee or another third party completely independently.

Following these guidelines will reduce the risk that a court will find an NDA unenforceable. For more information and advice drafting NDAs, contact any member of the Troutman Sanders LLP Labor & Employment Group.

# *Brinker* Opinion Provides Important Guidance, Leaves Questions, Regarding Meal and Rest Periods in California

***By Evan D. Dwin and Kevin F. Kieffer***

On April 12, 2012, the California Supreme Court issued its long-anticipated opinion in *Brinker Restaurant Corporation et al. v. Superior Court* (*Hornbaum*) (Case No. S166350), which provides some clarification of California's requirements for employee meal and rest periods. This decision is not only critical for pending and future wage and hour class action cases, but presents an important opportunity for California employers to review, analyze, and, if necessary, revise their meal and rest period policies.

*Brinker* is a putative class action brought by hourly restaurant employees against Brinker Restaurant Corporation, which owns, among others, Chili's Grill & Bar and Maggiano's Little Italy. The plaintiffs alleged that Brinker failed to provide meal and rest periods, or premium wages in lieu thereof, as required by California Labor Code sections 226.7 and 512 and Industrial Welfare Commission Wage Order No. 5-2001 subdivisions 11 and 12. The employees also claimed that Brinker required them to work "off the clock" during meal periods and engaged in "time shaving" by altering time reports to misreport hours worked. They sought to certify a class of approximately 60,000 current and former nonexempt employees. The Court's opinion resolves ambiguity and conflicting authority, but also leaves unanswered questions.

## Meal Periods

**Employers Are Required to Make Meal Periods Available but Need Not "Police" Them to Ensure That No Work Is Done**

The *Brinker* Court resolved a split in authority regarding whether employers must not only make meal periods available, but also ensure that the employee does not work during the meal period. The Court held that, while an employer must provide meal periods in which employees are relieved of all duty, it does not need to "police" meal periods to "ensure that no work is done." Despite its favorable holding against policing meal periods, the Court warned that liability for premium pay will still attach where an employer impedes or discourages employees from taking meal periods or pressures them "to perform duties in ways that omit breaks."

In addition, an employer can still be liable for straight pay (but not premium pay) for work performed on meal breaks if the employer "knew or reasonably should have known" that the employee was working through his or her meal periods. The Court offered little guidance on these issues, stating that "what will suffice will vary from industry to industry."

Taken together, the Court's holdings make it clear that an

employer's meal period policy should, at least, provide for meal periods that:

- relieve employees of all duty;
- relinquish control over employees' activities;
- permit employees a reasonable opportunity to take an uninterrupted 30-minute break; and
- do not impede or discourage employees from taking meal breaks without performing any work.

**It Remains Critical to Properly Record Meal Periods**

In a concurring opinion, Justice Werdegar, who also drafted the Court's unanimous opinion, reminds employers that nothing in *Brinker* relieves them of their obligation to record meal periods. In fact, Justice Werdegar stated that if the employer's records show that no meal period was taken for a shift over five hours, a *rebuttable presumption* arises that no meal period was provided. Thus, an employer who provides meal periods, but fails to properly record them, still risks liability. For this reason, in addition to making sure meal periods are provided in accordance with *Brinker's* holdings, California employers should also make sure they implement effective policies for recording meal periods.

**There Are No Timing Requirements for Meal Periods Beyond Those Expressly Required by California Labor Code Section 512**

The Court also settled an ambiguity that the plaintiffs argued existed regarding the timing of meal periods. The plaintiffs contended that where a second meal period is required (i.e., a shift lasting more than 10 hours), meal periods could not be spaced more than five hours apart. The Court rejected this reading of the statute, holding that, absent a waiver, section 512 requires only what it explicitly says: a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's tenth hour of work. In other words, an employer can legally provide the first meal period during the first or second hour of a shift lasting more than 10 hours, so long as a second meal period is provided prior to or at the end of the tenth hour.

**The Holdings in Brinker Do Not Mean That Individual Issues in Meal Period Cases Necessarily Preclude Class Certification**

In his concurrence, Justice Werdegar noted that individual questions of why a meal period was missed, such as an employer's assertion that the meal period was waived, do not per se render meal period classes uncertifiable. This is because a waiver of a meal period is an affirmative defense that must be pled and proven by the employer, not a part of the employee's case-in-chief. Justice Werdegar also reaffirmed that individual questions of damages based on missed meal periods are not a bar to class certification.

Thus, employers should not read Brinker as the end of class actions for alleged meal period violations; instead, it is a reminder that employers should try to limit their exposure to class action litigation by creating uniform and compliant meal period policies.

## Rest Periods

The Court reversed the Court of Appeal's interpretation of rest period requirements, in which the trial court held that the right to a 10-minute rest period begins after three and a half hours of work, and that additional 10-minute rest periods become available every four hours thereafter. The Court reasoned that the Court of Appeal failed to consider the Wage Order's language, which provides not only that a meal period is required per four hours of work (and starting after three and a half hours), but also that meal periods are required for any additional "major fraction" of four hours of work. In other words, it is not sufficient to simply provide rest periods every four hours starting at three and a half hours.

The Court set forth the following required schedule for rest periods:

- An employee working for three and half hours up to six hours is entitled to 10 minutes' rest.
- A second 10 minutes' rest is required if the shift is between six and 10 hours because there would be one rest period for the first four hours, and an additional rest period for the remaining two hours of a six-hour shift, which is a "major fraction" of four more hours of work.
- The right to a third rest period would not be triggered until hour 10 (four hours after the six hour rest period) and would suffice for a shift lasting up to 14 hours (i.e., one rest period for hours one through four, a second rest period for hours five through eight, and a third rest period at hour 10 because there would be a "major fraction" of four hours past the eighth hour, but no additional rest period until a full four hours elapses at hour 14).

- Additional rest periods would continue to be required in similar increments (i.e., a fourth rest period for shifts lasting 14-18 hours, a fifth rest period for shifts lasting 18-22 hours, etc.).

The Court also rejected the plaintiffs argument that the first rest period must be before the first meal period, but noted that the Wage Order requires that employers provide rest periods in the middle of each work period "insofar as practicable." The precise meaning of this requirement is still unclear, except that "employers must make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render [it] infeasible." Employers should exercise caution and should attempt to schedule rest periods in the middle of an employee's shift unless it simply is not possible to do so. Similarly, employers should try to schedule the first rest period before the first meal period where possible.

The Court also held that class certification was proper because the plaintiffs alleged (and Brinker admitted) that Brinker had a policy to allow one 10-minute rest period for every four hours of work after three and half hours, which means that violations would occur on a class-wide basis for employees who were not given a second rest period after six hours of work.

**The Lack of an Offending Policy Precluded Certification regarding Alleged Off-the-Clock Work**

With respect to the plaintiffs' allegations that they were required to work off the clock, the Court held that class certification was inappropriate because, unlike the evidence of a uniform rest period policy that violated California law, there was no evidence (or any allegations) of a systematic policy or across-the-board pressure to require employees to work off the clock. While this holding sheds little light on off-the-clock claims, it remains advisable for employers to specifically forbid off-the-clock work in their formal employment policies.

## Significance of *Brinker*

*Brinker* clarifies and explains statutory and regulatory provisions which have been, and continue to be, the subject of numerous class actions. While *Brinker* does not address every conceivable meal and rest period issue, it presents a unique opportunity for employers to manage the risk of class action wage and hour liability by implementing policies that attempt to track the Court's holdings. This includes, at a minimum, making sure company policies are designed to make meal periods available, making sure meal periods are accurately and diligently recorded, and providing rest periods at the intervals set forth by the Court.

# Severance Agreements for Employees Over 40: Understanding the Older Workers Benefit Protection Act

***By Christina H. Bost Seaton and Rebecca Williams Shanlever***

When drafting a severance offer or release agreement, one of the first questions that legal counsel or human resources asks is, "is the employee over 40?" But why does the employee's age matter in the context of a release? This article summarizes the extra protections provided to employees age 40 and over, and outlines why one-size-fits-all severance and release agreements just don't work.

For an employee who is 40 years old or older, the detailed, employee-friendly provisions contained in the Older Workers Benefit Protection Act ("OWBPA") apply. The OWBPA, which is part of the Age Discrimination in Employment Act ("ADEA"), requires employers to follow a strict timeline to get a valid release of any age discrimination claims. The OWBPA also requires employers to provide additional, detailed information when two or more employees are terminated at or around the same time. Although the OWBPA most commonly applies in the context of involuntary terminations and reductions-in-force, its strict rules apply equally to early retirement plans, exit incentive plans, and other voluntary departures where an employee is asked to sign a release.

## General Rules for Employees over 40

Under the OWBPA, for a release of age discrimination claims to be valid, the release must be "knowing and voluntary." At minimum, this means that the release must:

- be in writing;
- be written in a manner that the employee would understand;
- be in plain, clear language that avoids technical jargon and long, complex sentences;

- not mislead or misinform the employee executing the release;
- not exaggerate the benefits received by the employee in exchange for signing the release, or the limitations imposed on the employee as a result of signing the release;
- specifically refer to the ADEA;
- specifically advise the employee to consult an attorney before signing the release; and
- not require the employee to waive rights or claims arising after the date the employee signs the release.

As with all releases, the employee also must receive additional consideration, above and beyond anything of value to which he or she was already entitled. This means that an employer cannot, for example, require an employee to sign a release to receive his or her final pay for hours worked.

The OWBPA requires employers to give employees a specific amount of time to consider the release. For a single employee, the employee must be given 21 days to consider the release. The consideration period starts to run from the date of the employer's final offer to the employee. Although material changes to that offer will restart the clock, the employer and employee may agree that changes, whether material or not, do not restart the running of the consideration period.

After considering and signing the release, an employee has seven days to change his or her mind and revoke his or her agreement to the release. If these time periods are not specifically included in the release, then the release is unenforceable.

## Additional Requirements for Two or More Employees Over 40

When an employer requests release agreements from a group or class of employees (i.e., two or more employees) age 40 or over, those employees receive additional protections. First, the required consideration period increases from 21 to 45 days. Second, the employer must provide the over-40 employees with detailed information about each of the other employees who have been offered severance and asked to sign a release. This requirement applies even when the departures are spaced out over a period of time, as long as it is part of the same decision-making process. For example, if an employer's expense reduction plan calls for staggered terminations over a six-month period, all of the terminations that are part of the plan count as multiple terminations under the OWBPA. The employer must provide the following information to the employees:

- the class, unit, or group of employees that were covered by the exit program (whether voluntary or involuntary);
- the eligibility factors for the program;
- the time limits applicable to the program;
- the job titles and ages of all of the individuals who (in the case of a voluntary exit incentive program) are eligible for the program, or who (in the case of an involuntary termination program) were selected for the program; and
- the ages of all individuals in the same job classification or organizational unit who are not eligible for, or who were not selected for, the program.

The rationale for requiring this information is that it allows employees to make an educated decision about whether to sign the release. This informational requirement exposes the employer's process for selecting employees for termination or determining which employees will be eligible for voluntary exit incentive programs. Again, these rules and the information requirements are very detailed. Employers should work carefully with legal counsel to develop and properly document the eligibility and selection process and to prepare the appropriate releases and notices.

Finally, keep in mind that even if a terminated employee signs a release, the Equal Employment Opportunity Commission ("EEOC") always has the right and responsibility to enforce the ADEA, as with the other laws under its regulation. Accordingly, releases may not include provisions that prohibit employees from (a) filing a charge or complaint with the EEOC, including a challenge to the validity of the waiver agreement; or (b) participating in any investigation or proceeding conducted by the EEOC.

The take away: with any severance or release agreement offered to a worker over the age of 40, be aware that the OWBPA applies, and make sure you consult with legal counsel to ensure you take all proper precautions.

# On the Campaign Trail, Partisan Bills Abound: Both Parties Promise Raises to Workers' Wages

***By Jim McCabe***

*Since our last update, most labor and employment legislation has seen little or no progression. We expect that this trend will continue until the 2012 presidential and congressional elections have been decided.*

*While Congress turns to the elections, two bills have been introduced since the last update – one by Democrats, and the other by Republicans – that are of interest to employers. While decidedly partisan in focus, these bills promise workers in America the same thing: a raise. These bills provide sharper focus on broader issues regarding employer and employee relations that may loom large in this year's elections, including the role of government in business and the difference in compensation between the average employee and the executive, between Main Street and Wall Street, and between Obama and Romney.*

*In other interesting news, recently introduced federal legislation attempts to regulate employers' use of technology to inform human resources decision-making. While these bills may not find their way to the President's desk, they highlight the shape of things to come.*

## THE REBUILD AMERICA ACT (S. 2252)

***CURRENT STATUS OF LAW:*** The Fair labor Standards Act ("FLSA") generally requires that employers pay employees minimum wage. Minimum wage is currently set at $7.25 for non-tipped workers and $2.13 for tipped workers.

The FLSA also generally requires that employers pay employees overtime at a rate of 1.5 times their base rate, *unless* the employer can demonstrate that the particular employee is exempt from overtime requirements. A common misconception among employers regarding overtime is that, as long as an employee is paid a "salary," the employee is not owed overtime. This is not the case. Rather, in general, to be exempt from the overtime requirements, the employee must qualify for one of the "exemptions" listed in the FLSA. The most common exemptions are the so-called white-collar exemptions, which include the administrative, executive, and professional exemptions. To qualify for these exemptions, employers must demonstrate that the particular employee actually performs exempt administrative, executive, or professional work (as defined by federal regulations and case law), that this work is their "primary duty" (as defined by federal regulations and case law), and that the particular employee is compensated at a minimum of $455 per week on a salary or fee basis (as defined by federal regulations and case law).

Currently, neither the FLSA nor other federal law requires employers to provide employees with paid sick leave.

***WHAT WOULD CHANGE:*** On March 29, 2012, Senate Democrats introduced The Rebuild America Act. As outlined below, this bill would increase minimum wage for non-exempt and exempt employees and would require employers to provide *paid* sick leave.

- Increase in Minimum Wage. The minimum wage would increase from $7.25 to $9.80 over two years and thereafter would be subject to an annual increase according to the percentage increase in the applicable Consumer Price Index. The base minimum for tipped employees would increase from $2.13 to $6.85 over five years and thereafter would require that the base minimum wage remain 70 percent of the actual minimum wage rate.

- Increase in Minimum Wage for Exempt Employees. The salary or fee basis requirement for the white-collar exemptions would increase from $455 per week to $1,045 per week over three years and thereafter would be adjusted annually by the increase in the applicable Consumer Price Index. The highly compensated employee exemption would also increase from $100,000 to $120,000 per year. The white collar exemption test would redefine the word "primary duty" with respect to the administrative, executive, and professional exemptions to mean a duty that "an employee spends more than 50% of the employee's work hours per week performing."

- Required Paid Sick Leave. Employees would receive one hour of paid sick leave for every 30 hours worked with the ability to earn up to seven days worth of paid leave (56 hours) per year. Employers could not require employees to find a replacement when they are on

sick leave. Employers would be required to post the requirements for sick leave in the workplace. Employees could bring a cause of action against employers who discriminate, retaliate against, or otherwise interfere with an employee's exercise of their right to take paid sick leave.

***WHY YOU CARE:*** Most obviously, paid sick leave and increases in minimum wage for exempt and non-exempt employees will increase the costs of doing business. Even more troubling, every time an employee requests paid sick leave, employers could be subject to litigation.

***LIKELIHOOD OF BECOMING LAW:*** This bill has little chance of passing in the Republican-controlled House and has been criticized by some pro-business groups as unwisely raising the costs of doing business in the midst of a struggling economy. While this bill is going nowhere fast in the legislature, aspects of this bill may be thrust into the court of public opinion on election day, as variations in compensation between the average employee and the executive, between Main Street and Wall Street, and between Obama and Romney, have already become an issue at the center stage of the 2012 elections.

## THE REWARDING ACHIEVEMENT AND INCENTIVIZING SUCCESSFUL EMPLOYEES ACT (THE "RAISE" ACT) (H.R. 3178; S. 2371)

***CURRENT STATUS OF LAW:*** The National Labor Relations Act ("NLRA"), as interpreted by the National Labor Relations Board ("NLRB"), prohibits employers from dealing directly with individual employees who are part of a labor union to increase an employee's compensation above the amounts defined by the applicable agreement between the union and the employer (the "collective bargaining agreement"). Such direct dealing would be considered a violation of the NLRA and could subject the employer to an unfair labor practice charge before the NLRB.

***WHAT WOULD CHANGE:*** On April 18, 2012, House Republicans introduced the RAISE Act, which would modify the NLRA to allow employers to pay employees covered by a collective bargaining agreement "greater wages, pay, or other compensation" than provided for in the agreement. On April 26, 2012, Senator Marco Rubio (R. - Fla.), potential vice presidential candidate for the GOP front runner – Mitt Romney – introduced similar legislation in the Senate. According to Senator Rubio, the NLRA's prohibition on direct dealing affects roughly 8 million union members who have capped salaries.

***WHY YOU CARE:*** RAISE would allow employers to deal directly with their employees regarding what matters most to employees, their compensation, without going through the often time-consuming and expensive process of collective bargaining.

***LIKELIHOOD OF BECOMING LAW:*** RAISE will almost certainly not pass the Democrat-controlled Senate and has been criticized by pro-union groups as an attempt to undercut employee rights to collective bargaining. The controversy surrounding this bill typifies one of the debates that looms large in this year's election, namely, what role the government should have in business and in rebuilding the economy. The controversial nature of the NLRB's role in governing labor relations in this year's election is heightened by the President's January recess appointments to the NLRB, which will likely continue to be a point of contention in the coming debates. (See our January 2011 article discussing these controversial appointments: http://www.troutmansanders.com/president-obamas-controversial-recess-appointments-to-the-nlrb-foreshadow-a-lively-year-for-labor-law-01-18-2012/).

## SOCIAL NETWORKING ONLINE PROTECTION ACT ("SNOPA") (H.R. 5050)

***CURRENT STATUS OF LAW:*** No federal law exists that specifically prohibits an employer from requiring an employee to provide login information related to an employee's private e-mail account or social networking websites (though we generally advise against this practice as explained in our article "Requesting Facebook Login Information a Risky Choice for Employers," also included in this edition of the Newsletter). While no federal law exists, Maryland recently passed the first state law prohibiting this practice and similar laws are pending in other state legislatures.

***WHAT WOULD CHANGE:*** On April 27, 2012, Democrats introduced SNOPA in the House. SNOPA is a play on SOPA ("Stop Online Piracy Act," H.R. 3261), an Act proposed by Republicans in the House last December that was denounced by Democrats in the House as an improper invasion of individual privacy rights. SNOPA, unlike SOPA, purportedly seeks to protect the privacy of individuals by making it unlawful for any employer to require or *request* that an employee or applicant provide the employer with a user name, password, or any other means for accessing the employee or applicants' private e-mail account or social networking website. SNOPA would also make it unlawful to retaliate against an employee for refusing to provide this information. In addition to employers, SNOPA would apply to K-12 schools, colleges, and universities.

***WHY YOU CARE:*** Do your managers request this information from applicants or employees? You may want to return to more old-fashioned methods of selecting and retaining employees or face civil penalties of up to $10,000 for each violation.

***LIKELIHOOD OF BECOMING LAW:*** While some pundits believe that SNOPA will receive a warmer bi-partisan reception than SOPA did, we think it will be difficult to pass this legislation until the elections have been decided. With that said, you should check for similar laws that may already be pending in your state's legislature.

### PAYCHECK FAIRNESS ACT (S. 3220) UPDATE

Yes, you've heard this one before. We last reported on the introduction of this bill in this Congress in our Summer 2011 installment (http://www.troutmansanders.com/congress-heats-up-for-the-summer-a-summary-of-potential-changes-to-federal-employment-laws-07-11-2011/). Reintroduced in the Senate on May 22, and reported out of committee on May 23, this bill is on the Senate Democrats' fast track. Will it work this time around? Our guess – there's some pressure on Republicans due to the allegations they are engaged in a "war on women." Still, we can't see this bill garnering much bipartisan support in the Senate, not to mention the Republican-controlled House.

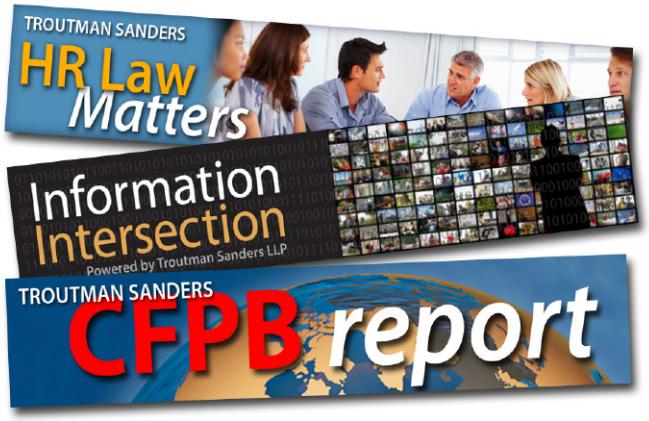
**At press time, the Paycheck Fairness Act stalled in the Senate when a cloture vote failed to garner any Republican support.**

# Broaden Your Perspective with Troutman Sanders Blogs

This past March we successfully launched our **HR Law Matters blog** at http://www.hrlawmatters.com/, which focuses on labor and employment laws covering HR best practices, creative strategies, and unique ideas on all human resources matters. Let us take this opportunity to introduce you to a few of our firm's other blogs that may be of interest to employers:

The **Information Intersection blog**, http://www.informationintersection.com/, with contributions from our own Christina Bost Seaton (among other attorneys in our Information Management and Electronic Discovery & Data Management practices), connects the legal issues arising from considerations of privacy, data security, information technology, outsourcing, e-commerce, the Internet and social media, cloud computing, information management, and e-discovery. It's a resource where you can get a better sense of various moving pieces, and how they intersect – and sometimes collide – with each other. The goal is to help our clients and friends think about these issues in the broader context of doing business.

The **CFPB Report**, http://www.cfpbreport.com/, penned by attorneys in our Attorneys General, Financial Services Litigation, and Financial Institutions practice areas, focuses on how the new Consumer Financial Protection Bureau will regulate consumer financial products and services in compliance with federal law, which is of critical importance to banks, mortgage lenders and




loan servicers, loan acquirers, check cashers, payment processors, providers of credit counseling, credit card issuers, debt buyers and collectors, and consumer and credit reporting services, among others. One of these attorneys, David Anthony, teamed with us this month on our article addressing criminal background checks.

Troutman Sanders LLP has many more blogs that may be of interest to you. Pick your own poison at our blog homepage (http://www.troutmansanders.com/firm/media/mediaresults.aspx?PublicationTypes=c6e8d6bb-f810-426a-936e-69197ad2c206&DateFrom=3%2f2%2f2010+1%3a03%3a47+PM).