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To learn more, see page 15.

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Maternity Leave: It's Not Just For Women Anymore

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The Massachusetts Maternity Leave Act ("MMLA") requires employers with six or more employees to grant full-time female employees eight weeks of leave for the purposes of giving birth or adopting a child under the age of 18 (or, if physically or mentally disabled, under 23). The MMLA contains a variety of pitfalls for the unknowing. For example, the 8 weeks of leave is per birth, such that a woman giving birth to, or adopting, twins would be entitled to 16 weeks of leave. Unlike the Family Medical Leave Act, the female employee cannot be required to use accrued vacation or sick time. Further, the interaction between the MMLA, the FMLA, and the American with Disabilities Act (or its Massachusetts parallel under MGL 151B) (together, "ADA") and the various entitlements under each, leaves many employers' heads spinning.

To assist employers with compliance, in 2000 the Massachusetts Commission Against Discrimination ("MCAD") issued Guidelines to employers regarding how the MCAD intended to apply the statute. The Guidelines contained a caveat: for those employers with Maternity Leave policies that were more generous than the statute, e.g., provided more time off, or paid time off, or who provided the leave only to females, the MCAD opined that not extending the benefits to male employees constituted sex discrimination in violation of MGL 151B, specifically:

The MMLA, by its terms, provides maternity leave to female employees only. This means that the MCAD is unable to take jurisdiction over claims in which male employees are seeking eight weeks of unpaid paternity leave. Providing maternity leave in excess of the eight weeks required by the MMLA to female employees only, and not to males, would in most circumstances constitute sex discrimination in violation of Chapter 151B. MCAD Guidelines on The MMLA, MGL c. 149, s. 105D, Section III.

Further, the Guidelines cautioned that compliance with the MMLA, may also violate Federal Law:

An employer who provides leave to female employees only, and not to male employees, may also violate the federal prohibitions against sex discrimination even though the employer has acted in compliance with the MMLA. According to the EEOC, 'when an employer does grant maternity leave, the employer may not deny paternity leave to a male employee for similar purpose. ...Accommodating female but not male employees constitutes unlawful disparate treatment of males on the basis of sex.' EEOC Compliance Manual, Section 626.6 on Paternity Leave. MCAD Guidelines on The MMLA, MGL c. 149, s. 105D, Section III.

The Guidelines further left open a possible challenge to the constitutionality of the MMLA under the Massachusetts Equal Rights Amendment, Article CVI of the Massachusetts Constitution.

Nonetheless, the MCAD's admitted lack of jurisdiction over male employees' claims provided a modicum of comfort that at least the MCAD would not initiate, accept a complaint, investigate or prosecute claims by male employees under the MMLA. Additionally, in the eight years since the Guidelines were issued no case had been reported claiming disparate treatment under MGL 151B. That has now changed.

The first case of a male employee claiming disparate treatment under MGL 151B resulting from his employer providing benefits in excess of that required by the MMLA is making its way through the MCAD. In the wake of comments made by MCAD Commissioner Martin S. Ebel referencing the case at a seminar, the MCAD has issued a letter of clarification re-asserting its view that an employer who offers benefits in excess of the requirements of MMLA is likely violating MGL 151B, but also, an employer who follows the requirements of the MMLA may, under certain circumstances be found to violate MGL 151B: "...under the current maternity leave statute, two married women who adopt a child are both entitled to maternity leave, but two married men adopting a child are not eligible for any such leave...such an incongruous result offends the concept of equality in fair treatment demanded by G.L.c 151B..." MCAD Clarifies Its Position On Maternity Leave For Men, Letter to the Editor, 36 MLW 2278, 2279 (June 23, 2008).

As an employer, to reduce your exposure to a possible MMLA claim by an employee, your company should:

- immediately review its Maternity Leave policy, ensuring compliance with the provisions of the MMLA and MGL 151B by adopting a gender neutral "Parental Leave" policy
- provide training to management regarding the company's "Parental Leave" policy, the MMLA's requirements (and pitfalls!) and the interaction with the FMLA and ADA, as applicable
- provide training to management and employees alike regarding applicable anti-discrimination and anti-harassment laws

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New Federal Law Prohibiting Discrimination on the Basis of Genetic Information

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On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act (GINA). GINA, which was debated in Congress for 13 years, protects individuals against discrimination based upon their genetic information in the areas of health insurance and employment. Although many states have genetic non-discrimination laws, GINA was enacted to provide a national and uniform standard to protect the public from discrimination while encouraging genetic testing, new research, and technology. Although this new law may not necessitate changes for companies operating in states which currently have genetic non-discrimination laws, such as Massachusetts, businesses will have time to review their policies and ensure compliance with the new legislation. The group health plan provisions take effect in May 2009 and the employment provisions become effective as of November 21, 2009.

What is "Genetic Information"?

"Genetic information" under the statute includes a person's genetic tests, the genetic tests of that person's family members and the manifestation of a disease in any family members. The term "family member"

includes all dependents, including adopted children, and relatives including anyone who shares a great-great-grandparent, such as a third cousin.

Why is the Act Needed?

Advances in genetic research, with the promise of development for better therapies of treating disease, coupled with past instances of genetic discrimination against racial and ethnic groups in the workplace, are the reasons put forward in support of the legislation. Congress wanted to allay concerns regarding the potential for discriminatory practices in health insurance and employment and to encourage individuals to take advantage of the potential benefits of genetic testing. On January 30, 2007 representative Louise Slaughter, from the District of New York, testified before the House Committee on Education and Labor in favor of an act to prohibit discrimination based on genetic information by stating:

There are over 15,500 recognized genetic disorders affecting 13 million Americans, and every one of us is estimated to be genetically predisposed to between 5 and 50 serious disorders.

In 2004, a John Hopkins University survey found that 92% of those polled did not want employers to have access to their genetic information and 80% thought health insurers should not have such access.

What does the Law Prohibit?

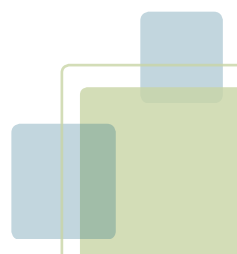
GINA prohibits group health plans and health insurance issuers from adjusting group premiums on the basis of genetic information and from requesting, requiring or purchasing genetic information for underwriting purposes prior to an individual's enrollment in a plan. Except in limited circumstances of voluntary participation in research studies, it also prohibits group health plans and insurance issuers from requesting or requiring an individual or family member to undergo genetic testing. The Act also makes "genetic information with respect to the employee" a protected classification and prohibits employers from discriminating against an individual on the basis of that classification.

What Should Employers do to Comply?

The Act requires the Equal Employment Opportunity Commission to promulgate regulations by next May, which will better help define what employers need to do to comply with the law. For now, employers should make sure that they include "genetic information" in the list of protected categories in their employment policies. In addition, if the employer has genetic information, it must maintain the information on separate forms, in separate files and treat it as confidential medical information. Employers should also review their policies and procedures to confirm compliance with HIPPA and the ADA, and to determine if changes related to protecting medical information are required.

Training should be considered for human resources personnel and any occupational health and safety personnel. For most employers, the practices they employ to comply with state laws prohibiting genetic information discrimination will serve them well in complying with this new federal law.

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U.S. Supreme Court Revisits Retaliation Claims In Employment Context

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On May 28, 2008, the Supreme Court of the United States gave employees seeking to assert claims of unlawful retaliation a powerful weapon when it affirmed that a Civil War era statute—42 U.S.C. § 1981—encompasses retaliation claims related to workplace discriminatory animus. Interestingly, the statute itself does not contain the words “retaliation” or “employment.” The Court reasoned that § 1981 applies to the employer-employee relationship based upon *stare decisis*, or past precedent. The case is *CBOCS West, Inc., v. Humphries*, 553 U.S. ____ (2008).

A Brief History of § 1981

The relevant portion of 42 USC § 1981 which the Supreme Court analyzed in *Humphries* provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens. 42 USC 1981.

The predecessor of this statutory language first appeared the year after the Civil War ended, in Section 1 of the Civil Rights Act of 1866, 14 stat. 27, enacted by Congress shortly after the December 6,

1865, ratification of the Thirteenth Amendment. This Amendment to the Constitution effectively abolished slavery and involuntary servitude in the United States. After ratification of the Fourteenth Amendment on July 9, 1868, guaranteeing due process and equal protection of the laws to all citizens, Congress passed the Enforcement Act of 1870, 16 stat. 140, which in essence became § 1981. The overarching purpose of these statutes was the eradication of “state-imposed civil disabilities and discriminatory punishments” which Southern legislatures sought to visit on the recently-freed slaves. See *General Building Contractors, Inc. v. Pennsylvania et al United Engineers and Constructors, Inc.*, 458 U.S. 375, 384-388 (1982).

In 1976, the Supreme Court reaffirmed that § 1981 applied to the making of private contracts. See *Runyon v. McCrary*, 427 U.S. 160 (1976). From this recognition, it was not a far leap for lower courts to apply § 1981 to the at-will “employment contract.” A good example of such an application is *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38 (2d Cir. 1984). In *Choudhury*, the Second Circuit Court of Appeals took up, for the first time, the question of whether an employee’s claim that his employer retaliated against him for filing a complaint for racial discrimination was recognized by § 1981. *Choudhury*, an Asian Indian, was a professor in the

physics department of the Polytechnic Institute of New York. After five years, he was appointed a full professor with tenure. Several years later, Choudhury discovered he was the lowest-paid full professor in the Institute's physics department. Choudhury filed a discrimination complaint with the Equal Employment Opportunity Commission and the New York State analogue Human Rights Commission. The matter was thereafter settled when the Institute agreed to a salary increase and additional research monies for Choudhury. Approximately one year later, Choudhury claimed his treatment by Polytechnic "... took a dramatic turn for the worse." *Id.* at 40. The poor treatment he alleged included the cancellation of Choudhury's main course offering, failure to reappoint him to departmental committees, and receipt of the lowest merit salary increases. Choudhury brought a § 1981 claim for retaliation, alleging that these adverse job actions were "payback" for having filed the earlier discrimination claim.

Joining the Fifth, Eighth, and Sixth Circuit Courts of Appeal, the Second Circuit expressly recognized Choudhury's cause of action for retaliation under § 1981:

The ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself. A person who believes he has been discriminated against because of his race should not be deterred from attempting to vindicate his rights because he fears his employer will punish him for doing so. Were we to protect retaliatory conduct, we would in effect be discouraging the filing of meritorious civil rights suits and sanctioning further discrimination against those persons willing to risk their employer's vengeance by filing suit.

We are unwilling to "give impetus to the perpetuation" of racial discrimination...by permitting an employer, with impunity, to

penalize its employee for asserting rights under § 1981. (Citation omitted.) *Choudhury*, 735 F.2d at 43, citing *Goff v. Continental Oil Co., Inc.*, 678 F.2d 593, 598 (5th Cir. 1982).

The Second Circuit went on to hold that a § 1981 retaliation claimant need not show that the retaliation itself was motivated by racial animus, or that the underlying discrimination complaint need be found meritorious in the final analysis to maintain a successful retaliation action.

This was the state of the law until June 1989, when the U.S. Supreme Court handed down its decision in *Patterson v. McLean Credit Union*, 491 US 164 (1989). Even though *Patterson* was not a retaliation case, it had far-reaching consequences for § 1981 retaliation claims. In *Patterson*, the Supreme Court held that "racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171. (Emphasis added.) In reading the 1981 statutory language itself quite narrowly, the Court reasoned:

The statute prohibits...when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation ... conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII. ...The second of these

guarantees, “the same right...to...enforce contracts...as is enjoyed by white citizens,” embraces protection of a legal process, and of a right to access to legal process, that will address and resolve contract-law claims without regard to race. (Emphasis added.) *Patterson*, 491 US at 176-177.

This reasoning effectively eliminated retaliation claims under § 1981 since such claims naturally arise during the course of the employment relationship—not at its inception. The *Patterson* Court also noted that extending § 1981 claims to “postemployment conduct” would “...undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.” Title VII claims of race discrimination are subject to the comprehensive administrative apparatus established by Congress and implemented by the EEOC, whereas section 1981 “provides no administrative review or opportunity for conciliation.” *Patterson*, 491 US at 181-182. The Court apparently wished to prohibit § 1981 retaliation claimants from circumventing the established administrative procedures used generally to help resolve claims of discrimination in employment.

Congress Reacts to the *Patterson* Decision

In 1991 Congress passed the Civil Rights Act of 1991, 105 Stat. 1071, largely to supersede *Patterson’s* narrow reading of § 1981. The 1991 Civil Rights Act added a provision—1981(b)—which states:

“Make and enforce contracts” defined

For purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

The House Report on this definitional section elucidates the purpose of the expanded statute:

The Committee intends this provision to bar all race discrimination in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring. H.R. Rep. No. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N 549, 630 (emphasis added).

Thus, the Act served to extend § 1981 protections to post-contract formation conduct, including claims for retaliation arising from an employee’s efforts to enforce the anti-discrimination laws.

The *Humphries* Case and a Look Back to 1969

For the first time since passage the Civil Rights Act of 1991, the Supreme Court in *Humphries* addressed the issue of whether § 1981 encompassed a claim for retaliation in the employment context. The plaintiff-employee in *Humphries* complained to his managers about what he believed to be the racially-motivated discharge of a black co-employee. *Humphries* claimed he was, in turn, fired for doing so, and sued for retaliatory discharge under § 1981. In affirming that § 1981 encompassed retaliation claims like *Humphries’*, the Court relied upon *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 225 (1969). *Sullivan* was actually a case under § 1982—long recognized as a companion statute to § 1981—which provides that “...[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.”

Sullivan, a white man, rented his home to a black man. *Sullivan* also assigned to the black renter shares in a corporation which allowed the owner to use an adjacent private park. The corporation controlling the park refused to allow the assignment

because the rentor/assignee was black. When Sullivan protested, the association expelled him and took back his membership shares. Sullivan sued the association, claiming a violation of § 1982, and the Supreme Court upheld Sullivan's claim:

[T]he corporation's refusal "to approve the assignment of the membership shares...was clearly an interference with...[the black lessee's] right to 'lease.'" ...Sullivan, the white lessor, "has standing to maintain this action," *ibid.*, because as the Court had previously said, "the white owner is at times' the only effective adversary' of the unlawful restrictive covenant." *Ibid.* (quoting *Barrows v. Jackson*, 346 U.S. 249 (1953)). The Court noted that to permit the corporation to punish Sullivan "for trying to vindicate the rights of minorities protected by § 1982" would give "impetus to the perpetuation of racial restrictions on property." ...And this Court has made clear that *Sullivan* stands for the proposition that § 1982 encompasses retaliation claims. *Humphries*, 553 US. ____ (2008) page 3.

Interestingly, both the *Humphries* and *Sullivan* retaliation claimants ultimately were not the individuals asserting claims of racial discrimination on their own behalf. Thus, the Supreme Court's reading of § 1981 confers broad-based protection on all employees seeking to vindicate anti-discrimination rights—whether or not such employees are the original victims of workplace discrimination.

Ramifications of the *Humphries* Decision

An employee proceeding under § 1981 on the basis of unlawful retaliation in the employment context need not go to the EEOC first and avail him or herself of the elaborate administrative apparatus extent there. The *Patterson* Court, ironically, was loath to circumvent this congressionally-mandated administrative procedure when, nearly twenty years ago, it limited the § 1981

reach. Today's § 1981 claimant can proceed with confidence directly to federal court to seek relief for alleged unlawful retaliation, utilizing the liberal discovery rules and broad subpoena power typically available in the judicial forum. Also, the 1981 claimant need not be the individual unlawfully discriminated against in the first instance. The *Humphries* Court's reliance on *Sullivan* indicates that the 1981 claimant may be a co-employee—perhaps not even a member of a protected class—who sought to expose and rectify what appeared to be unlawful workplace discriminatory animus. Section 1981 claims are not subject to the same cap on damages which limits the monetary recovery available to Title VII claimants. See *e.g. Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001).

Unlike Title VII, Section 1981 allows for personal liability of corporate officers, directors, and employees where they intentionally cause infringement of rights protected by 1981, regardless of whether the corporation may also be liable. See *e.g. Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir. 1986). Such intentional conduct may also raise insurance coverage issues for these corporate agents.

Thus, employers must ensure that all employees understand the reach of the right of freedom from retaliation which § 1981 bestows on the individuals seeking to vindicate such rights—whether personally or not—under the anti-discrimination laws. In the wake of *Humphries*, failure to train personnel on the scope of potential retaliation liability under § 1981 could prove costly.

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Structuring a Merger for Architects & Engineers

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The level of merger activity in the architectural and engineering industry has picked up significantly in recent months, and promises to be even livelier in the coming year. If you are considering merging your firm or acquiring another, the way you structure the transaction can have far reaching consequences, particularly in the area of taxation.

There are several tax options available for structuring an acquisition. Prior to developing a successful tax structure for the transaction it is important to first determine whether the transaction will be the sale of assets or stock, and whether it is to be a taxable acquisition or a tax-free reorganization.

The parties to a transaction may agree on a taxable asset deal. In this instance an adjustment is usually negotiated in the purchase price to compensate the seller for incurring the tax. One form of taxable asset deal is a “direct asset sale” where the buyer purchases the assets directly from the seller for cash.¹ This is the simplest of all transaction structures and results in the buyer receiving a “step-up” in the basis of the assets acquired up to the purchase price.

For example, if a buyer purchases a plotting printer for \$900 that has a book value of \$500 on the books of the seller, the buyer is allowed to “step-up” the basis of the acquired assets from \$500 to \$900. This step-

up is preferable because it allows the buyer a larger depreciation and therefore a larger non-cash tax deduction. This structure benefits the buyer because it reduces taxes annually while having no impact on the cash flow of the business. The seller must report income on the transaction which could qualify for favorable capital gains treatment depending on the character of the assets being sold.

Another form of taxable asset deal involves a “cash merger.” Under this deal structure the selling entity is merged into the buying entity or its parent company and the stockholders of the selling company are given cash in exchange for their stock.

Under either of the taxable asset deal structures, buyers must be aware of how the acquisition price is to be allocated in the transaction. For example, if the purchase price exceeds the fair market value of the assets acquired the buyer has created goodwill. This is an intangible asset to the buyer and must be amortized over a period of fifteen years. Although the buyer does obtain a tax benefit from such a transaction most buyers would prefer that the transaction be structured to minimize the amount of goodwill. This is due to tangible assets serving as better collateral for potential bank borrowing and being depreciated over shorter useful lives, therefore providing the buyer with a larger tax deduction.

¹Doloboff and Wilcox, 771-2nd T.M., *Corporate Acquisitions – (A), (B), and (C) Reorganizations*

From the seller's perspective a taxable asset deal generates gains and losses based on the nature of the assets sold. For example, the sale of inventory would be taxed at ordinary income rates. But the sale of depreciable assets would at least partially be taxed at the more favorable capital gains rates (assuming the seller is not a C-corporation).

The issue for the C-corporation seller is that it will not receive capital gain treatment on the asset transaction since C corporations do not have capital gains rates. A C-corporation will also be subject to double-taxation should the entity liquidate after the sale, so choice of entity is critical to maximizing after tax dollars in a taxable transaction. There are limited options available for C-Corporation owners to help take some of the sting out of the double tax at the corporate level.

In all taxable asset deals none of the seller's tax attributes, most notably net operating losses, can be carried over to the buyer. These tax attributes remain with the seller after sale and if the seller liquidates these tax attributes essentially are lost.

In a tax-free reorganization, both parties generally have the same tax consequences regardless of whether the reorganization is structured as an acquisition of assets or of stock. But the requirements for qualifying as a tax-free reorganization differ depending on whether an asset acquisition or stock acquisition is chosen. If the parties to a transaction agree to a tax-free asset acquisition there are three structures available for consideration. The first is called an "A Reorganization." Under this structure at least 80% of the stockholders of the seller's company exchange their stock for stock of the acquirer and the seller's company is then merged into the acquirer.

Another tax-free transaction structure is a "forward triangular merger." Under this structure the seller company is merged into a subsidiary of the buyer and the seller receives enough stock in the parent company to qualify for tax-free treatment.

A "C Reorganization" is another tax-free transaction structure. This structure has the seller company transferring its assets to the buyer or its subsidiary in return for enough stock in the parent company to qualify for this treatment and, once executed, the seller company liquidates and distributes the parent company stock to the stockholders of the seller.

Under all three tax-free scenarios the assets are transferred to the buyer at the book value amount carried over from the seller. As a result of the tax deferred nature of these transactions there is no "step-up" in basis of the acquired assets for the buyer.

There are also several tax structures available to apply to a stock deal. Assuming a taxable stock acquisition is planned and the seller is a closely held business, the simplest form of stock deal involves the purchase of stock for cash. This transaction is taxable to the stockholders of the seller at capital gain rates, which currently are at 15% for federal income tax purposes.

Another form of taxable stock transaction which is useful when the stock of the seller is widely held or includes restless minority owners is the "reverse subsidiary cash merger." This structure is helpful under these circumstances because a majority vote of the stockholders binds all stockholders to the agreement. Under this tax structure a newly formed subsidiary of the buyer is formed and merged into the seller. The stockholders of the seller receive cash for their shares of stock and the parent company buyer takes ownership.

If the parties to a stock transaction agree on a tax-free deal one method that may apply is the "B" reorganization, in which the stockholders of the seller transfer their stock to the buyer in exchange for only stock in the buyer.

Another means to structure a tax-free deal is through a "reverse triangular merger." Under this method the buyer establishes a subsidiary which is merged into

the seller's company at which time the stockholders of the seller receive stock in the buyer sufficient to effect such a transaction (i.e. the buyer acquires at least 80% (control for tax purposes) of the seller's stock).

Under each of the tax-free scenarios mentioned above, unless a specific election is made to change the substance of the transaction, the basis the seller had in the assets and liabilities of the company carries over to the buyer. The buyer, therefore, receives no "step-up" in basis on the assets of the company and no additional depreciation deduction as is available in an asset deal.

However, in a stock deal, the tax attributes, including available net operating losses of the seller, carryover to the buyer. The losses however, are limited in the amount that can be deducted in any one year. This is designed to discourage potential buyers from making acquisitions solely to purchase net operating losses for use in offsetting income generated from the operations of the buyer.

In any form of stock transaction the buyer is not only responsible for any current or future liabilities of the acquired company but it is also liable for any pending or future IRS audits performed on the acquired company. In this regard it is imperative to review the three previously filed income tax returns of the seller during due diligence in order to gain an understanding as to the amount, if any, of exposure the buyer is undertaking by structuring the transaction as a stock deal.

Mergers and acquisitions are obviously complicated transactions. Your first step should be to seek qualified, experienced help in examining and structuring any deal.

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E-Verify is Alive, Well, and Gaining Speed

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E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an internet-based system operated by the Department of Homeland Security (“DHS”) in partnership with the Social Security Administration (“SSA”) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify allows participating employers to electronically compare employee information taken from the Form I-9 against records in SSA’s and DHS’s databases.

According to the U.S. Department of Justice, E-Verify is:

...the best means available for employers to electronically verify the employment eligibility of their newly hired employees. ...[And] virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce.

E-Verify is touted as reducing the instance of undocumented new hires, and ensures government contractor and sub-contractor compliance with federal and state laws; it may even provide a safe harbor for an employer who is alleged to have knowingly hired an undocumented worker.

The Federal Government now requires all businesses that contract with federal agencies to verify the employment eligibility of all persons hired during the contract term, and all persons performing work within the United States on the federal contract, to use E-Verify as a condition of each current and future federal contract. Several states and/or municipalities have joined in and now require their state agencies to verify employment electronically; those entities include, but are not limited to, Rhode Island, Arizona and certain Connecticut municipalities. Similarly, employers who employ graduate students through Optional Practical Training Programs (“OPT”) must now register for E-Verify if they want their employees to qualify for 17 months of OPT employment, which will enable the graduates to maintain their employment through the duration of the H-1B processing period.

The timing of a query through E-Verify is the same as for completion of an I-9 form. The earliest an employer may initiate a query is after an individual accepts an offer of employment, after the employee and employer complete the Form I-9, but no later than the end of three business days after the new hire’s actual start date. An employer may not pre-screen applicants using the system, and may not delay training or an actual start date based upon a tentative “non-confirmation” or a delay in the receipt of a confirmation of employment authorization.

Despite the mandate to use E-Verify, and several positive features that it may have, there are still many questions which DHS and SSA have not answered. For example, although the DHS and SSA have agreed to “safeguard” information provided to them, and to use it only for verification of Social Security Numbers and employment eligibility, the corporate and personal information collected is extremely broad-based, and may form the basis for employment-site investigations. There is also the possibility that the system may be accessed by unauthorized persons, and could result in identity theft.

Employers may experience other issues associated with re-verification of existing employees, or the continued employment of persons for whom employers have received “non-confirmation” notices from DHS. Finally, it should be noted that E-Verify has not yet been perfected, and may be time-consuming for employers, particularly those who are attempting to register in the first instance.

In short, although E-Verify clearly contains many “bugs,” it is here to stay. Employers are advised to take advantage of the resources available on the DHS website [www.uscis.gov], and to contact their immigration counsel to assist in streamlining the E-Verify process.

Gwen P. Weisberg is a Partner in the Professional Practices Group at Donovan Hatem LLP. Gwen has extensive litigation experience in state and federal courts, through trial and appeal, including construction, corporate, commercial, real estate, surety, federal receivership and insurance defense litigation matters. She has extensive experience in student loan bankruptcy discharge proceedings, and in mediation and arbitration of commercial and construction disputes. Gwen represents clients before federal and municipal agencies and administrative boards, and engages in all aspects of employment-based immigration, including non-immigrant visas, permanent residency petitions, immigration compliance, and I-9 employment verification audits. Gwen can be reached at 617-406-4591 or at gweisberg@donovanhatem.com.

SBANE's 3rd Annual HR Symposium— Workforce 2009: Navigating the Legal Challenges

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Malcolm S. Medley

Commissioner of the Massachusetts Commission Against Discrimination

“The new Wage and Hour Regulations and the serious
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Chief of the Attorney General Fair Labor Division

“Legislative initiatives affecting the workforce”

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*State Representative & Chair of the Joint Committee on Economic Development
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&

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The DH Benchmark

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