GABLE GOTWALS
COUNSEL

RAISING THE BAR

Recent Awards

- *GableGotwals recognized by The Oklahoman as a part of the Top Workplaces in Oklahoma. In addition to being among an elite group of only 50 companies selected, GableGotwals was the only law firm included as an honoree.*
- *Firm honored by the Oklahoma Business Ethics Consortium with a Leading Member award.*
- *GableGotwals named as one of Oklahoma's Great Companies to Work For by Oklahoma Magazine.*
- *Thirty-seven GableGotwals attorneys named as Oklahoma Super Lawyers with four in the State's Top 50 and a Top 25 Woman.*
- *GableGotwals ranked in the 2014 "Best Law Firms" list by U.S. News & World Report and Best Lawyers® regionally in 58 practice areas.*
- *Steve Barghols received the 2013 Joe Stamper Distinguished Service Award from the Oklahoma Bar Association.*
- *Drew Edmondson received the Oklahoma Bar Association's President's Award.*
- *Sid Swinson chosen as a 2013 Men of Distinction Honoree by the Tulsa Business & Legal News.*

GableGotwals welcomes the attorneys and staff of the Glass Law Firm.

Attorneys Robert Glass, Philip Hixon, Jared Nelson, Meagen Burrows, Susan Jordan and LeAnn Ellis joined the GableGotwals team effective January 1, 2014.

The Glass Law Firm's founder, Robert Glass, began his legal career at GableGotwals in 1984. After working at firms in San Antonio and Tulsa, Robert founded his own firm in 2000. Now, Robert is returning to the place where his legal career began and bringing with him an outstanding team of attorneys and other professionals to GableGotwals.

The Glass Law Firm has a superb reputation for skillful and effective legal counsel, with distinction and concentration in the area of health care law. The group is also known for their experience in the areas of banking/corporate finance; business transactions; restructuring, workouts and bankruptcy; litigation; construction; labor and employment law; real estate; representations before governmental agencies; tax; wills, trusts, estate planning and probate; and insurance law.

Robert Glass joins our firm as a shareholder. He has been included in the *Best Lawyers in America* in the areas of health care and bankruptcy each year since 2001. Additionally, he has been listed in *Super Lawyers* for his business litigation practice every year since 2006 and in Chambers for corporate and commercial law since 2011. Martindale-Hubbell has given Robert an AV rating. Robert received his law degree, as well as his undergraduate accounting degree, from the University of Texas.

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Philip D. Hixon joins GableGotwals as an of counsel attorney. He has more than a decade of litigation experience representing the interests of clients in a variety of legal matters including construction, environment, insurance, healthcare and general litigation. Martindale-Hubbell has given Philip an AV rating and he is listed as a Rising Star with Super Lawyers in 2010-2011.

Jared K. Nelson joins the firm as an associate attorney. He brings experience to GableGotwals in the areas of health care law and general business transactions, including business formations and reorganizations and structuring business ventures.

Meagen E. Burrows joins the firm as an associate attorney. She has been focused primarily in the areas of health care law, general business transactions and corporate law.

Susan I. Jordan joins GableGotwals as an of counsel attorney. She has devoted her legal practice to the representation of hospitals, physicians, nurses and other health care providers. Susan is the founder of Tulsa-based Jordan Law, where she will continue to also practice.

LeAnn Drummond Ellis joins the firm as an of counsel attorney. She brings varied legal experience in the areas of tax law and wills, trusts, estate planning, guardianships and probate. LeAnn is also in private practice with Ellis and Ellis based in Stillwater, where she lives full-time while commuting to Tulsa at least one day a week. Martindale-Hubbell has given LeAnn an AV rating and she is a Fellow of the American College of Trust and Estate Counsel.

GableGotwals Attorney sworn in by the Oklahoma Supreme Court as OBA President

Renee DeMoss will serve as the Oklahoma Bar Association's 2014 president. She will lead the OBA's 18-member Board of Governors that meets monthly and oversees the organization.

Renee has been a shareholder with GableGotwals in the Tulsa office since 1984. Her area of practice focuses on commercial litigation, ERISA, insurance law and general business matters. She has been actively involved with and held offices in numerous organizations throughout her career, including serving as president of the Tulsa County Bar Association, Tulsa County Bar Foundation and the Oklahoma Bar Foundation.

Renee is the first woman president from the Tulsa area and the fifth woman president dating back to the 1800's.

EEOC Strikes Out in Criminal Background and Credit Check Litigation

A blog by Timothy A. Carney

The EEOC has been aggressively pursuing litigation against private businesses for alleged violations of Title VII based upon the use of criminal background and credit checks in the hiring process. The theory pursued by the EEOC is that an employer's use of these pre-hiring screening devices to exclude applicants has an unlawful disparate impact on minorities.

This aggressive push comes on the heels of enforcement guidance issued by the EEOC last year relating to the use of arrest and conviction records by employers in making employment decisions. The link to this guidance is at: www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Thus far, however, the EEOC has met with relatively little success in pursuing its aggressive agenda. Recently, it was even required to pay attorney's fees and costs to a business it sued for discrimination based upon criminal background checks. In EEOC v. Peoplemark, Inc., No. 11-2582 (Oct. 7, 2013), the Sixth Circuit affirmed a district court's award of over $750,000 in attorney's fees, expert witness fees and other litigation costs to the employer where the EEOC failed to present any evidence to support its claim that the employer had a "blanket policy" of denying jobs to African American applicants with felony records.

The Court found that the EEOC's claim "was not groundless when filed," because it sued on the basis of statements made by the employer's associate general counsel claiming the employer had a blanket policy of not extending employment opportunities to persons with felony convictions. However, it had an obligation to dismiss the case once the employer produced over 175,000 pages of documents demonstrating that no such blanket policy existed. The Court found that once the EEOC knew or should have known that no such policy existed, it was "unreasonable to continue to litigate the … claim…"

In another recent case, *EEOC v. Freeman*, No. 09-CV-2573 (D. Md. Aug. 9, 2013), the EEOC sued an employer alleging that its use of criminal background and credit checks for employment screening resulted in a disparate impact against minorities in violation of Title VII. The federal district court dismissed the case after discovery in a scathing rebuke of the EEOC's evidence and its expert analysis. The *Freeman* Court called the EEOC's claim a "theory in search of facts to support it," and stated that "[s]omething more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks." Among other things, the Court found the expert "cherry-pick[ed] data," and even manipulated data to change the very character of the information provided by the employer, which the Court found to be "an egregious example of scientific dishonesty."

The *Freeman* Court acknowledged that employers have legitimate reasons for conducting criminal background and credit checks, finding that "[e]mployers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable."

Another court earlier this year dismissed the EEOC's claims in a suit that alleged that an employer's use of credit checks in the hiring process had a disparate impact on black applicants, *EEOC v. Kaplan Higher Education Learning Corp.*, No. 10-CV-2882 (N.D. Ohio Jan. 28, 2013). In Kaplan, the EEOC sued a group of institutes of higher learning that conducted credit checks on applicants for positions who worked with students receiving financial aid. These employers had instituted these pre-hire checks after finding that certain employees had misappropriated student financial aid payments.

The EEOC claimed the employers' use of credit checks disproportionately excluded black applicants. However, because the employers did not keep records showing the race of any applicants, the EEOC was required to attempt to prove their races through other means.

These cases demonstrate that the EEOC is intent on aggressively pursuing disparate impact claims involving criminal background and credit checks. They should serve as a call to employers who utilize these types of screening devices to undertake a careful review of their policies to ensure that they are narrowly tailored and that they seek only information that is job-related. In addition, as the cases demonstrate, it is unwise for employers to have a blank policy of exclusion from employment based upon the results of such screenings.

Timothy A. Carney is a shareholder in the Tulsa office of GableGotwals. Tim can be reached at 918-595-4810 or tcarney@gablelaw.com.

Will the Supreme Court Change the Law on Limitations?

A blog by Leasa Stewart

In October, the United States Supreme Court heard oral argument in an ERISA-governed long-term disability benefits case, *Heimeshoff vs. Hartford Life and Wal-Mart Stores Inc.* (Case Number 12-729). The plaintiff in the case has asked the Court to hold that a limitations period on filing suit cannot begin to run until a claimant has exhausted the administrative review that must be provided for under ERISA. During oral argument, Justice Stephen Breyer specifically asked what problems carriers would face if the Court held that claimants must be able to exhaust the internal appeals process before the statute of limitations period on suits can start. Such a holding would drastically change current law and might negate ERISA plan terms which expressly provide a time limit for filing suit that begins at a time different than when the internal appeals process is exhausted, such as from the time proof of loss is required under the plan. As pointed out by Hartford Life's counsel at oral argument, such a holding would undermine Congress' goal of wanting to assure employers the courts will respect ERISA plan terms. Practically speaking, declaring that time limits to file suit cannot begin to run until internal appeals have been exhausted would also promote uncertainty in the process as the exhaustion date is not always an easy date to determine. Hopefully, the Supreme Court will decide to continue to respect ERISA plan terms and allow employers the freedom to contract for the limitations period they would like a plan to have.

Leasa Stewart is a shareholder with GableGotwals in Oklahoma City. She can be reached at 405-235-5595 or lstewart@gablelaw.com.

New Shareholders Named

GableGotwals is pleased to name Paul Rossler and Greg Metcalfe as Shareholders in the Firm effective January 1, 2014.

Paul Rossler can be reached at 918-595-4872 or prossler@gablelaw.com.

Paul Rossler has been an associate with GableGotwals since 2007. Paul has an extensive background in intellectual property and engineering. Prior to practicing law, Paul served on the engineering faculty at Oklahoma State University and Kettering University. Rossler's court admissions include the United States Patent & Trademark Office along with all Oklahoma courts. He is also a registered professional engineer in Oklahoma. In 2013, Paul was named by *Super Lawyers,* a Rising Star in Intellectual Property.

Greg Metcalfe can be reached at 918-235-5578 or gmetcalfe@gablelaw.com.

Greg Metcalfe has been of counsel with GableGotwals since 2011. Greg came to the Firm with a wealth of state and federal litigation experience earned during eight years as an Oklahoma Assistant Attorney General. He has handled hundreds of civil lawsuits and appeals involving a variety of diverse issues, including technology issues, contract disputes, business litigation, oil and gas litigation, employment disputes, civil rights defense, and tort claims. Greg has also developed expertise regarding discovery of electronic information and he serves as an e-discovery instructor for the National Association of Attorneys General.

Tulsa World Business Viewpoint by LeAnn D. Ellis:

Can a small business deduct charitable contributions?

Charitable contributions can make a significant difference to those in need. While charitable giving is to be applauded and encouraged, a business owner should take care to understand how to properly report those philanthropic gifts.

Although any business may make a charitable contribution, how the contribution is deducted for income tax purposes depends on the organization's structure. Charitable contributions made by a business are usually not deductible by the business itself, unless the business is a corporation.

Although any business may make a charitable contribution, how the contribution is deducted for income tax purposes depends on the organization's structure.

If your business is a sole proprietorship or a single-member limited liability company, your business taxes are filed on Schedule C of your personal tax return. Because the only method of deducting a contribution is on Schedule A of your personal tax return, your business cannot make a separate charitable contribution. It's important to note that charitable contributions reported on Schedule A require itemizing your deductions. Generally, you may deduct up to 50 percent of your adjusted gross income, but 20 percent and 30 percent limitations apply depending on the type of contribution and the type of charitable organization.

Because partnerships and S Corporations are also not separate taxpayers for income tax purposes, their income and deductions flow through to their partners and shareholders on Schedule K-1s. So, if your partnership makes a charitable contribution, each partner takes a percentage share of the deduction on his/her personal tax return through their Schedule A. Deductions for charitable contributions by members of a multiple-member limited liability company are treated in the same manner as partnerships and S Corporations. However, if you own a regular C Corporation, the corporation is entitled to the charitable deduction, subject to specific percentage limitations.

Sometimes, business owners confuse advertising expenses with charitable contributions of cash. IRS regulations provide that you can deduct a payment to a charity as a business expense when the payment to the charity bears a direct relationship to your business and you make the payment with the reasonable expectation of financial return commensurate with the amount paid. For example, a business owner can pay a charity for an ad on the charity's website or in pamphlets and deduct as a normal business expense because the business received something in return for the donation.

However, if you have a charitable contribution and a business deduction within the same transaction, no part of the payment can be deducted as a business expense. Business expenses are preferred from an income tax perspective because business expenses are 100 percent deductible and are not subject to limitations. To the extent possible, consider converting charitable contributions into a business expense to lower your income taxes.

LeAnn D. Ellis is an of counsel attorney in the Tulsa office of GableGotwals. LeAnn can be reached at 918-595-4814 or lellis@gablelaw.com.

The Oklahoman talks with Jeffrey Curran about potential liabilities at company parties where alcohol is served.

Oklahoma laws on liquor should be remembered at office parties

Q: Can a business be held liable if an employee or guest injures herself or others after consuming alcohol at an office-sponsored function?

A: Probably not. Right now, Oklahoma doesn't have a pure "social host" liability law or case that allows someone to sue a party host for supplying liquor to someone who becomes intoxicated and then causes an accident. But an injured party can possibly sue the club or establishment where the party is held under certain circumstances. Optimally, I'd suggest having the party in a restaurant or club that is licensed to serve alcohol, or hiring a caterer that has a license to serve alcohol.

Q: Does excluding hard liquor and limiting the available alcohol to beer and wine make any difference?

A: No. The law doesn't look at them any differently for this purpose.

Q: Does a cash bar, as opposed to an open bar, help limit potential liabilities?

A: No. Right now, the question comes down to whether there is a commercial vendor and whether there is an "overserving" situation.

Q: If a caterer is hired to provide and manage the bar services, does that shift liquor liability from the company hosting the function to the caterer?

A: It's not really a shift, because so far Oklahoma doesn't allow a direct action against the social host. But it does allow an action against the "commercial vendor" under the right circumstances. A caterer or commercial provider of the alcohol would likely fall under this category.

Q: Does a company's general liability insurance cover this type of situation?

A: Social host liability may be covered under a business' general liability policy or a party giver's homeowner's policy. However, as of right now, there isn't a cause of action for social host liability against a business or against someone just throwing a party. But under the right circumstances, such as continuing to serve a guest who is obviously intoxicated, there may be such liability in the future. If so, you'll want to make sure you have sufficient policy limits to cover what would likely be a large claim.

Q: Is a business obligated to confirm that employees/guests are of legal drinking age before serving?

A: Yes. There is a legal obligation both not to serve minors and prohibit a minor's access to alcohol. Allowing a minor access to alcohol, either directly or by negligence, can result in a criminal fine or even jail time.

Jeffrey A. Curran is an of counsel attorney with GableGotwals in Oklahoma City. He can be reached at 405-235-5537 or jcurran@gablelaw.com.

Tulsa World Business Viewpoint by Timothy Carney:

Employers need to set social media policies

Technology has forever changed the way we communicate, and a recent ruling from the U.S. Court of Appeals for the Fourth Circuit serves notice to businesses of all sizes that their policy and procedure manuals must keep up with the times.

The court recently held that a sheriff's department employee fired by the sheriff for "liking" the campaign Facebook page of the sheriff's political adversary engaged in speech protected by the First Amendment of the U.S. Constitution. Although the case, *Bland v. Roberts*, was decided based on constitutional principles applicable only to public sector employees, the decision may have important implications for private employers as well.

First, Section 7 of the National Labor Relations Act protects the rights of employees to discuss wages, hours and working conditions in a concerted or collective manner. The National Labor Relations Board has issued rulings recently that address protection for social media activity and may conclude that if an employee posts on Facebook about wages, hours or working conditions and another employee "likes" it, or posts a link to or "like" of the site of a union or another organization that promotes or supports employee rights, it could be held to be concerted protected activity.

Second, an employer that seeks out social media activity by or about applicants and employees may be exposed to information that, if known, could raise issues in the event employment action is taken against the individual and litigation ensues. For example, the employer could learn information about an employee's sexual orientation, illness, age, disability, concerns about the employer practices, and the like, which could be problematic. Even if the information had nothing to do with the employer's employment decision, it places the employer in the position of having to explain how and why it gathered the information and to prove that the information had no bearing on the employment decision.

So what makes a good social media policy?

Instead of trying to prevent the use of social media, employers should focus on encouraging its responsible use, which includes protecting business or client information, trade secrets, and company trademarks and copyrights.

Businesses should also consider the extent to which they want to monitor the public and private social media activities of applicants and employees. It's risky for employers to seek out too much information. Carefully consider whether it's important or helpful to monitor applicant/employee social media activity, and what drawbacks may exist. Also, the way you monitor and use monitoring activity can make a big difference.

Whether to allow social media contacts between managers and subordinates makes business sense, too. When managers connect with subordinates in social media, they potentially expose themselves to information about their subordinates that they would not learn in the workplace. Businesses need to educate management about these types of dangers and may even need to implement policies that limit social media activity in that respect.

Instead of trying to prevent the use of social media, employers should focus on encouraging its responsible use, which includes protecting business or client information, trade secrets, and company trademarks and copyrights.

Timothy A. Carney is a shareholder in the Tulsa office of GableGotwals. Tim can be reached at 918-595-4810 or tcarney@gablelaw.com.

Protect Your Stuff

A Blog by Paul Rossler

From Day One, a start-up company needs to protect its technology and its branding, and to budget for that protection. Some suggested steps follow, many of which require little or no direct, out-of-pocket expense.

1. **Protect "the secret sauce."** Mark secret information as confidential, limit access to it, and enter into confidentiality agreements before sharing it.
2. **File a provisional patent application** on any unique product, method, composition or ornamental design that cannot be protected as a secret.
3. **Choose a unique trade name and trademark.** A trade name is the company's "nickname" or "doing business as" name. A trademark is part of the company's "brand," the word or logo placed on products or services.
4. **Buy the domain names that cover the trade name and trademark.** Also, register the name and mark on social media sites.
5. **Place "TM" next to the trademark.** This lets others know it is a trademark.
6. **Apply for federal registration of the "flagship" trademark.** Once federal registration is obtained, the circle R symbol, ®, can be used.
7. **Give notice of copyright.** Software code, web pages, photographs, and marketing literature can be marked with a copyright notice as soon as they are created.
8. **Federally register creative material that is most likely to be copied.** Registration must occur within three months of publication or within one month of learning of infringement, whichever is earliest.
9. **Execute work-made-for-hire agreements.** When hiring third parties to design, invent or create, make certain that the start-up company solely and exclusively owns all intellectual property rights.
10. **Make certain employment agreements are clear about ownership.** Similar to the work-made-for-hire agreement, employment agreements should clearly state that the employee is being hired to invent or create and that inventions or expressions are owned solely and exclusively by the company.

Paul Rossler is a shareholder in the Tulsa office of GableGotwals. Paul can be reached at (918) 595-4872 or prossler@gablelaw.com.

About Us

GableGotwals is a full-service law firm of over 70 attorneys representing a diversified client base across the nation. Though Oklahoma-based, our connections and reach are global. Fortune 500 corporations, entrepreneurs, privately owned companies, foundations and individuals entrust us every day with the stewardship and strategic management of their legal challenges. GableGotwals is well known for its high quality legal services provided by a highly experienced group of litigators and transactional attorneys who have been recognized by Chambers USA, Best Lawyers In America, Oklahoma Super Lawyers and a number of federal, state and county bar associations.