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THE COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE MIDWEST

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Unanswered Questions Face Nebraska Water Users in 2005

Water has been a vital factor in the prosperity of Nebraska since the Homestead Act encouraged the state's settlement. Throughout most of the 19th and early 20th centuries, farmers and ranchers based their livelihoods on inconsistent rainfall. To combat the constant irregularities in rainfall, early farmers created irrigation districts that harnessed the waters of Nebraska's rivers and put those waters to beneficial use for crop irrigation. The use of surface water irrigation allowed those farmers who invested in irrigation districts to receive a constant supply of water in the growing months and to increase the profitability of the fertile soils of our state.

The beneficial use of surface water was limited to those areas that were well-suited for irrigation ditches. The use of surface water was not economically feasible for many areas outside of the existing river valleys. The "Dirty Thirties" bankrupted many farms that did not have the constant supply of water provided by irrigation districts. In Nebraska, a disparity grew between the value of fertile lands that had access to irrigation districts and those fertile lands that had to rely on unpredictable rainfall.

In the 1940's, the invention of center pivot irrigation changed the face of agriculture and Nebraska. Center pivot irrigation allowed those farmers who had been shut out of irrigation districts by location, prosperity, or politics to have access to Nebraska's water resources. The ability to tap the groundwater resources in Nebraska provided new prosperity to Nebraska farmers.

The beneficial use of groundwater and surface water by agricultural, industrial, and municipal users continued unabated from the early 1950's until the early 1990's. In that decade, the realization that groundwater was not an unlimited resource began to hit home in the Republican River Basin. Upstream groundwater wells that had pumped from the plentiful groundwater of the Ogallala aquifer began to experience falling water tables. Downstream surface water irrigators in Kansas were not receiving their appropriated amount. The falling water tables and diminished flows resulted in a battle between the water users in Nebraska and Kansas. The result was a Supreme Court decision apportioning a certain amount of surface water to Kansas, thereby requiring groundwater well restrictions in Nebraska.

Why didn't Nebraska's water regulators act to prevent groundwater pumping from affecting surface water rights? Unfortunately, water law in Nebraska has been on a collision course between groundwater users and surface water appropriators for a long time. Traditionally, Natural

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Resource Districts have been the regulators of groundwater uses, while the Department of Natural Resources has regulated surface water use. The dual systems set up by the Nebraska Legislature were unable to deal with the conflicts that arose between the two types of water use. The two regulators have battled over how to implement water restrictions and how to regulate hydrologically-connected surface waters and groundwater. These battles, and the situation in the Republican River Basin, led to the adoption of LB 962. LB 962 changed how Natural Resource Districts and the Department of Natural Resources will deal with these conflicts in the future.

As the Nebraska Legislature was dealing with the conflicts between Natural Resource Districts and the Department of Natural Resources with LB 962, the conflict between surface water users and groundwater users came to a head in the Nebraska Supreme Court. The Court heard arguments for *Spear T Ranch v. Knaub*, 269 Neb. 177 (2005). In this case, the Spear T Ranch near Scottsbluff sued a variety of groundwater users for conversion of their surface water appropriation rights. The Spear T Ranch's theory was that the surface water appropriation rights that they held on Pumpkin Creek were a property right that was being stolen by groundwater users who were pumping enough water to dry up the creek. Spear T Ranch's claim was originally dismissed by the District Court for failure to state a claim.

The Nebraska Supreme Court took the case on appeal to determine how conflicts between surface water appropriators and ground water appropriators should be addressed and whether Spear T Ranch had stated an adequate claim for relief by the court system. The Court focused on the interrelation between ground and surface waters stating: "Hydrologically, ground water and surface water are inextricably related." *Id.* at 183. With this truth in mind, the Court went about structuring a mechanism for dealing with conflicts between surface water appropriators and groundwater users. The Court was faced with two competing bases for water law in Nebraska: surface water appropriators's rule of prior appropriation and ground water appropriators's rule of correlative rights.

The Court refused to "apply the statutory surface water appropriation rules to conflicts between surface and ground water users." *Id.* at 185. The Court stated: "[The] prior appropriation rule . . . would give first-in-time surface water appropriators the right to use whatever they want to the exclusion of later-in-time ground water users. This could have the effect of shutting down all wells in any area where surface water appropriations are hydrologically connected to ground water." *Id.* The Court was unwilling to use this approach as "this would unreasonably deprive many ground water users" of any beneficial uses of water. *Id.* The Court's refusal to apply the prior appropriation rule to surface water and groundwater conflicts is a victory for groundwater users. The Court cautioned lower courts against using injunctions against groundwater users.

The Court was also unwilling to apply the traditional groundwater rule of correlative rights to the conflicts between surface water and groundwater users. Correlative rights "provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal." *Id.* at 188. "Under the rule, the overlying landowners have no proprietary interest in the water under their ground and each owner over a common pool has a correlative right to make a beneficial use of the water on his or her land. Priority of use is irrelevant because in times of shortage, the common supply is apportioned among the landowners based on their reasonable needs." *Id.* The Court was unwilling to use a pure correlative rights rule for conflicts between surface water appropriators and groundwater users, because the rule did not allow a clear avenue of relief for surface water users.

Rather than applying either the prior appropriation rule or the correlative rights rule, the Court decided to apply the rule outlined in the 2nd Restatement of Torts. The Court determined that "[t]he common law should acknowledge and attempt to balance the competing equities of groundwater users and surface water appropriators. The Restatement recognizes that ground water and surface water are interconnected and that in determining the rights and liabilities of competing users, the fact finder needs broad discretion." *Id.* at 194. The Court's decision to use the 2nd Restatement of Torts places the role of determining whether a groundwater user's use injures a surface water appropriator directly in the hands of the court system.

The rule announced by the Court is that "[a] proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of

water of another, unless . . . the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water." *Id.* (emphasis added). This decision by the Court makes those groundwater users whose withdrawal of groundwater has a "direct and substantial effect" upon a surface water appropriation liable for any losses (harm) that is "unreasonably caused".

The Court did not address what would be considered a "direct and substantial effect". Both surface water and groundwater users should be concerned with how the Court will determine a direct and substantial effect. It is possible that the Court could make a determination based on a specific distance from the stream (one mile) or that the Court could examine the hydrologic relationship of every watercourse in the state in different pieces of litigation. The determination of what constitutes a "direct and substantial effect" will be the first major hurdle faced in litigation.

In addition, the Court will have to determine when a groundwater use "unreasonably causes harm" to a surface water appropriation. The determination of what is "reasonable" is one of the most complicated (and litigated) subjects in the law. The Court did not give a lot of guidance to future fact finders in determining what is reasonable. The Court accepted the factors used in the 2nd Restatement of Torts as part of the test. *Id.* at 192. The Court declared that "[w]hether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making the reasonableness determination, the Restatement, *supra*, § 850A, provides a valuable guide, but we emphasize that the test is flexible and that a trial court should consider any factors it deems relevant." *Id.* As you can see, the Court has given broad discretion (and little guidance) to trial courts to determine what uses are reasonable and what uses are unreasonable.

So where do water users go from here? The Spear T decision will probably not immediately change uses of groundwater or surface water. However, the Court's decision to make groundwater users liable for injuries to surface water appropriators will probably mean many lawsuits in the next year, unless the Nebraska Legislature takes immediate steps to displace the Court's decision with a new statutory framework. Surface water appropriators will be lining up to collect damages for losses that may have been caused by groundwater users.

For surface water appropriators, their new, and probably only, remedy for prior losses is damages. In order to get these damages, surface water appropriators will have to take those groundwater users to court and prove that the groundwater users have a "direct and substantial effect" on their surface water appropriation and that the groundwater users's use "unreasonably caused harm" to the surface water appropriation. In addition, surface water users may be given a new groundwater use right to account for future losses to their surface water appropriation.

Groundwater users are faced with the fact that their withdrawals may make them subject to joint and several liability with other groundwater users for the losses suffered by surface water appropriators. This liability should make groundwater users concerned because the damages to surface water appropriations could be very large. For example, the damages asked for in the Spear T case were over $4 million. These damages would be minimal compared to those of the Central Irrigation District and other irrigation districts in Nebraska. Groundwater users should consider the upcoming risks from litigation in their watersheds. Litigation within each watershed may affect the major groundwater users. Groundwater users should be concerned with the remedy of joint and several liability, which allows a surface water appropriator to collect all of their damages from one groundwater user. The groundwater user is then required to collect from the other groundwater users who may have had "a direct and substantial effect" on the surface water appropriation.

As you can see, there are unanswered questions for both surface water appropriators and groundwater users. The answers to what is "a direct and substantial effect" and when does a groundwater user cause "unreasonable harm" will come from the courts. It is important that you consider how your rights will be affected by the pending series of litigation. If you have any questions regarding how the Spear T case, LB 962, or other statutes, rules and regulations will affect your water rights or your current water uses, please contact us at (402) 475-5100.

-Scott D. Peterson, Esq.

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Litigation Practice Group
of Rembolt Ludtke LLP

Our litigation practice encompasses virtually every area of civil litigation. Much of it focuses on business-related matters, but we handle numerous personal cases such as divorce, personal injury and adoption. The diversity of practice areas in the firm provides the litigators with expert advice in-house, enabling them to provide effective representation in a variety of matters. We make extensive use of paralegals and law clerks to help minimize the cost to clients.

Rembolt Ludtke attorneys appear in Nebraska state and federal courts (including the Eighth Circuit Court of Appeals) on both the trial and appellate level. We also represent clients in administrative proceedings before local, state and federal governmental agencies.

Our ultimate goal is to provide practical and result-oriented legal services. We recognize that frequently a trial in a court of law may be the least favorable outcome for all parties involved. So we strive, through a combination of thorough case preparation, a realistic analysis of the law and the facts, and the use of various means of alternative dispute resolution, to resolve matters in a fair and cost-effective manner, to avoid the uncertainties and expense involved in a trial.

Peter C. Wegman

Pete works in both our Lincoln and Seward offices in the areas of personal injury and wrongful death and family law. He earned his B.A. from the University of Nebraska-Lincoln and his J.D., with distinction, from the University of Nebraska College of Law. Pete is active in the community and within professional organizations, including currently serving on the Board of Directors of the Nebraska Association of Trial Attorneys.

Mark A. Fahleson

Mark received his B.S. and J.D., with high distinction, from the University of Nebraska. After graduation, he served as judicial clerk for a Nebraska Supreme Court judge, and as Chief of Staff/Legislative Director for a member of Congress. Mark practices in the areas of labor and employment, telecommunications and utilities, and government relations. He has published several articles, is a frequent seminar speaker, and has been an adjunct professor at the University of Nebraska College of Law.

Daniel E. Klaus

Before Dan joined the firm, he practiced for a time in Colorado; he remains a member of the Colorado Bar. He earned his B.A. from Nebraska Wesleyan University and his J.D., with distinction, from the University of Nebraska College of Law. Dan is an adjunct professor at the College of Law, and is a Fellow of Nebraska State Bar Foundation. Dan is a civil litigator, with experience in a variety of areas, including corporate and commercial litigation, telecommunications, antitrust and securities. He is currently the chair of the litigation practice group.

Brian S. Kruse

Brian received his B.S. and J.D., with high distinction, from the University of Nebraska. He has published articles, and is an adjunct professor at the University of Nebraska College of Law. Brian's litigation practice focuses on the areas of commercial and corporate litigation, and personal injury.

Glen Th. Parks

Glen is a graduate of the University of Nebraska, where he received his B.A. with high distinction and his J.D. with distinction. He served as judicial clerk to a Nebraska Supreme Court judge for a year before joining Rembolt Ludtke LLP. Glen's practice areas include intellectual property and commercial litigation, and appellate practice.

Jane F. Langan

Jane received her B.A., with high distinction, and J.D., with highest distinction, from the University of Nebraska. She is a former chair of the Young Lawyers Section of the Nebraska Bar Association, and serves as an ex-officio member of the Executive Committee. Jane currently represents Nebraska and Iowa on the Young Lawyers Division Special Project Team of the American Bar Association. She is an adjunct professor at the University of Nebraska College of Law. Her primary practice concentration is in commercial and corporate litigation, family law, and insurance corporate practice.

Scott D. Peterson

Scott graduated from the University of Nebraska-Lincoln and received his J.D. *cum laude* from the University of Arizona, James E. Rogers College of Law. Scott's practice is concentrated in civil litigation, agricultural law and environmental law.

WHY US?

One part of our litigation practice at Rembolt Ludtke is handling wrongful death and serious personal injury claims. Our litigators in this area are aggressive, competitive, experienced and caring people. We believe it is a privilege to be asked to help people who are dealing with the tragedy of the death of a loved one due to someone else's negligence, or coping with permanent injuries that make it difficult or impossible to support a family.

Why call us for this type of representation?

1. Our attorneys have participated in personal injury jury trials in five states. We have trial experience in most of the judicial districts in Nebraska. Our litigators speak at trial seminars and teach regularly at the University of Nebraska College of Law.

2. We don't advertise. Lawyers are now free to advertise their services, and many collision victims receive direct mailings from personal injury attorneys. We respectfully disagree with our colleagues who engage in that practice. Our work comes from referrals-which result from hard work and helping people.

3. Our clients have the option of hiring us on a hourly or contingent fee basis (we are paid for our services only if, and when, our clients receive a settlement). We believe it is important for clients to have that choice. Our representation agreements are clear and in writing, and we explain them carefully to clients.

4. Our contingent fee arrangement is fair. For clients hiring us on a contingent fee basis, we charge from 25-30% of the net recovery, versus the somewhat standard 33% of the gross recovery. Clients are reimbursed the litigation expenses they have paid, and holders of subrogation claims are paid, before we calculate our percentage fee.

5. We communicate regularly. Every litigation case is staffed with a partner, an associate attorney, a paralegal and a legal executive assistant. Our personal injury clients receive a detailed monthly statement explaining the work done on their cases, and an itemization of the litigation expenses incurred.

6. We limit our work. We recognize we can't be experts at everything, so we attempt to limit our practice in this area to wrongful death and serious personal injury. We carefully screen our cases and have a network of qualified attorneys whom we are comfortable referring clients to if we are not in a position to help them. Sometimes just getting people to the right attorney is the most important thing we do.

7. We don't sue doctors. We have a dynamic, growing health care practice, and we need to work with physicians and other health care providers to adequately represent our injured clients. We recognize that doctors, like attorneys and other professionals, occasionally make mistakes. When clients call with malpractice issues, we refer them to lawyers in other firms we believe are qualified for that type of representation.

8. We try cases. The vast majority of civil cases are settled without a trial, but often, to achieve a fair result, cases must be prepared and clients be readied for trial. We are comfortable before judges and comfortable before juries. Our opposition knows that.

Think of us if you or one of your loved ones is injured or killed through another's negligence. We find the way to make circumstances more bearable in those difficult times.

-Peter C. Wegman, Esq.

Bringing It Home

Lawyers see all kinds of people in all kinds of situations. Though clients are involved and invested in their complex business transactions and intricate estate plans, no area of law is more intense or personal than domestic relations.

Whether you're experiencing the joy of an opportunity to adopt or the heartache of a failed relationship, our attorneys have the experience, knowledge, and perspective to help. When some aspect of your home life requires legal attention, you need an attorney who knows the law and knows how to deal with emotionally charged situations. We know there are times to be aggressive - but we also know that sometimes more flies are caught with honey. People dealing with family litigation sometimes need help organizing their thoughts and priorities. We strive to be good listeners and confidants.

Our domestic relations attorneys, Peter C. Wegman and Jane F. Langan, have handled cases in most Nebraska judicial districts and have successfully taken a number of cases before the Nebraska Supreme Court and Court of Appeals. We are assisted by two paralegals with significant experience in this area. We work regularly with a number of other domestic relations attorneys and they know our reputations. Sometimes, divorce clients are surprised when we tell them we're glad they've heard their spouse has a good lawyer. The process is much smoother when we work with others who know what they're doing.

The domestic matters we handle are not cookie-cutter or routine. Many, if not most, divorce cases raise issues from other legal disciplines and may involve business valuations, inheritance and tax concerns, and division of pension and employee benefit plans. At Rembolt Ludtke LLP, we are able to offer a team approach when necessary to address more complicated issues.

In addition to divorce, paternity, and modification matters, we handle simple and complex adoptions and guardianships. We recently represented a couple in successfully adopting two children even after the biological parents became uncooperative. Last year, Jane Langan worked with a group of nine lawyers from other states on a nationwide project called "One Child, One Lawyer", designed to give lawyers training to handle adoptions and guardianships and to serve as lawyers for children in contested cases. The project educated hundreds of lawyers and was judged the best public service project of the year by the American Bar Association.

- Jane F. Langan, Esq.

TRICKS OF THE TRADEMARK

Hints to Securing Your Trademark Registration

So, you've come up with a fantastic slogan, or a unforgettable logo, or a witty name for your business. It's your baby; you created it and want to keep it from by being diluted by anyone else. You want the public to identify this fine symbol of your creative genius with **your** products and/or services, not those of anyone else. Registering it with the USPTO[1] is the obvious thing to do. But you knew that.

What you might not know, however, is the process (and the tricks of the trade) to attain and secure such trademark rights. Below are listed four such hints, garnered from decisions of the Trademark Trial and Appeals Board or TTAB. If there is trouble with the registration of a trademark, it may ultimately end up at the TTAB. If the people at the USPTO do not think your application for a trademark is sufficient, they will first ask us to correct the shortcomings. However, if they still ultimately decide not to register it, we can appeal that decision to the TTAB. The second way you may need to appear before the TTAB is to defend your trademark against another company opposing it.[2] In either type of trial before the TTAB, you would have to defend your trademark registration quite thoroughly. Therefore, it is very important to get the application right from the beginning.

(1) Be very careful not to misrepresent the scope of your trademark in your application. When you register a trademark, you have to sign a sworn statement about which goods and services you are offering to the public under the trademark. (Your trademark rights are limited to the type of goods and services actually offered with the trademark label.) While it may be easy to inadvertently include on the registration application goods or services that you *intend* or *hope* to offer under the trademark, it is very important to list only the things actually available at the time of the registration.[3] TTAB takes quite a hard line when it finds a false exaggeration of the scope of a trademark. It assumes you knew better and that assumption is difficult to overcome.

(2) Cooperate with the examining attorney at the USPTO. As mentioned above, the people there will alert you to any problems they see with your trademark application and give you a chance to correct it. It looks very bad if you get all the way to the TTAB and this Board discovers that you have not complied with the exact requests from the people at USPTO. In one case, USPTO asked the applicant for information on the product being sold under the trademark. In response, the applicant merely mentioned its website, basically telling them to find it themselves. The TTAB made an example of this poor applicant by rejecting the application and publishing this decision for all to see and cite. Don't be the next bad example for the TTAB to show to the world.

(3) There are many other small tricks of trademark registration to be applied in unique situations. For example, if you want to register a number of generic words, it is better to submit it as a phrase rather than as a compound word. For example, VEGGIE RINGS is more registrable than VEGGIERINGS for vegetable-based snack foods. As the case law now stands, a compound word will be rejected as too generic sooner than would a phrase.

(4) Another example of unique tricks concerns the "phantom mark". A phantom mark is a flexible trademark where part of the mark changes in new contexts, but the trademark protection stays the same. For example, a trademark of "McXXXXX" for all of McDonald's entrees, in which they replace the XXXXX with -Chicken, -Nuggets, -Fries, would be a phantom trademark. Most phantom marks are not registrable, following the general rule that only one mark is protected per application. However, we now know that when the possibilities of the changing element are reasonably limited, phantom marks are occasionally registered. A company successfully registered a telephone number (212) M-A-T-T-R-E-S and had rights to the same number with a different area code.

When you apply for a trademark, you hope never to end up before the TTAB because that means something has gone wrong. However, the TTAB is there to enforce your right to have a mark registered if it meets the requirements (even if the USPTO or another company does not think so). Your success before the TTAB rests largely on the quality of your application already filed. These hints hopefully will help avoid some pitfalls and increase your success in registering and defending your baby—that perfect trademark.

- Glen Th. Parks, Esq.

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[1] This stands for the United States Patent and Trademark Office.

[2] TTAB can also enforce <u>your</u> trademark against the registration of other, confusingly similar marks. If you discover that the USPTO registered such a mark, you have 30 days to oppose that registration before the TTAB. If you are ever in such a position, you might be able to use these tips against the registration of the offending trademark.

[3] You can also register an intent-to-use, which gives you priority over others' later attempts to use the mark, but you get the protection only after you begin to use the mark for that good or service in public commerce.

RECORDS RETENTION POLICIES

Odds are that your business will sue or be sued at some point in the future. If you've had the misfortune to have been involved in a lawsuit, you probably recall when your attorney asked you to make copies of relevant documents. Your attorney reviewed them, and then, to the extent the other side asked for copies, you had to produce them to your opponent. Often clients ask, "How long do I have to keep documents?" As with most legal questions, there is no clear answer. What is clear is that you need a records retention policy to protect your business.

A records retention policy determines when certain categories of documents are destroyed. Under no circumstances do you destroy documents, except in accordance with the policy.

Why have a records retention policy? If you destroy documents without a policy and are sued, the consequences could also destroy your case. If you intentionally destroy documents that could be used as evidence, the judge is allowed to instruct the jury that the destroyed documents must have been unfavorable to your case. Why else would you have destroyed them? The Nebraska Supreme Court recently stated, "When intentional destruction of evidence is established, the factfinder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction." *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). Likewise, the Eighth Circuit Court of Appeals, which governs Nebraska's federal courts, generally approved the following instruction:

> If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not. *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988).

In other words, the worst case scenario is that even if the evidence you destroy was actually favorable to you, the jury is permitted to find that it was unfavorable simply because you destroyed it. If you have and follow a records retention policy, the judge is less likely to give the above instruction.

The trick is in creating the policy, as there are no definite rules. Most courts hold that a records retention policy must be "reasonable". The Eighth Circuit Court of Appeals considers three factors to determine if your policy is reasonable:

The type of document. Different categories of documents should be kept for different periods of time. As an example, the Eighth Circuit noted, "A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints." *Lewy*, 836 F.2d 1104.

In addition, federal and state statutes may impose a minimum time frame to retain certain types of documents. For example, Section 11(c) of the Fair Labor Standards Act requires employers to maintain payroll records, collective bargaining agreements, and sales and purchase records for at least three years. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages.

Don't forget electronic copies of documents, including such things as e-mail and information on a Blackberry, PDA or computer hard drive. When it's time to destroy hard copies of documents, you should also destroy the electronic copies. Also remember that several copies of electronic documents, especially e-mails, may be on several different computers.

The frequency and magnitude of complaints and whether lawsuits have been filed. You may need to save documents even if the policy says it's time to destroy them, such as when you are notified that a possible dispute could arise. If a lawsuit has been filed, you should maintain all records, regardless of the policy, and contact your attorney.

Whether the document retention policy was instituted in bad faith. Follow the policy consistently. If you rarely follow the policy, and then destroy documents that could be relevant in a lawsuit before the lawsuit is filed, a judge will probably rule that you acted in bad faith. The same thing could happen if you destroy documents in different time periods than your written policy.

–Brian S. Kruse, Esq.

New Child Labor Regulations Effective February 14

In December 2004, the U.S. Department of Labor published its final regulations amending the existing regulations for the child labor provisions of the federal Fair Labor Standards Act (FLSA). The new regulations, which went into effect on February 14, 2005, implement statutory changes adopted by Congress in the Compactors and Balers Safety Standards Modernization Act of 1996 and the Drive for Teen Employment Act of 1998, and adopt a number of other significant changes as well.

A. Background

Generally, the child labor provisions of the FLSA establish a minimum age of 16 for employment in non-agricultural occupations, but the Department of Labor is authorized to provide regulation for 14- and 15-year olds to work in suitable nonhazardous occupations during periods and under conditions that will not interfere with their schooling or health and well-being. The FLSA permits 16- and 17-year olds to work in nonagricultural occupations, without hours or time limitations, except in occupations deemed "hazardous" by the Secretary of Labor. The new regulations attempt to incorporate recent statutory changes to these provisions and modernize the regulations to account for changes in the workplace and the emergence of new types of businesses where young workers may find employment opportunities.

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B. New Regulations

Highlights from the new regulations include the following:

- Cooking Duties. Since 1961, the FLSA's child labor provisions have restricted the ability of 14- and 15-year olds to engage in certain cooking activities. While the old regulations clearly barred heavy-duty cooking activities such as working over a hot stove for extended hours, the Department interpreted the regulations so as to permit lighter-duty types of cooking activities (*e.g.*, grilling a cheese sandwich) that were performed "in plain view" of the customer. The new regulations eliminate the "in plain view" interpretation, and instead ban all cooking by 14- and 15-year olds, except cooking that involves electric or gas grilles (but not open flames or use of automated broilers) and deep fat fryers that are equipped with and use devices to automatically raise and lower the baskets into hot oil. Under the new regulations, 14- and 15-year olds may also use dishwashers, toasters, popcorn poppers, coffee machines and grinders, devices used to maintain the temperature of prepared foods (such as warmers, steam tables, and heat lamps), and microwave ovens that are used only to warm prepared food and do not have the capacity to warm above 140° F. Also, 14- and 15-year olds are allowed to clean kitchen equipment (not otherwise prohibited), remove oil or grease filters, pour oil or grease through filters, and move receptacles containing hot grease or hot oil, but only when the equipment, surfaces, containers and liquids do not exceed a temperature of 100° F.

- Driving on Public Roads. For years the Department of Labor's interpretation of its regulations relating to the ability of 16- and 17-year olds to drive on the public roadways pursuant to employment differed between the Department's various regional offices. In 1998, Congress enacted the Drive for Teen Employment Act to adopt a uniform standard on this issue, and these new regulations finally incorporate those statutory changes. Now, all on-the-job driving on public roads by 16 year olds is prohibited, and "incidental and occasional driving" by 17-year olds is allowed only if certain conditions are met. These conditions include, among other things, that: (1) the minor employee must not have a record of moving violations at the time of hire; (2) the minor has successfully completed a state-approved driver's education course; (3) the vehicle is equipped with seat belts and the employer has instructed the minor that the seat belts must be used; (4) the driving to be performed by the minor cannot include route deliveries or route sales, the transportation for hire of property, goods, or passengers, urgent, time-sensitive deliveries, or the transporting at any one time of more than three passengers (including the employees of the minor's employer); (5) the driving cannot involve more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the minor's employer to a customer or transporting passengers (other than the employees of the employer); and (6) the driving must truly be "occasional and incidental," which is defined as no more than one-third of the employee's work time in any workday and no more than 20 percent of the employee's work time in any workweek.

- Roofing. Current regulations ban all work by minors in "occupations in roofing operations," but do not ban all work on roofs. The new regulations change this so as to also prohibit 16- and 17-year olds from working "on or about a roof," which includes all work performed upon or in close proximity to a roof. This includes carpentry and metal work, alterations, additions, maintenance and repair (including painting and coating of existing roofs), the construction of the sheathing or base of roofs (wood or metal), including roof trusses or joists, gutter and downspout work, the installation and servicing of television and communication equipment such as cable and satellite dishes, and the installation and servicing of heating, ventilation and air conditioning equipment or similar appliances attached to roofs. The new regulations maintain an exemption for apprentices and student learners.

- Paper Balers and Compactors. Historically, the Department of Labor's hazardous occupation orders have barred minors under 18 years of age from working in occupations involving the operation of paper-products machines, such as scrap paper balers. In 1996, Congress adopted the Compactors and Balers Safety Standards Modernization Act, which, among other things, amended the FLSA so as to permit 16- and 17-year olds to load, but not operate or unload, scrap paper balers and paper box compactors if certain conditions are met. The new regulations incorporate these conditions, which include such things as mandating that the machine must meet the applicable American National Standard Institute (ANSI) standard and must have an on-off switch incorporating a key-lock or other system, and that on-off switch must be maintained in an off position when the machine is not in operation.

Employers found to be in violation of the FLSA's child labor provisions face significant monetary penalties as well as a public relations nightmare. If you desire more information on these new regulations or want to determine whether your business is in compliance with the FLSA, you are encouraged to contact experienced employment/labor law counsel for more information.

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