ERICKSON, THORPE & SWAINSTON, LTD.

NEVADA LAW BULLETIN

I-9 Audits Dramatically Increased – Beware of the New Forms

By Rebecca Bruch, Esq.

In 2012 ICE audited more than 3,000 companies for compliance. That number is 12 times higher than in 2007. Fines in 2013 reached nearly $13 million, with the median fines being approximately $11,000. In addition, 238 corporate employees were arrested, and at least one employee was sentenced to 18 months of prison time. Violation of these laws carry harsh civil and criminal penalties. President Obama has proposed increased penalties for hiring undocumented workers. Based on that policy, we can expect an increase in audits and penalties alike.

On March 7, 2013, the U.S. Citizenship and Immigration Services (USCIS) announced the release of the official revised I-9 form. The new form has a revision date of March 8, 2013. There are several changes to the form, with the idea being to simplify the form. Those changes include:

- Additional data fields, including employee passport information and telephone and e-mail addresses.
- Simplified instructions.
- Expanded form and revised layout.

As of May 8, 2013, employers must use the new I-9 form. The new form is available at the USCIS website at **www.uscis.gov**. USCIS has updated its Handbook for Employers which provides guidance for completing the new I-9 form. The Handbook for Employers can also be accessed through the USCIS website.

Don't throw out the baby with the bath water. Remember these practice pointers when looking at I-9 compliance. They have not changed:

- Get I-9s completed immediately upon hire, but do not ask for completion of the forms until after a job offer has been made.
- Remember that it is the employee's choice of which documents to present, but you must verify the documents for compliance with the new forms, and to assure they are genuine.
- While not mandatory, it is a good practice to make copies of the I-9 documentation provided by the employee, and keep it with the I-9 form. This could be very helpful if you are audited, and need to explain your determination that documents apeared to be authentic.
- Track expiration dates for supporting documents, and follow up on those which are approaching that expiration date.
- Retain I-9s and documents for three years after hire date or one year after termination, whichever date comes later.
- Avoid putting I-9 documents in an employee's personnel file. Such a practice could unexpectedly provide evidence of a discrimination claim.
- Make sure your HR team is familiar with the actual form and the requirements for each section.

I-9 compliance should be a priority, given the new and increased priority it has been given by the current administration. If you have questions about this important matter or any other human resources or employment issues which may be on your mind, do not hesitate to contact Erickson, Thorpe & Swainston's experienced employment law attorneys.

ETS NEWS

Trial Victory

Erickson, Thorpe & Swainston congratulates John Aberasturi and Brett Dieffenbach on their recent victory in trial. In the matter of *Oswalt, et. al. v. Currivan*, Plaintiffs sought more than six million dollars in damages arising from an ATV accident in Elko County, Nevada. The parties had been contentious neighbors for decades due to various disputes mainly regarding easement rights. This case arose from a hunting incident whereby hunters were granted permission to hunt on defendant Currivan's property. When the deer was shot by a first-time minor hunter, it did not immediately go down and bounded onto plaintiffs' property. The ensuing incident occurred while the hunters, with the help of Mrs. Currivan and her ATV, were attempting to retrieve the then dead deer.

In his claim for battery, Mike Gerber sought unspecified damages for pain and suffering. He alleged that Theresa Currivan maliciously ran into him on her ATV in an attempt to kill him. Dr. Jill Oswalt sought in excess of six million dollars in past and future lost wages in her claim for intentional infliction of emotional distress arising from the heart attack she suffered upon viewing the incident.

The jury ultimately disagreed with the plaintiffs and awarded only $8,000 to Mr. Gerber and provided James and Theresa Currivan a complete defense verdict upon the claims of Dr. Oswalt.

John Aberasturi

Brett Dieffenbach

ETS Community Leaders

Congratulations to Brett Dieffenbach for being elected to the position of President of the Association of Defense Counsel of Northern Nevada for 2013.

Congratulations to Charity Felts for being elected to the position of President-Elect of the Northern Nevada Human Resources Association for 2013.

Nevada Legislature Seeks to Protect Social Media Passwords

By Charity F. Felts, Esq.

Let's say you are interviewing candidates for an open position within your organization. Are you tempted to ask for the applicant's username and password information so you can login to the applicant's social media accounts? Requests by employers for that type of private information have touched a public nerve. Legislators around the United States have responded with legislation aimed at protecting the privacy of applicants and employees by protecting their social media login information.

Maryland was the first state, in April 2012, to approve legislation addressing the privacy of personal social media accounts. Nevada is following the trend and has proposed similar legislation. Assembly Bill 181 ("AB 181") was introduced in the Assembly on March 1, 2013, and seeks to make it unlawful for an employer to require an employee or prospective employee to disclose a username, password, or any other information that provides access to a social media account. AB 181 also prohibits an employer from discharging, disciplining, or discriminating against an employee or prospective employee who refuses to disclose this information. Dubbed the "Facebook Bill," AB 181 passed the Assembly in late March and has since been transferred to the Senate and referred to the Committee on Commerce, Labor and Energy.

Nevada joins a majority of states which seeks to prohibit employers from asking for social media usernames and passwords as a condition of employment. According to the National Conference of State Legislatures, as of May 13, 2013, social media password legislation has been introduced or is pending in thirty-five states. So far, Arkansas, Colorado, New Mexico and Utah have enacted social media password protection legislation in 2013.

Our neighbor to the west, California, enacted social media password protection legislation in 2012. The California law generally prohibits private employers from requesting or requiring that employees or applicants: (1) disclose their user name or password to gain access to social media content; (2) access their personal social media account in the employer's presence; or (3) divulge any personal social media information, i.e. divulging the content of a co-worker's account who is a Facebook friend. Even with these restrictions, the California law does permit employers to request that an employee divulge personal social media account information reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations. No such exception for investigative purposes appears in AB 181. Even if misconduct or unlawful conduct is suspected, the Nevada law would provide no mechanism for requesting this information.

The only notable exception in AB 181 is that an employer may require an employee to disclose his/her username, password, or any other information to an account or service, other than a personal social media account, for the purpose of accessing the employer's own internal computer or information system. Presumably, this exception was included to make it clear that employers can continue to ask their employees for the login information for internal, non-personal accounts and information systems.

To date, AB 181 has not been met with any resistance and Nevada is likely to join other states in passing social media password protection legislation. For more information on this bill or to track its progress, visit the Nevada Legislature's webpage at **http://www.leg.state.nv.us/**. And remember, you can also contact one of Erickson, Thorpe & Swainston's experienced employment law attorneys for all of your employment issues.

ERICKSON, THORPE & SWAINSTON, LTD.

Erickson, Thorpe & Swainston was founded in 1969. Since that time, the Firm has efficiently and successfully represented its clients in state and federal courts in Nevada and Northern California. As experienced trial and appellate attorneys, we vigorously advocate our clients' interests while remaining committed to the principles of the highest legal ethics.

Erickson, Thorpe & Swainston offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.

Pending Legislation Aimed at Amending NRS Ch. 40, the Statutes Governing Construction Defect Litigation in Nevada

By Andrea K. Pressler, Esq.

As you have likely seen or heard through the media, significant efforts are being put forth at this year's legislative session to amend Nevada's construction defect statutory scheme, commonly referred to as NRS Chapter 40. There is currently one pending bill before the Assembly which seeks to revise numerous aspects of NRS Ch. 40.

NRS Ch. 40 was initially implemented to assist with the surge of construction defect litigation in Nevada. However, since enacted in 1995, homeowners and contractors have come to realize the flaws in the law, which ultimately do not allow the right to repair, leading to the demise of numerous contractors in our state, as well as increased insurance rates and homes that are never repaired.

One of the strongest contentions with NRS Ch. 40 is the "built-in" claimant/homeowner attorney's fees recovery. As NRS 40.655 presently reads, reasonable attorney's fees are recoverable by homeowners as damages. However, rather than the Court making a determination that any award of attorney's fees is reasonable, claimant's attorney fees are essentially built into any settlement allocation and demand made to the contractors, sometimes at the soaring rate of forty percent.

Assembly Bill 184 seeks to revise the claimant attorney's fee award language of NRS 40.655, as well as to amend the existing definition of "construction defect," and require an attorney to provide an affidavit from a homeowner or homeowner association to file with the Court in certain circumstances and revise certain statute of limitations pertaining to construction defect litigation.

Section 1 of AB 184 seeks to amend the definition of "construction defect" to provide that an issue is a construction defect if it: 1) presents an unreasonable risk of injury to a person or property; or 2) violates the law, unless the workmanship exceeds the standards set forth in any applicable codes and ordinances, which causes physical damages and which is not completed in a good and workmanlike manner. Presently, an issue can be alleged as a construction defect for merely being a violation of the law, including without limitation, violation of local codes or ordinances, even if approved by an the local governing authority and does not include a requirement for evidence of any damage to any persons or property.

Section 2 of AB 184 also seeks to remove reasonable attorney's fees from NRS 40.655 and only authorizes a claimant to recover reasonable attorney's fees in certain circumstances, but not mandatorily. Section 3 of AB 184 seeks to implement a requirement that an attorney advise a claimant in writing and obtain an affidavit verifying claimant's notification of certain provisions that pertain to construction defect law, namely the provisions of NRS 40.688, which require mandatory disclosure of construction defect litigation if the subject home is subsequently listed for sale.

Section 4 seeks to shorten the statute of repose in which claims for construction defect can be made from ten years to three years. For latent injury or damage deficiencies (those alleged defects that are not apparent by reasonable inspection), the bill seeks to shorten the present statute of repose from eight years to four years. With regard to patent deficiencies (those defects that are apparent by reasonable inspection), the bill seeks to revise the statute of repose from six years to three years. This bill was referred to the Committee on Judiciary on February 14, 2013 and re-referred to the Committee on Ways and Means on April 23, 2013.

It goes without saying that this bill is attempting to make substantial changes to NRS Ch. 40, which attempts have been unsuccessful and vehemently opposed in prior years. Such efforts are with the hope that changes to the law governing construction defect claims will stimulate homebuilding and growth within our state, without the fear of impending litigation. Updates regarding the progress of this bill will be provided in the next newsletter. In the meantime, should you have any questions or need further information as to the pending bill, please feel free to contact me at any time.

Save the Date

September 10, 2013, 9:00 a.m. to 4:00 p.m.

The ETS Employment Law Seminar will be held September 10, 2013 at The Grove. Stay tuned for more information and a finalized seminar agenda. We look forward to seeing you again in the fall.