BRYCE DOWNEY & LENKOV LLC

Labor & Employment Newsletter
November 2015

Upcoming Labor & Employment Webinar!
11/5/15
Click Here to Register
Hiring Do's and Don'ts
(With Video Examples)

Medical Marijuana: Colorado Supreme Court Upholds Decision in Favor of Employers

The growing trend among states to legalize marijuana for medical and sometimes, even for recreational purposes, raises a number of questions for employers. One of the most pressing questions raised is whether an employer may terminate an employee who tests positive for marijuana when there is no evidence that the employee was impaired at work.

This is the precise issue that was raised in the recent case of *Coats v. Dish Network, LLC*, 2015 CO 44, 350 P.3d 849. There, the Colorado Supreme Court upheld the employer's firing of Coats for using medical marijuana in violation of the employer's zero tolerance policy, even though the employee was not impaired at work. This issue has not been addressed by Illinois or Indiana yet. While this decision is not binding on other states, it will certainly provide guidance for other states to consider.

Until very recently, it had been thought that drug tests could only test for the presence of marijuana, but could not test for impairment. However, there has been growing evidence of being able to test for impairment through blood serum tests. Currently, there are efforts to create a THC testing device that would work similarly to a breathalyzer. However, such efforts are in very early stages.

Practice Tip:

As most states have not addressed this issue, the best practice for employers is to gather objective evidence of an employee's impairment at work, rather than merely a positive drug test, before terminating an employee for violating an employer's zero tolerance policy.

On 10/27/15, Storrs Downey presented on this topic before the Boiler and Tank Contractors of Illinois. If you would like a copy of the presentation, please email **Storrs** at sdowney@bdlfirm.com.

DOL to Consider Ruling on Personal Electronics Devices

In our January 2015 newsletter article entitled "Get Smart About Your Smart Phone Policy," we discussed some of the issues surrounding employee smart phone use. In August 2015, the Federal Department of Labor (DOL) indicated that it intends to seek public input on personal electronic device use by non-exempt employees during non-work hours. Currently, the law requires that non-exempt employees be paid for all hours worked, unless the time worked is *de minimis*. However, there is little guidance regarding what constitutes "*de minimis*." While frequently, reading and responding to a work email may take an employee less than a minute, which would be considered *de minimis*, what happens if an employee does this several times per hour? Perhaps the DOL's intention to seek public comment on the topic is to help bring clarity to this issue.

Additionally, as we mentioned in our prior article, this issue is being tested in *Allen v. City of Chicago* (No. 10 C 2183), which is a collective action pending before the United States District Court in the Northern District of Illinois. The case was tried in August 2015 and a decision is expected any day now. We will continue to monitor this issue and keep you posted.

Practice Tips:

In anticipation of a potential DOL rule on personal electronic device use by employees during non-working hours, we recommend that employers consider the following:

- Avoid issuing company-owned electronic devices to non-exempt employees.
- Clearly designate hours that non-exempt employees may use electronic devices for work purposes.
- Discourage non-exempt employees from using electronic devices for work-related purposes after designated work hours.
- If you require non-exempt employees to use technology outside of working hours for work-related purposes, insist that they record their time and compensate them for such time worked.
- Consider "locking out" non-exempt employees during non-designated work hours.
- Continue to monitor legal developments.

Significant Proposed Changes to Federal Overtime Laws

In June 2015, the Federal Department of Labor (DOL) proposed significant changes to federal regulations regarding overtime exemptions under the Fair labor Standards Act (FLSA). The proposed changes are expected to extend overtime protections to approximately five millions white collar workers, who are currently deemed exempt and not entitled to overtime pay. As you can imagine, this has employers very concerned about the possibility of increased overtime costs.

Currently, to be exempt from overtime, an employee must earn at least $455/week, must be an "executive, administrative of professional" and must meet the corresponding "duties test." Also exempt are "highly compensated employees," who are defined as employees that earn over $100,000 a year and earn at least $455/week in salary or fees and "customarily and regularly" perform the duties of one of the white collar positions under the FLSA.

The proposed regulations increase the minimum salary requirement for exempt executives, administrators and professionals from $455/week ($23,660/year) to $921/week ($47,892/year). The proposed increases are expected to increase to as high as $970/week ($50,440/year) when the final rules go into effect. The proposed regulations also increase the minimum salary for highly compensated employees from $100,000/year to $122,148/year. Further, the DOL is proposing that these salary thresholds increase annually.

A final rule is expected in mid 2016. We will continue to monitor these proposals and keep you up to speed.

Practice Tip:

Employers should consider conducting an analysis to identify which employees may lose their exempt status and consider salary increases to maintain their overtime exemptions to help minimize overall costs.

DOL's Aggressive Interpretations Finds Most Workers are Employees Rather Than Independent Contractors

On 7/15/15, the Department of Labor (DOL) Wage and Hour Administrator issued an interpretation regarding the classification of independent contractors and employees. The distinction is an important one as employees are entitled to certain benefits such as minimum wage, overtime and workers' compensation, as well as health coverage under the Affordable Care Act. The distinction also has significant tax implications.

The Administrator stressed that there is no magic formula for determining proper worker classification and that various factors need to be weighed. The Administrator's recent interpretation provided several factors for businesses to consider when classifying workers, including:

1. Whether work is an integral part of the putative employer's business.
2. Whether the worker's managerial skill affect the worker's opportunity for profit or loss.
3. Comparing the relative investment to the putative employer's investment.
4. Whether the work performed requires special skill and initiative.
5. Whether the relationship between the worker and the putative employer is permanent or indefinite.
6. The nature and degree of the putative employer's control.

The Administrator concluded that "most workers are employees under the [Fair Labor Standards Act] FLSA." This aggressive interpretation broadly expanded the FLSA, which is the federal legislation governing wage and hour law for employees, including minimum wage and overtime. Courts have a long history of using several multi-factoral tests to determine whether a worker is an employee or an independent contractor; however, the Administrator essentially disregards factors that the courts have historically treated as significant, such as whether the worker controls his own hours, has little or no supervision and decides what tools and equipment to buy. The Administrator also did not allow public comment (as is typically done with proposed changes).

Proper employee classification has been the subject of numerous recent lawsuits involving Fed Ex Ground and Uber drivers. It is unclear if and how courts will apply this new guidance. If courts adopt this guidance, it presents considerable exposure for misclassification suits to businesses using workers misclassified as independent contractors. Even if the courts do not adopt this guidance, the guidance alone will provide increased motivation for workers to allege misclassification claims.

Practice Tip:

This is a good time for businesses to audit and correct their worker classifications to ensure proper classification and help reduce their exposure for misclassification suits.

To read about the Seventh Circuit's recent decision finding that certain FedEx drivers were employees rather than independent contractors, see page 3.

Seventh Circuit Finds FedEx Drivers Were Employees, Not Independent Contractors

In *In Re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 792 F.3d 818 (7th Cir. 2015), the Seventh Circuit held that drivers for FedEx were employees, not independent contractors, under the Kansas Wage Protection Act (KWPA).

Relying on the FedEx Operating Agreement, which set forth FedEx's policies and procedures for interaction with the drivers, the district court concluded that the drivers were not employees. According to the district court, the analysis was limited to whether FedEx retained the right to control the drivers and the policies and procedures in the Operating Agreement did not show the requisite level of control to render the drivers employees under the Kansas Act. The court entered summary judgment in favor of FedEx and the drivers appealed to the Seventh Circuit.

The primary issue raised by the parties was whether the drivers were employees under the Kansas Wage Protection Act, or were independent contractors. Because the issue of whether the drivers were employees or independent contractors was a question of Kansas law, the Seventh Circuit certified two questions to the Kansas Supreme Court: "(1) Given the undisputed facts presented to the district court in this case, are the plaintiff drivers employees of FedEx as a matter of law under the KWPA?;(2) Drivers can acquire more than one service area from FedEx. Is the answer to the preceding question different for plaintiff drivers who have more than one service area?" *Craig v. FedEx Ground Package System, Inc.*, 686 F.3d 423, 431 (7th Cir. 2012).

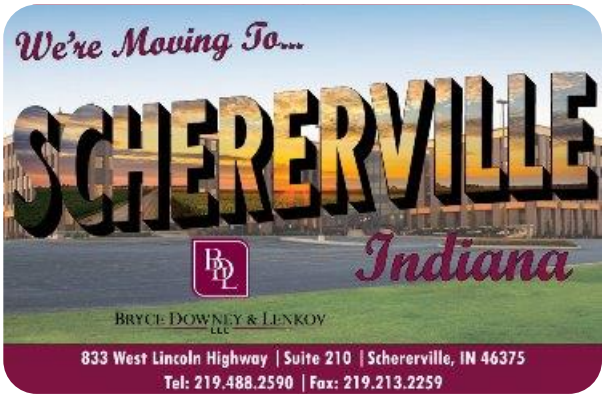
The Kansas Supreme Court answered the first question affirmatively and the second question negatively. In concluding that the drivers were employees under the Act, the Kansas court applied a 20 point analysis from one of its earlier decisions that addresses economic reality considerations but focuses primarily on the employer's right to control. However, the court held that no evidentiary determination regarding the right to control was necessary.

Based on the conclusion of the Kansas Supreme Court, the Seventh Circuit reversed the summary judgment entered in favor of FedEx and remanded the case for entry of summary judgment in favor of the plaintiffs.

Practice Tip:

While *Craig* involved the limited question of whether certain drivers were employees under Kansas law, it demonstrates that some courts will embrace employers' policies and procedures for interaction with workers, without consideration of the actual exercise of control, in determining whether workers are employees or independent contractors.

New Indiana Office Location



Our Indiana office has moved to a new location. Our new address is **833 West Lincoln Highway, Schererville, Indiana**. The new office is more than twice the size of our previous space in Crown Point.

BDL is Growing

Bryce Downey & Lenkov is pleased to announce the newest additions to its team.

Joe Eichberger, partner, handles civil litigation and construction.

C. Matt Alva, associate, focuses on workers' compensation and general liability.

Jim McConkey, of counsel, represents clients in construction and business litigation

Sadiq Shariff, associate, handles workers' compensation and general liability.

Timothy Brown, associate, represents clients in general liability, workers' compensation, transportation and insurance litigation.

Kevin Borozan, associate, defends clients in workers' compensation and general liability matters.

New Partners

We are pleased to announce that **Jeanmarie Calcagno** and **Juan Anderson** have been elevated to income members.

Jeanmarie Calcagno focuses on workers' compensation. She started her legal career as an Assistant State's Attorney representing Cook County in its workers' compensation cases. Jeanmarie has represented employers from many different aspects of the business arena, including small business, middle market, corporate and construction clients.

Juan Anderson concentrates on construction litigation, professional liability, and product liability. He has defended a wide range of clients, including large hospitals, construction firms, universities and food manufacturers.

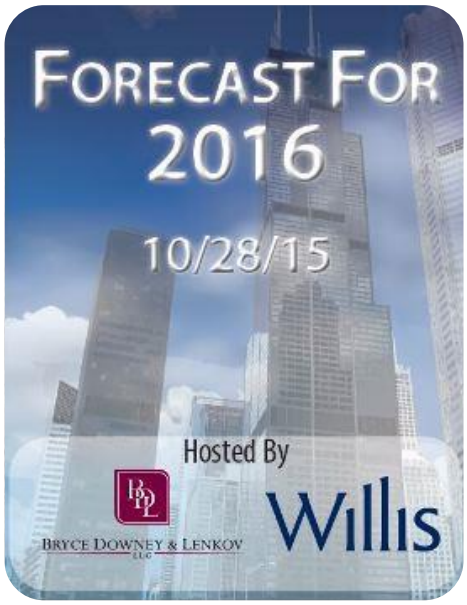
Publications

Storrs Downey and **Maital Savin's** article "Call Me Claimant? Understanding Transgender Employee Discrimination Claims And Legal Developments" was published in the October issue of Claims Management Magazine. Click Here to view the full article.

Maital Savin's article "Avoiding Pregnancy Discrimination Claims Understanding *Young V. UPS* And Illinois' New Pregnancy Accommodation Laws" was published in the summer issue of the Illinois Manufacturer Magazine. Click Here to view the full article.

Recent Seminars

- On **10/27/15**, **Storrs Downey** presented "Marijuana in the Workplace" to Boiler & Tank Contractors of Illinois.
- On **10/28/15**, Willis Insurance and Bryce Downey & Lenkov co-hosted **Forecast for 2016** on 10/28/15. BDL presenters included **Jeanne Hoffmann**, **Robert Bramlette**, **Jim McConkey** and **Mollie O'Brien**.



BRYCE DOWNEY & LENKOV LLC

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Workers' Compensation

- Intervening Accident Breaks Causation
- Accident Date Trumps Hearing Date In Wage-Diff Award

General Liability

- The "Open and Obvious" Defense Restored By the Illinois Supreme Court
- Indiana Court of Appeals Affirms Admission of Testimony of Naprapath

Corporate & Construction

- How Can I Lower My Real Estate Taxes?
- Illinois Appellate Court Interprets Section 30 Of The Mechanics' Lien Act And Limits Recovery To Sub-Subcontractors

Upcoming Seminars

- In January, **Storrs Downey** will speak to Mechanical Contractors Association of Chicago about Legal Concerns & Ramifications of Terminating Problem Employees. Stay tuned for more details.

Free Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics

Upcoming

11/5/15 – Click Here to Register
Hiring Do's and Don'ts (With Video Examples)
Storrs Downey & Maital Savin

12/2/15– Click Here to Register
Is Your Independent Contractor Actually An Employee?
Geoff Bryce & Maital Savin

Recent

10 Tricky Employment Termination Questions Answered
Spills, Thrills & Bills: The True Story Behind Illinois & Indiana Premises Liability Law
Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace

If you would like a copy of any of our prior webinars, please email Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Giving Back

"CHILL" With Bryce Downey & Lenkov

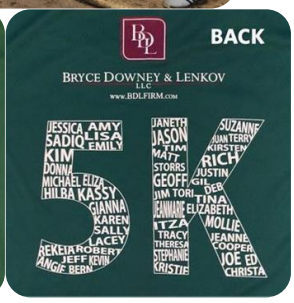
Bryce Downey & Lenkov is a longtime supporter of the Respiratory Health Association and is a benefactor at its upcoming event on 11/12/15. The CHILL event is a 2 ½ hour social gathering among the kitchen and bath showrooms on the first floor of the Merchandise Mart. All proceeds support RHA and their mission to protect clean air and ensure proper lung health care.

Skyline Plunge

For several years now, Geoff Bryce has participated in the Respiratory Healthy Association's "Skyline Plunge." On 9/13/15, he and his wife Sharon, rappelled 27 stories to help raise awareness and funds for lung disease research, education and advocacy. According to Geoff, "This is a cause that is very near and dear to us and we look forward to participating in various awareness events throughout the year"

Race Judicata

On 9/10/15, BDL braved rain and mud to raise money for Chicago Volunteer Legal Services' Race Judicata 5K Race. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago. This year, BDL won 3rd place in the annual t-shirt design contest!



BDL Participates In Baskets For Breast Cancer

Bryce Downey & Lenkov is proud to have participated in Baskets for Breast Cancer! 100% of sales from the silent auction of over 70 baskets including trips, vacations and sports memorabilia went to breastcancer.org.

Contributors to the November 2015 Labor & Employment Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were Storrs Downey, Maital Savin and Jeff Kehl.

Cutting Edge Legal Education

If You Would Like Us To Come In For A Free Seminar, Click Here Now Or Email Storrs Downey At sdowney@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Some of the topics we presented are:

Some of our previous seminars include:

- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace
- Spills, Thrills and Bills: The True Story Behind Illinois and Indiana Premises Liability Law
- Subrogation Basics for Workers' Compensation Professionals
- Employment Law Issues Every Workers' Compensation Professional Needs To Know About

Who We Are

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers committed to delivering services, success and satisfaction. We exceed clients' expectations everyday while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Schererville, IN, Memphis and Atlanta, and attorneys licensed in multiple states, we are able to serve our clients' needs with a regional concentration while maintaining a national practice.

Our attorneys represent small, mid-sized and Fortune 500 companies in all types of disputes. Many of our attorneys are trial bar certified by the federal court and have been named Leading Lawyers, AV Preeminent and were selected to Super Lawyers and Risings Stars lists. Our clients enjoy a handpicked team of attorneys supported by a world-class staff.

Our Practice Areas Include:

- Business Litigation
- Business Transactions & Counseling
- Corporate/LLC/Partnership Organization and Governance
- Construction
- Employment and Labor
- Counseling & Litigation
- Entertainment Law
- Insurance Coverage
- Insurance Litigation
- Intellectual Property
- Medical Malpractice
- Professional Liability
- Real Estate
- Transportation
- Workers' Compensation

Disclaimer: