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Employers Must Use New Employment Eligibility Verification Form I-9 No Later Than December 26, 2007

Daryll Neuser was named a Wisconsin Rising Star 2007 by *Super Lawyers* magazine. This is the second year that Daryll was named a Wisconsin Rising Star.

Rob Sholl has been elected by his fellow attorneys to *Best Lawyers in America 2008*, the definitive guide to legal excellence in the United States. Rob was also selected for *Super Lawyers 2007*, an annual listing of the top 5% of practicing attorneys in any given state.

Lynn Stathas authored a chapter entitled "Discrimination and Sexual Harassment" for a book published by the Wisconsin State Bar Association, *The Wisconsin Business Advisor Series: Employment Law*.

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On November 7, 2007, the U.S. Citizenship and Immigration Services (USCIS) issued a revised Employment Eligibility Verification Form (Form I-9), along with a Handbook for Employers, Instructions for Completing the Form I-9. The revised Form I-9 with a revision date of June 5, 2007, is now available for use. As of November 7, 2007, the revised form is the only version of the Form I-9 that is valid for use. Employers have a grace period until December 26, 2007 to transition to the new Form I-9. Failure to use the revised Form I-9 after December 26, 2007 could result in fines and penalties.

The new Form I-9 reduces the number of documents an employer may accept to verify employees' identity and employment eligibility. Five documents were eliminated from "List A" of the List of Acceptable Documents: Certificate of U.S. Citizenship (Form N-560 or N-561); Certificate of Naturalization (Form N-550 or N-570); Alien Registration Receipt Card (Form I-151); Unexpired Reentry Permit (Form I-327); and Unexpired Refugee Travel Document (Form I-571). These documents were removed because they were believed to lack sufficient features to help deter counterfeiting, tampering or fraud.

One document, the Unexpired Employment Authorization Document (Form I-766), was added to "List A" on the revised Form I-9. The revised "List A" now includes: U.S. Passport; a Permanent Resident Card or Alien Registration Receipt Card (Form I-551); an unexpired foreign passport with a temporary I-551 stamp; an Unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B) and an unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, for nonimmigrant aliens authorized to work for an employer.

Please feel free to contact a member of Reinhart's Labor & Employment Department if you have any questions about the revised Form I-9, or about identity and employment eligibility issues generally.

Illinois Plaintiffs May Pursue Illinois Human Rights Act Complaints in Court Beginning January 1, 2008

Illinois Governor Rod Blagojevich recently signed into law amendments to the Illinois Human Rights Act (IHRA) that will give access to Illinois state trial courts to individuals filing charges of employment discrimination on or after January 1, 2008.

Under current Illinois law, individuals who believe their rights under the IHRA are violated file their charges with the Illinois Department of Human Rights (IDHR), which is then responsible for investigating and processing the claims. If a charge is found to have "no substantial evidence," the complainant can appeal this finding to the IDHR's Chief Legal Counsel. A charge found to have "substantial evidence" results in the parties being required to engage in mandatory conciliation. If conciliation is unsuccessful, or if sufficient time lapses after the filing of the charge, the complainant is permitted to pursue his or her charge with the Illinois Human Rights Commission (IHRC). The IHRC is responsible for hearing and adjudicating claims under the IHRA. Complainants are not, however, permitted to proceed to state court with their IHRA charges.

Under the changes to the IHRA, an individual will still be required to file his initial charge with the IDHR. Complainants will now, however, be permitted to pursue their IHRA claims in Illinois state courts under any one of the following three circumstances:

1. The IDHR does not complete its investigation within 365 days of the complainant's filing of the charge;
2. The IDHR determines there is no substantial evidence to support the charge and, accordingly, dismisses the charge; or
3. The IDHR determines there is substantial evidence to support the charge.

Thus, under the revisions to the IHRA, all Illinois complainants will have the opportunity to pursue their charge of employment discrimination in state court. Complainants will be required to file such lawsuits within 90 days of any of the above-cited circumstances in the same county in which the alleged discrimination occurred.

Complainants who receive a "substantial evidence" finding from the IDHR will still be able to request that the IDHR file a complaint on their behalf with the IHRC. The IDHR will still be able to order conciliation. Conciliation will, however, no longer be mandatory.

Significantly, complainants who file lawsuits in Illinois courts under the new law will be entitled to request a jury trial. Further, the IHRA does not place a cap on the amount of "actual damages" that can be awarded to complainants. "Actual damages" has been interpreted to include compensation for both mental suffering and emotional harm. Because Title VII places a limit on the amount of compensatory and punitive damages an individual may recover, plaintiffs' attorneys may choose to pursue discrimination claims in Illinois under the IHRA instead of under Title VII. Further, complainants will now be able to engage in even more extensive discovery, which may increase the costs and time involved for employers defending against IHRA claims.

The amendments to the IHRA reinforce the importance of taking proactive measures to minimize exposure to discrimination claims, including providing employees with training and reviewing current company policies. Illinois employers can reasonably anticipate that these amendments will increase the cost of defending against a claim of discrimination. The amendments also create a very real possibility that Illinois employers will be defending themselves before juries and judges that are not familiar with employment laws. This may result in both inconsistent and excessive verdicts.

Please feel free to contact a member of Reinhart's Labor & Employment Practice if you have any questions about how these amendments may affect your business.

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Wage and Hour Misclassifications Lead to Litigation and Large Settlements

Two wage and hour lawsuits filed by plaintiffs who believed their employers had improperly classified them as "exempt" from overtime recently ended with starkly different results for the employers involved. However, both cases illustrate the significant costs and risks for unwary employers.

In the first case, the office supply retailer Staples recently agreed to settle a wage and hour lawsuit for $38 million. The case was brought under California wage and hour law by approximately 1,700 assistant managers who argued that Staples misclassified them as exempt from overtime under California's executive exemption.

In a far better result for the employer, and in a case much closer to home, the Wisconsin Court of Appeals recently dismissed a similar lawsuit filed against RadioShack Corporation. In that case, two RadioShack store managers sued the retail employer claiming they were improperly classified ***under Wisconsin law*** as executive employees, and thus improperly exempted from overtime payments. The two managers successfully certified the lawsuit into a class action to include all store managers for RadioShack stores with annual sales of $500,000 or more.

After discovery was completed, both RadioShack and the plaintiffs moved for summary judgment. The trial court denied the plaintiffs' motion for summary judgment but granted RadioShack's motion, dismissing the plaintiffs' claims. The plaintiffs appealed.

Of the many arguments made by the plaintiffs on appeal, one argument is particularly important for Wisconsin employers relying upon the executive exemption. Specifically, the plaintiffs argued that as managers they lacked authority to act on store personnel issues. Thus, the plaintiffs argued, they did not meet the element of Wisconsin's executive exemption, which requires that the individual have:

> "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight[.]" Wis. Admin. Code § DWD 274.04(1)(3).

The plaintiffs argued that they could not hire employees, could only conduct "prescreening reviews" of employment applicants, could not discharge employees, and could not determine wage rates, give raises, award bonuses or choose which employees would work at their stores. The Court of Appeals was not persuaded and held that, in their efforts to identify areas where they may have had limited influence, the plaintiffs disregarded areas where they had significant input into personnel decisions.

The Court's conclusion was supported by the plaintiffs' depositions. The plaintiffs repeatedly testified to instances in which they recommended personnel changes and their recommendations were given weight. For example, one of the plaintiffs testified that on five or six occasions he made recommendations that employees be discharged and in all but one instance RadioShack discharged the employees. In addition, the second plaintiff testified that store managers recommended employees for other positions, including entry into RadioShack's manager training program, and that recommended candidates were in fact accepted into the program.

Given this evidence, the Court of Appeals concluded that the only reasonable inference was that these store managers' "suggestions and recommendations" regarding personnel decisions were given "particular weight," making the store managers exempt from overtime. These two wage and hour cases serve as a good reminder for Wisconsin employers. First, at the time the Wisconsin-based cases were filed, Wisconsin's white collar exemptions were interpreted consistently with the Federal Fair Labor Standards Act (FLSA). However, readers should recall that Wisconsin did not adopt the August 2004 amendments to the federal FLSA exemptions. The federal revisions have thus created two separate sets of white collar exemption rules (one federal and one state), and Wisconsin employers must comply with both.

Second, to avoid being caught in costly litigation, Wisconsin employers should regularly re-determine the exempt status of the jobs in their organizations. Exempt status is determined on an individual-by-individual basis. The fact that a position was once exempt does not mean that the position remains exempt or that similar positions are also exempt. To accurately determine whether a specific position is exempt, employers must regularly re-analyze the position against all the elements of the exemption tests under both federal and Wisconsin law.

The attorneys in Reinhart's Labor and Employment Department are experienced in applying the tests to determine exempt status and would be pleased to assist

you should you encounter questions."