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continued from page 1

our vice president of programming, we will focus on educational topics that will help our members grow as in-house legal professionals. We will also strive to provide more programs through our distance learning infrastructure, including recording and storing programs that can be accessed on the WMACCA website.

- Second, we will endeavor to increase the branding and prestige of the in-house bar by highlighting the activities of our members. Under the leadership of Bob Gans, of Computer Sciences Corporation, our vice president of external relations, we will publicize “Monthly Deal” features that describe corporate transactions, regulatory achievements, and litigation wins in which our members took lead roles. Please be sure to provide Ilene Reid with information on achievements in these areas.
- Third, we will continue to improve our signature programs, including the Corporate Counsel Awards, Corporate Scholars Program, New Lawyers Symposium and law-school outreach program, and institute a new General

Counsel Breakfast Club. Manik Rath of LMI, our president-elect, will manage these activities.

- Fourth, we will focus on providing high-quality programming, networking events and community involvement programs for our members in central and southern Virginia. Vanessa Allen of Philip Morris USA Inc., of the Central and Southern Virginia Steering Committee, will lead these activities.
- Fifth, we will attempt to be more interactive with our members. To this end, we will have a spring and fall “town-hall” conference call, open to all members where I, and other board members, will answer questions and solicit ideas on how we can improve and grow our association.

As we begin 2008, I look forward to continuing to help WMACCA grow and evolve, implementing our strategic plan and working to transform our operational structure to support the size and activity level of our association. These goals, along with your enthusiasm and creativity, will be a winning combination for WMACCA.



Ilene G. Reid
 WMACCA Chapter
 6928 Race Horse Lane
 Rockville, Maryland 20852



Kevin Lapidus, SVP, General Counsel and Corporate Secretary, SunEdison LLC President's Message

For the in-house bar, WMACCA serves an important role in the legal profession. Our association provides visibility and prestige, focused educational programming (frequently provided by our own members), networking opportunities and community involvement and service events for our members. Now in its 27th year, WMACCA has grown to more than 1,600 members from approximately 500 companies and organizations, facilitates more than 60 events per year, and has an operating budget of almost \$600,000.

I am pleased to have been selected as the president of WMACCA for the upcoming year. I have enjoyed my prior positions in the association and look forward to continuing to help WMACCA grow and achieve its goals. Over the past few years, I have enjoyed working with strong WMACCA leaders, and would like to specifically thank Mary Kennard, our immediate past-president, for her service to the association.

In prior years, and continuing this year, WMACCA has been fortunate to have a diverse and dedicated leadership team. The 18-member WMACCA board of directors, the chairs of our eight forums, other volunteer leaders and our excellent administrative staff, led by our executive director, Ilene Reid, help plan and execute WMACCA activities and initiatives. Along with our membership base, these individuals are a core association asset and one of the keys to

our success. As president, I will attempt to organize, motivate, and coordinate this leadership team. Given WMACCA's size and activity level, I believe the board's role is akin to a senior-level operating team in a company. To this end, I have developed a new organization chart for the association that clarifies leadership roles and creates an effective operating structure. The chart is reprinted on pages 3–4 of this newsletter.

I believe this organizational structure will create the opportunity and scope of authority for many different individuals to help lead the organization. I believe in distributed leadership and creating a culture and mechanism for creativity. I also hope that many of our members will look at this structure and see an opportunity to become personally involved by reaching out to contact members of the leadership team and volunteering their assistance. There have been a number of inflection points and key new initiatives in WMACCA's past that have propelled the association forward, and I hope that together we can brainstorm and implement additional creative and useful new ideas.

Last May, the WMACCA board concluded a strategic planning initiative. As we begin a new year, I believe it is useful to revisit and summarize this plan to provide a framework for our 2008 activities. The board described WMACCA's mission statement as:

It is the mission of WMACCA to be the preeminent provider of educational programming and networking opportunities for attorneys who practice law as employees in

corporations and other private sector organizations in this region. To fulfill this mission, WMACCA will promote the common interest of its members, contribute to their continuing legal education, seek to improve understanding of the role and value of in-house counsel, work with regulatory and government agencies and other officials, as appropriate, to advocate the interests of our membership, and encourage advancements in the standards of corporate legal practice. WMACCA also will provide its members with meaningful opportunities to satisfy their pro bono and community service responsibilities.

Building on the strategic plan, I would like to emphasize certain strategic goals I will focus on this year, as well as the tactical steps to achieve those goals.

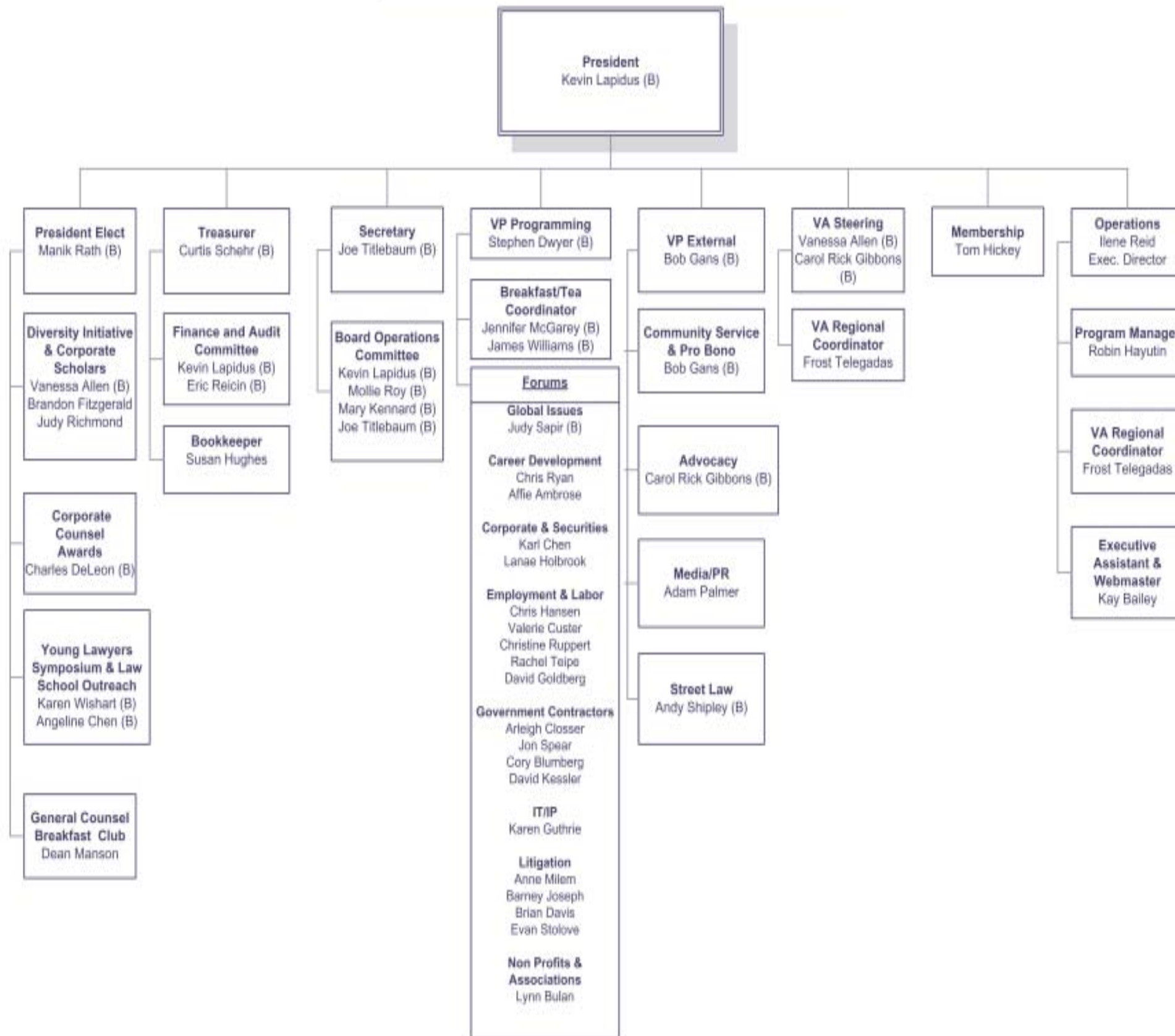
- First, I believe WMACCA is uniquely situated to provide targeted substantive programming for the in-house bar, and that this is a key attribute of membership. Under the leadership of Stephen Dwyer of the American Staffing Association,

continued on page 4

WMACCA's Special Projects and Initiatives Chart2

WMACCA Focus Extra by Womble Carlyle Sandridge & Rice, PLLC

WMACCA Organizational Chart 2008



If you would like to become more involved in one of WMACCA's special projects or initiatives, you can contact the responsible volunteer leader by email:

Special Projects and Initiatives — **Manik Rath, president-elect** – mrath@lmi.org

- **Diversity Initiative and Corporate Scholars**
Vanessa Allen – vanessa.l.allen@pmusa.com
Brandon Fitzgerald – brandonfitzgerald@mac.com
- **Corporate Counsel Awards**
Charles DeLeon – charles.deleon@gtsi.com
- **New Lawyers Symposium and Law School Outreach**
Karen Wishart – kwishart@tv-one.tv
Angeline Chen – angeline.g.chen@lmco.com
- **General Counsel Breakfast Club**
Dean Manson – dmanson@hns.com

Programs — **Stephen Dwyer, VP programming** – sdwyer@americanstaffing.net

- **Breakfast/Tea Coordinators**
Jennifer McGarey – jennifer.mcgarey@rcn.net
James Williams – james.williams@liquidityservices.com
- **Forums:**
 - Career Development**
Chris Ryan – cryan@k12.com
Affie Ambrose – aambrose@acumensolutions.com
 - Corporate & Securities**
Karl Chen – karl.chen@watsonwyatt.com
Lanae Holbrook – lanae.holbrook@nasdaq.com
 - Employment & Labor**
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Anne Milem – anne.milem@slma.com
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Non-Profits and Associations

Lynn Bulan – lbulan@lsc.gov

External Relations Initiatives — **Bob Gans, VP external relations** – rgans@csc.com

- Community Service and Pro Bono** — Bob Gans – rgans@csc.com
- Advocacy** — Carol Rick Gibbons – carol.gibbons@capitalone.com
- Media/Public Relations** — Adam Palmer – apalmer@cyveillance.com
- Street Law** — Andy Shipley – andrew.shipley@ngc.com

Central and Southern Virginia Steering

Vanessa Allen – vanessa.l.allen@pmusa.com
Carol Rick Gibbons – carol.gibbons@capitalone.com
Frost Telegadas, Regional Administrator – ftelegadas@verizon.net

Membership — Tom Hickey – thickey@cyrencall.com

Focus *Extra*

New Federal and State Ethics Laws Present High-Stakes Challenges for Business and Their In-House Counsel

By Lawrence H. Norton and James A. Kahl
Womble Carlyle Sandridge & Rice, PLLC

Lunches, lobbying, and campaign donations—once activity considered to be just part of doing business—have become a high-stakes compliance challenge for corporations and associations, and the in-house counsel who advise them. A new federal ethics and lobbying law requires an executive in every organization that employs a lobbyist to swear under oath that the entire organization is in compliance with Congressional ethics and lobbying rules. Even if a company only occasionally hires an outside lobbyist, the employees of that company must now comply with more rigid Congressional gift and lobbying restrictions.

At the state and local levels, a personal campaign contribution by a senior executive may cause a company to face debarment from government contracting or loss of existing contracts. State and local governments have also tightened gift rules and expanded lobbying laws to cover a wide range of interaction with legislative and executive officials, boards, commissions, and public corporations.

Here are some of the biggest risks now facing businesses and their executives:

“Sarbanes-Oxley-Type” Certification For Companies That Employ Even A Single Lobbyist

The new federal ethics and lobbying law (“The Honest Leadership and Open Government Act” or “HLOGA”) requires that, for the six-month period beginning on January 1, 2008, and every six-month period thereafter, one person sign—under penalty of perjury—a “Sarbanes-Oxley-type” certification on behalf of the organization. The certification must state that the organization is familiar with Congressional gift and travel rules, and that no one has “provided, requested, or directed” a gift (including travel) to a Member of Congress or staffer in violation of the gift and travel rules. Each individual lobbyist must also file a separate certification.

It remains unclear whether the sworn certification must attest to compliance by every employee of the company or some subset of employees. Further guidance from the House and Senate ethics committees is expected, possibly when the new filing form is released in March 2008. What is clear is that companies that employ lobbyists may not reimburse any of their employees for a meal or other benefit provided to a Member or Congressional staff.

This new semi-annual certification must also disclose detailed information about political contributions, and donations to inaugural events, Presidential libraries, and charities with close ties to a Member of Congress.

New Private Sector Liability For Violations of Congressional Gift and Lobbying Rules

Before the passage of HLOGA, Congressional ethics rules applied only to Members and their staffs. Now businesses that employ or retain lobbyists are subject to liability for violating these rules. Moreover, the House ethics committee has announced that the new gift restrictions apply even to a non-lobbyist employee of a company that occasionally retains an outside lobbyist. When that non-lobbyist employee merely buys lunch for a Congressional staffer, it exposes the employer to liability.

In general, HLOGA prohibits gifts from lobbyists, and the organizations that employ or retain them, to Members of Congress and their staffs. While there are some circumstances where payments for food and other gifts are permissible, the exceptions are nuanced and are subject to continuing guidance from the ethics committees. Indeed, lunches with Members, fact-finding missions, and Member appearances at company-sponsored events all may implicate gift and travel restrictions, and must be analyzed carefully. Also, companies that employ or retain lobbyists may no longer pay for a Member’s travel, except for one-day visits and one overnight—and even those trips may not be planned or requested by a lobbyist.

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While the effect of these new gift and travel restrictions may be to push more activity into the campaign fundraising arena, caution is advised there, too. Federal campaign finance laws prohibit the use of corporate facilities, equipment, and staff in connection with fundraising activities, and impose other restrictions. This means an executive's assistant may not handle RSVPs for a private fundraising event, for example, and the company's courier services and stamps may not be used to transmit campaign contributions.

Companies May Forfeit Public Contracts Under State and Local Pay-To-Play Laws

Many states are taking aim at the "pay-to-play" culture that surrounds the awarding of state and local contracts. An ever-growing number of states, counties and municipalities now bar or severely limit campaign contributions to certain covered officials by state and local contractors, their top executives, and in some instances, executives' spouses and dependents. Businesses that fail to comply with these laws may face the immediate severing of existing contracts, suspension from consideration for future contracts, significant fines, and imprisonment.

Currently 20 states have so-called "pay-to-play" laws at the state or local level, and others are actively considering them. Keeping track of these laws is a challenge. For instance, many U.S. cities have their own pay-to-play rules, as do approximately 21 New Jersey counties.

Just Who Is A Lobbyist Anyway?

If a person spends substantial time on Capitol Hill or in state legislatures, trying to get new legislation passed or keep the law as it is, he or she is usually required to register as a lobbyist. HLOGA, however, sharply reduces the thresholds for registration, in particular the amount of money a company must pay its employees for lobbying activities before triggering registration under the Lobbying Disclosure Act.

New state and local lobbying laws sweep even more broadly, regulating all kinds of activity that does not fit within traditional concepts of lobbying. In some states, the definition of "lobbying" includes attempting to influence government contracts, seeking

business and tax incentives, calling an executive branch or board official to describe a client's product or service, grassroots activities, or even having lunch with an official which will merely engender "goodwill." Once a person meets a state's definition of lobbying, there are usually registration and reporting requirements, and there may be restrictions that apply to campaign contributions.

Ignore These New Laws At Your Peril

The price for violating these new federal, state, and local laws is steep. HLOGA has added enforcement muscle to the Lobbying Disclosure Act by increasing maximum fines from \$50,000 to \$200,000 per violation, and making felonies of certain violations, punishable by up to five years in jail. The Comptroller General is also empowered to conduct random audits of Lobbying Disclosure Act filings, starting with the first quarter of 2008.

Similarly, new state and local laws call for hefty fines, debarment, and imprisonment. Many states have established new enforcement agencies or handed new powers to existing agencies. And the harm to business reputation can be more damaging than the sanction imposed by a government agency.

For any business that interacts with public officials, a sound compliance program is critical. In developing the program it is essential to understand the vulnerabilities of the company and its executives, and tailor a program to address them. Businesses must treat government affairs compliance as seriously they do other areas of organizational exposure. In fact, because companies cannot completely eliminate the possibility of a rogue employee or inadvertent violation, the existence of a serious compliance program is the best defense to a government inquiry or investigation.

Lawrence H. Norton and James A. Kahl served as general counsel and deputy general counsel, respectively, of the Federal Election Commission from September 2001 to March 2007. As leaders of the FEC's legal team, Larry and Jim played a critical role in every aspect of implementation and enforcement of the landmark McCain-Feingold law. They currently lead the Political Law Practice at Womble Carlyle Sandridge & Rice, PLLC. Larry can be reached at Lnorton@wcsr.com and Jim can be reached at jkahl@wcsr.com.

FLSA Claims Continue to Vex Employers

By Charles A. Edwards
Womble, Carlyle, Sandridge & Rice PLLC

Over the past three years, there have been huge swings in the amount of litigation under the federal Fair Labor Standards Act—the statute enacted in 1938 to guarantee the payment of minimum wages and overtime compensation. Recent statistics show that FLSA litigation declined by 24 percent in 2007 after rising by 41 percent in 2005 and by 25 percent in 2006¹. However, Department of Labor statistics show that during fiscal year 2007, the number of workers awarded back wages because of DOL wage-hour investigations was the second largest number since 1993, and the amount of those wages—\$220,613,703—is the highest ever.

Can these results be reconciled, and what predictions can we make about future litigation activity? The answer may well be specific to particular locations and the industries that are located there.

FLSA Claims Often Brought as Class Actions

One interesting example arose in the United States District Court for the Northern District of Georgia, headquartered in Atlanta, where a single plaintiffs' attorney, filed 29 different FLSA complaints, most of which claimed to be class-actions. Defendants included poultry processors, construction concerns, hotels, pawn shops, and real estate brokerages. The Florida-based personal injury firm whose associate filed the Georgia has an Atlanta office with particularly close ties to labor unions, an exceptionally lucrative referral source. Their ten earliest-filed FLSA cases in Georgia targeted an industry in which litigation sponsored or encouraged by organized labor has been noteworthy: Union activity in the food processing sector is keyed to assisting employees who seek sick pay for time spent before and after their work shifts—often called “donning and doffing.”

Why does this matter to employers who aren't in a union's crosshairs, or whose workforce is not unionized? Simply, no employer is immune.

Wage-hour litigation usually involves the same type of claims that have shown up in the Georgia cases and in similar lines of business. Among the most common are (1) that employees are not being paid for all the time they devote to their jobs; and (2) assertions of “misclassification” of employees—i.e., that those who are deemed “exempt” by virtue of their supervisory, administrative, professional, outside sales, or skilled computer duties are, really production workers whose compensation should include premium pay for overtime worked.

1. “As Suits Decline, Lawyers Say Cos. Have Wised Up,” *EmploymentLaw360* (January 2, 2008) (on the Web at employment.law360.com).

In addition, claims under state wage-hour laws are often included in the complaint, and related employee benefits issues may become important. A wider look at wage-hour litigation would encompass the contingent workforce, both independent contractors who assert they are not “independent” and temporary, loaned, and other workers who are not paid in the same manner as so-called “statutory employees.” More and more wage claims are being brought in state courts, where plaintiffs may not face stringent deadlines and the likelihood of surviving motions can be greater.

Other factors that make FLSA litigation problematic for employers are the general lack of insurance coverage for compensation practices, the absence of any requirement for pre-litigation resort to a regulatory agency complaint or charge, and the extreme generality of DOL regulations which, being relatively new, are still being explained by judicial decisions. FLSA class action cases are often troublesome because—even though there is a requirement that claimants must consent to be part of the litigation—federal district judges are usually less demanding in these cases than they are in certifying a traditional class action. Certification ends up being a rather relaxed process, preceded by limited formal discovery and followed by an opt-in notice to eligible employees—an invitation to join the party.

Moreover, the FLSA allows the prevailing plaintiff—not the prevailing “party”—to recover attorneys' fees. This one-way street means that an employer wanting to resolve the litigation will need to address the fees question as well. Settlement of a wage-hour claim may require more formality than settlement of most employment litigation, and the court may become concerned with the impact of a settlement as to those who have not consented to become a part of the case. Conversely, it is to an employer's interest to conclude all litigation with its current or former employees, so the incentive to allow a broader settlement, with its attendant greater costs, may be compelling.

Giving the Potential Costs, Take Steps to Minimize Exposure

Finally, any federal court litigation raises the specter of electronic discovery. Dealing with this issue in a document-intensive case can drive up both the costs and the administration headaches of the equation. Experienced plaintiffs' counsel often lead with a demand letter reminding the employer of how much litigation costs, with emphasis on the e-discovery process. And don't forget the practical problems presented by doing battle with your current employees who are statutorily protected against retaliation, as well as the potential for adverse publicity and damage to customer relationships.

In short, the larger amounts recovered by DOL in settlements—usually reached without litigation—are indicative of the contin-

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ued rise in employer exposure to claims. The drop in new-case filings still leaves an overall increase in filed cases and—because of the large number of class actions—can mean that many more claimants are seeking money from employers than was the case four years ago.

Prudent employers are taking steps to minimize their exposure. Critical analysis of compensation practices cannot be limited to a survey of the employer's policies and payroll records—it must take into account the panoply of components of the human resources delivery of goods or services with a full appreciation of their legal implications. Job descriptions designed to identify “essential functions” for ADA purposes may hamper your definition of exempt versus non-exempt duties. In the absence of careful documentation (a particular problem regarding salaried employees who do

not have to complete time records, or who do so on an honor system), employees are free to estimate how many hours they typically work, and employers have a real task of defending themselves. Regardless of the strategy you choose—and it is prudent to make decisions before battle begins—being fully informed is the best way to start. You may want to consult <http://flsa.blogspot.com/>—Womble Carlyle's FLSA blog—as a part of that education.

Charles A. Edwards is a member of the Labor and Employment practice group at Womble Carlyle Sandridge & Rice, PLLC, resident in the firm's Winston Salem, N.C., office. He also served as human resources counsel for the firm and as leader of its Labor and Employment Practice Group from 1995 until 2007, and is a co-author of the firm's FLSA blog. Charlie can be reached at cedwards@wcsr.com.



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