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## Truckin' got my chips cashed in... Keep truckin', like the do-dah man... Compensating Truck Drivers: Did It Get a Bit More Clear?

By Christina Lopez-Nutzman and Jeffrey A. Risch

Do you have to pay your truck drivers overtime? Answering that question with certainty is more difficult than figuring out the lyrics to *The Grateful Dead's* classic *Truckin'*. However, the answer to this question has now become clearer as a result of a decision issued on December 21, 2009 by the U.S. Court of Appeals for the Seventh Circuit (*Collins v. Heritage Wine Cellars, Ltd.*, 7th Cir., No. 09-1181) that clarified a fairly complicated area under the Motor Carrier Act (MCA). The Court held that a group of truck drivers who delivered wine solely within the state of Illinois (intrastate) were not entitled to overtime pay because the wine they delivered was part of an interstate movement of goods and therefore remained in interstate commerce under a fixed and persisting intent test.

To understand the Court's conclusion it is helpful to provide a bit of background regarding the MCA and the importance of the terms "interstate" and "intrastate" commerce. The FLSA exempts from its overtime pay requirements employees over whom the Department of Transportation has authority to establish qualifications and maximum hours of service under the MCA. Under the MCA, generally of course, the Transportation Department has authority over a motor carrier's employees if the motor carrier transports property between states (interstate) and if its employees engage in activities "affecting the safety of operation of motor vehicles in the transportation on the public highways of...property in interstate or foreign commerce within the meaning of the MCA." Travel confined within one state (intrastate) and related shipments typically do not fall within the MCA exemption because the statutory language of the MCA "does not indicate a congressional intention of regulating a purely intrastate shipment merely because of its effects on interstate commerce." The shipment itself must be in some sense interstate commerce (transportation between a place in a state and a place in another state).

On March 5, 2007, Anthony Collins and eight other Plaintiffs filed a lawsuit against Heritage Wine Cellars claiming that they had not been paid overtime wages required under the FLSA. All Plaintiffs were employed as truck drivers delivering wine within the state of Illinois from the company's warehouse located in Niles, IL. Heritage is, among other things, a wholesale wine importer and distributor in the Chicago area. Heritage imports wines from wineries located outside Illinois. All of the wine that makes its way into Heritage's warehouse is purchased by Heritage. About one-fourth of the wine Heritage ships to its Illinois warehouse is ordered in advance by retail stores. The remainder of the wine is stocked based on Heritage's predictions of its customers' needs and stored temporarily in its warehouse until ordered. In short, the interstate journey of the wine began once Heritage purchased the wine.

The Plaintiffs in Heritage argued that they only moved product within the state and therefore Heritage was not a motor carrier within the MCA's definition. The Appellate Court stated that whether an intrastate portion of interstate transportation retained

its intrastate character, or whether it was properly characterized as having taking place in interstate commerce, is determined by the ‘fixed and persisting intent’ criteria codified at 29 C.F.R. Sec. 782.7(b)(2). Under the regulation, purely intrastate shipments do not enter in interstate commerce “if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment,” the Court said.

Prior to Heritage, some courts used the fixed and persisting intent test while others relied on an alternative elaboration of the fixed and persisting intent test. Both tests lacked ease in application and interpretation. The alternative elaboration is a seven factor test promulgated by a policy statement issued by the Interstate Commerce Commission in 1992 (the ICC was the predecessor to the Department of Labor as the enforcer of the Motor Carrier Act. The ICC is now defunct). The policy statement lists seven criteria the ICC thought favored characterizing an intrastate journey as part of interstate commerce and ten more criteria it believed did not detract from that characterization. The Appellate Court did not see any need to apply such a cumbersome test that provides no direction in how to apply the criteria or what weight is given to each criterion. The Court chose to decide the case on a much simpler test by borrowing four of the criteria they believed made sense. Those criteria are 1) the shipper bases its determination on the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis; 2) no processing or substantial product modification of substance occurs at the warehouse; 3) while in the warehouse the merchandise is subject to the shipper’s control and direction as to the subsequent transportation; and 4) the shipper or consignee must bear the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier (this goes to the shipper’s

responsibility for the original interstate journey). The Court held that if these conditions are satisfied the intrastate leg at the end of a shipment should be deemed part of an interstate shipment.

In simpler words, even though Heritage’s drivers never left the state to deliver wine, they were moving wine that was part of an interstate journey that had not reached its final resting place. That final resting place was determined through pre-existing orders or predictions of customer needs. The court decided that Heritage met all of the factors and held that “it would be odd to conclude that Heritage had no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment even with respect to those wines for which it had no order in hand.” Heritage intended that they would remain in its warehouse only as long as it took to find a customer, and it compressed the time it took to find one by basing its deliveries to the warehouse on projections of demand calculated from customers’ purchase histories.

This decision is of great value going forward because it provides a much needed simplified roadmap in determining potential liability. Practitioners can use this decision to argue that even in situations where the final destination of product is predicated on customer inventory forecasts or pre-existing orders, any movement within the state satisfying four criteria will be deemed interstate commerce exempting those employees moving the product from overtime pay. Employers can use this decision to determine whether current compensation policies for truck drivers moving product solely within the state is in compliance with the FLSA.

*If you have any questions or would like any additional information regarding this topic or any other employment law matter, and preemptive steps that you can take to protect and/or prepare your organization, please contact attorney Christina Lopez-Nutzman at [cnutzman@salawus.com](mailto:cnutzman@salawus.com) or 312.894.3371 or attorney Jeffrey Risch at [jrisch@salawus.com](mailto:jrisch@salawus.com) or 312.894.3302.*

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## Illinois Vehicle Code and Phone Use in School Zones Act

By Julie A. Proscia

2010 has already brought forth substantial legislative changes that require companies to revamp their policies and procedures.

On January 1, 2010, an amendment to the Illinois Vehicle Code became effective, prohibiting drivers from using an electronic device to compose, send or read electronic messages. Electronic messages are defined to include, and are not limited to, email, text messages, instant messages, and/or commands or requests to access internet sites.

On January 1, 2010, the Phone Use in School Zones Act also became effective. This Act prohibits the usage of mobile phones in school zones, regardless if the usage is with a hands free device or not. The only time a person may use a mobile phone in a school zone is if the individual is engaged in highway construction or a medical emergency and the phone is in hands free mode.

The advent of these prohibitions presents potential increased liability for companies that require employees to drive for their position. As such, it is important for all companies to update or institute mobile phone policies.

**Clients who currently subscribe to SmithAmundsen’s Labor & Employment Frontline Program should have already received a revised Mobile Phone Use policy as part of this unique program.** If you are not a member of the Frontline Program but would like more information about the \$50 per month fixed retainer program, please contact our Labor & Employment assistant Emily Lempa at [elempla@salawus.com](mailto:elempla@salawus.com).

*If you have any questions or would like additional information regarding this topic and preemptive steps you can take to protect your organization, please contact Julie A. Proscia at 630.587.7911 or [jproscia@salawus.com](mailto:jproscia@salawus.com).*

# Immigration Alert

By Sara M. Stertz

## NEW REQUIREMENTS FOR ILLINOIS EMPLOYERS ENROLLED IN E-VERIFY – HAVE YOU FILLED OUT THE NEW FORM?

Employers need to be aware that Illinois now requires additional documentation for those employers enrolled in E-Verify. Pursuant to the Illinois Right to Privacy in the Workplace Act, new requirements for E-Verify participants went into effect on January 1, 2010. If an employer in Illinois enrolls for E-Verify the employer **MUST** attest to such with the State of Illinois through a form provided by the Illinois Dept. of Labor that:

- The employer received the E-Verify Training materials from the Department of Homeland Security (DHS) and ALL employees who will administer the program have completed the E-Verify Computer Based Tutorial (CBT)
- That the employer has posted the notice from DHS indicating that the employer is enrolled in E-Verify

The form must be completed by January 30, 2010 if the employer enrolled in E-Verify prior to January 1, 2010 or upon initial enrollment with E-Verify after January 1, 2010.

A copy of the **Illinois Department of Labor Attestation Form** can be found by clicking [here](#). The DHS Poster indicating the employer is enrolled in E-Verify will be provided by DHS upon enrollment into the program. Employees must retain a copy of the form and provide it to the state upon request.

## IMMIGRATION UPDATE: IT IS TIME AGAIN FOR H-1B APPLICATIONS TO BE FILED

If you are an employer who is planning to apply and sponsor an H-1B employee in 2010, the time is now to start the application process. The first available date to file an H-1B petition is April 1, 2010. With the economy seemingly on the uptake, demand for H-1B visas may far outweigh the demands of last year and the 65,000 visa cap may be achieved quickly. Due to the downturn in the economy in 2009, the H-1B visas available to employers remained for many months past the initial available filing date of April 1. We do not know what the demand will be for 2010 but no employer should rely on visas being available late into the year like last year.

*If you have any questions or would like any additional information regarding this topic or another matter, and preemptive steps that you can take to protect and/or prepare your organization please contact attorney Sara Stertz at [ssertz@salawus.com](mailto:ssertz@salawus.com) or 312.894.3265.*

# A Primer on Non-Compete Agreements

By Jeffrey M. Glass

An issue that frequently arises is the enforceability of restrictive covenants, also known as non-compete clauses. Below is a quick overview of some factors courts consider when deciding whether to enforce these provisions, and some pointers for dealing with common practical issues that arise.

Non-compete clauses are contrary to free competition. Accordingly, the deference courts typically give to private contracts does not apply. Instead, courts scrutinize these provisions to determine whether the party seeking to enforce them has a “protectable interest.” If such an interest exists, the analysis shifts to whether the restriction is reasonably tailored to protect it.

One category of protectable interest is a near-permanent customer relationship. This exists where the relationship existed before the employee was hired, or where customer loyalty is with the company, not the employee.

The other main category of protectable interest is confidential or proprietary information. This is information that is not known outside the company, that has been kept confidential, and that has value as a result. Examples include pricing formulas, customer profiles, and product designs.

If a protectable interest exists, the analysis shifts to whether the restriction is reasonable as to duration, geographic area, and scope of prohibited activity. In terms of time, studies indicate that courts hesitate to enforce covenants beyond two years (generally speaking).

While the foregoing may seem simple enough, in practice each case presents unique issues and many variables.

*Now that you know the general guidelines, here are a few practical tips:*

- If you want to enforce a non-compete, pay the departing employee any compensation to which he is legitimately entitled. You may forfeit the ability to enforce a valid restriction if you breach your obligations to the employee.
- Courts construe restrictive covenants against the drafter. They can refuse to enforce a draconian restriction. Therefore, resist the temptation to draft overly aggressive restrictions.
- A party seeking to enforce a non-compete can strengthen its case in advance by using password protected databases for customer data, and having the employee at the time of hire acknowledge in writing that he is being granted access to confidential information. This will also go a long way in exercising possible rights under applicable Trade Secrets laws.

■ If you are hiring an employee who has a non-compete agreement with his former employer, make sure he does not take any information with him. There was a case where a company hired a salesperson who had downloaded information from his former employer's sales database prior to his departure. Although the information was basically worthless, the case dragged on for years because the court assumed that he would not have taken it if it did not have value.

■ Independent contractors cannot be bound to restrictive covenants, because by definition an independent contractor has the right to perform similar services for others. Including restrictive covenants within an independent contractor agreement is an all too common fatal flaw.

*If you have any questions or would like any additional information regarding this topic or another matter, and preemptive steps that you can take to protect and/or prepare your organization please contact attorney Jeffrey Glass at [jglass@salawus.com](mailto:jglass@salawus.com) or 815.904.8804.*

## Harassment of Female Employees Costs Doctor 257,000

By Jennifer M. Reddien

On December 21, 2009, the U.S. Court of Appeals for the Fifth Circuit found a Texas medical clinic liable for \$257,000 in back pay and damages for sexual harassment and retaliation under Title VII of the 1964 Civil Rights Act after finding that the male physician that owned and operated the clinic repeatedly propositioned and harassed female employees. *Alaniz v. Zamora-Quezada*, 2009 U.S. App. LEXIS 28052 (5th Cir. 2009). The Court affirmed that the physician, Dr. Zamora-Quezada, engaged in quid pro quo harassment toward three of four plaintiffs and created a sexually hostile work environment for female employees.

The female employees alleged that the physician, Dr. Zamora-Quezada, engaged in various inappropriate behavior, including but not limited to, the following: frequently asked them out, forced them to dance with him, caressed their hands, legs, and back, inappropriately stared at their bodies, suggested that they wear more revealing clothing, grabbed them and kissed them, asked them the color of their underwear, told them they could keep their jobs if they had a sexual relationship with him, and urinated in his private bathroom with the door open. When two of the female employees refused the physician's advances, Dr. Zamora-Quezada fired them for poor performance. Another employee was fired after she was unable to meet impossible deadlines and was labeled a "sexual harassment spy" by Zamora. The fourth employee was terminated for allegedly stealing money and pharmaceuticals after Dr. Zamora-Quezada unjustifiably reprimanded her and eliminated her position. The employees filed a lawsuit alleging quid pro quo harassment, hostile work environment, and retaliation against Dr. Zamora-Quezada.

The defendant, Dr. Zamora-Quezada, argued that the plaintiffs did not produce sufficient evidence to establish a sexually hostile work environment under the multi-factor "totality of the circumstances" standard, as set out in the U.S. Supreme Court's decision in *Harris v. Forklift System, Inc.*, 510 U.S. 17 (1993). The Court disagreed with the defendant, reasoning that based on the evidence that the physician repeatedly and frequently propositioned the female employees, commented on their physical appearance and dress,

attempted to kiss them, and touched them without their consent, the District Court did not err in upholding the jury verdict on the sexual harassment claim. Moreover, the Court noted that based on the facts, a jury could reasonably determine that the physician's conduct materially altered the plaintiffs' conditions of employment and created a sexually hostile work environment.

In reaching its decision, the Court relied on *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871 (5th Cir. 1999) and *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996), finding that the physician's harassment in the *Alaniz* case was more egregious than the harassment in both the *Shepherd* and *Farpella-Crosby* cases. In *Farpella-Crosby*, the Court focused on the frequency and crudeness of certain remarks and concluded that the remarks were sufficiently severe and pervasive to create a hostile work environment absent evidence of propositioning or inappropriate touching.

The Court in *Alaniz* upheld the jury's damages awards of \$51,286 in back pay, \$42,000 compensatory damages and \$164,000 in punitive damages.

There are several steps employers should take to prevent harassment in the workplace. *First*, employers should frequently review anti-discrimination and harassment policies and complaint procedures to confirm that they are consistent with current law (The law is constantly changing, are your policies and practice keeping up?). *Second*, employers should train all employees on the nuances of a diverse workplace and place an emphasis on the prevention of harassment (exclusively training "management" is not enough). *Lastly*, employers should take appropriate measures to ensure that dedicated management is adequately trained in the sophistication of internal investigations and related workplace anti-harassment monitoring ("management" is still the employer's eyes and ears).

*Jennifer Reddien is an attorney with SmithAmundsen's Labor & Employment Practices Group where she counsels employers on both traditional labor and employment law matters and focuses her practice on litigation, including preventative strategies. Please contact Jennifer at [jreddien@salawus.com](mailto:jreddien@salawus.com) or 312.894.3245.*

## FEBRUARY

### 2010 LABOR & EMPLOYMENT LAW FORUM

Presenters: SmithAmundsen Labor & Employment Practice Group

This full day presentation at the Valley Industrial Association will provide the latest updates and revisions on labor and employment. Topics to be discussed include:

- Employment Case Law Updates
- Employment Legislative Developments (federal & state)
- Managing the "Problem" Employee (10 Rules every HR Manager must know)
- Health Care Reforms (and the impact on employers)
- Preventing/Correcting Employee Leave Abuse
- Labor Update: State of Unions in the Fox Valley & Key Legal Developments
- Immigration/E-Verify Updates
- Wage/Hour Developments (compensable vs. non-compensable, overtime, preventing lawsuits, commission issues, and exec compensation plans)

- Date: February 4, 2010
- Location: Aurora, IL
- Time: 8:00 am - 3:00pm
- To register, please contact please contact [preese@viaassn.org](mailto:preese@viaassn.org).

### EMPLOYEE CLASSIFICATION & PREVAILING WAGE UPDATES

Presenter: Jeffrey Risch

On February 6, 2010, Jeffrey Risch, will present "Employee Classification & Prevailing Wage Updates," at the Midwest Truckers Association Annual Convention in Peoria, IL. Now in its 47th year, Mid-West Truckers Association represents and services 2,700 members in 15 states. Mid-West Truckers Association members are trucking companies and companies that operate trucks as part of their business.

- Date: February 6, 2010
- Location: Peoria, IL
- Time: 10:30 am
- To register, please click [here](#).

### DOG EAT DOG... PROTECTING YOUR BUSINESS TRADE SECRETS AND CUSTOMER RELATIONSHIPS FROM THE COMPETITION

Presenter: Jeff Risch

This webinar, co-sponsored by the Illinois Chamber of Commerce, will cover:

- Contract Rights (The Good, Bad & Ugly)
- Non-Compete Agreements
- Non-Solicitation Agreements
- IL Trade Secrets Act
- Rules Before Hiring from Your Competition

- Date: February 11, 2010
- Webinar
- Time: 1:00 pm - 2:45 pm
- To register, please click [here](#).
- Use coupon code [h4yh66qp3f](#) to save \$30.00 off your registration!

### IF THE DEPARTMENT OF LABOR STOPS BY TODAY, WOULD YOU PASS A SURPRISE AUDIT?

Presenter: Rebecca Dobbs

This Assurance University program will prepare attendees for Department of Labor (DOL) audits and teach them how they can protect themselves and meet fiduciary responsibilities before the DOL requires an audit. The program will cover:

- The difference between an employee (W2) and an independent contractor (1099) from the standpoint of two critical government agencies - the IRS and Illinois Department of Employment Security
- How to protect yourself when hiring and classifying a W2 versus a 1099 hire
- How and when an individual contractor can pursue benefits under an ERISA plan
- How to minimize potential liability for misclassification

- Date: February 23, 2010
- Location: Schaumburg, IL
- Time: 8:30 a.m. to 12:00 p.m.
- To register, please click [here](#).

### BULLYING, VIOLENCE & DISCRIMINATION IN THE WORKPLACE

Presenter: Julie Proscia and Leslie Day of Precision Human Resources

With the economic climate uncertain, companies are facing a rapidly changing work environment that is faced with uncertainty, hostility and violence. Julie Proscia and Leslie Day will discuss the rise in violence, workplace bullying and discrimination in the workplace by examining counseling strategies and policies, which are procedures that can save companies thousands of dollars in litigation after an incident erupts. Topics include:

- Bullying is a new focal area for HR professionals. Is it illegal? Find out!
- Retaining employees who fight, threaten, harass or intimidate is a legal exposure! Find out why!
- Harassing behavior has a legal definition and a "street" definition. Make sure you are correct when interpreting employee actions as "illegal."
- Retaliation by management is a HUGE landmine for all employers. Recent clarification of the definition is important to understand to prevent accidental legal exposures.

- Date: February 26, 2010
- Webinar
- Time: 9:00 am - 10:00 am
- For additional information and to register, please contact Emily Lempa at [elempa@salawus.com](mailto:elempa@salawus.com).