KANE KESSLER, P.C.

Our Business Is You℠ | July 2011

WELCOME...

Welcome to Kane Kessler's inaugural Newsletter. In our Newsletter, we will be publishing articles about timely and noteworthy legal issues that we believe to be of interest to our clients, in our many areas of legal practice, as well as news about the Firm and its achievements.

Kane Kessler is a midsized law firm located in midtown Manhattan and serving clients throughout the United States and globally. Kane Kessler has been in the business of providing exceptional legal services to its clients for over 80 years with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

Our Business Is You℠

For more information about the Firm, please visit our website at www.KaneKessler.com or call us at (212) 541-6222.

The Editors,

Judith A. Stoll

Gary E. Ostroff

New York State's Wage Theft Prevention Act
MORE WORK AND MORE RISK FOR EMPLOYERS

In December 2010, in response to what it perceived to be the widespread deception and exploitation of employees, the New York State legislature enacted amendments to the Labor Law titled the Wage Theft Prevention Act ("WTPA"). The WTPA went into effect on April 9, 2011, and imposes substantial new burdens and risks on all New York State employers. Among other things, the WTPA requires written notice to every employee at the time of hire and between January 1 and February 1 of each year, containing specified information about the employee's compensation. The WTPA also imposes significantly increased penalties for the failure to pay wages and/or overtime. These new penalties make it more crucial than ever to properly classify employees as exempt or nonexempt, to keep track of employees' work hours and to accurately calculate wages and overtime. The following is a summary of the key provisions of the WTPA.

NOTICES TO EMPLOYEES

Employers must provide a written notice to every employee (exempt and nonexempt) at the time of hire and between January 1 and February 1 of each year of the employee's employment, containing the following information:

- Rate or rate(s) of pay and the basis thereof (i.e., by hour, shift, day, week, salary, piece commission or other)
- Any allowances claimed as part of the minimum wage (tip, meal or lodging allowances)
- The employer's regular pay date
- The name of the employer and any "doing business as" names used by the employer

INSIDE: THE COVENANT YOU NEVER NEGOTIATED FOR • DEALING WITH THE PATENT TROLLS
RESIDENTIAL UNITS FOR SHORT-TERM RENTALS • THE SEC IMPLEMENTS DODD-FRANK'S WHISTLEBLOWER INCENTIVES

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- The physical address of the employer's principal place of business and mailing address, if different, and the telephone number of the employer

A new notice must also be provided within seven (7) days before any change in the required information.

The notice must be provided in English and in the employee's primary language, provided it is one of the following designated languages: Spanish, Chinese, Korean, Creole, Russian and Polish. Each time the notice is provided to the employee, the employer must obtain from the employee a signed and dated acknowledgment in English and in the employee's primary language (if it is one of the designated languages) and the employer must preserve the acknowledgments for six (6) years. If the employee's primary language is not one of the six (6) designated languages, then notice and acknowledgment only in English complies with the law. Templates for the notice and acknowledgments can be found at www.labor.ny.gov (go to "Laws and Regulations" and click on Wage Theft Prevention Act).

The penalty for failing to provide timely notice is $50 per week per employee, up to a maximum of $2,500.

Notice With Wage Payments

Employers must provide a notice to every employee with each payment of wages, containing the following information:

- Dates of work covered by the payment
- Name of employee
- Name, address and phone number of employer
- Rates(s) of pay and the basis of the rates (i.e., by hour, day, etc.)
- Gross wages
- Deductions
- Allowances claimed against minimum wage
- Net wages

For nonexempt employees, employers must also provide:

- Regular hourly rate(s) of pay
- Overtime rate(s) of pay
- Number of regular hours worked
- Number of overtime hours worked

For employees paid on a piece rate basis, employers must provide:

- Piece rate(s) of pay
- Number of pieces completed at each piece rate

The penalty for failure to provide a wage statement is $100 per week per employee, up to a maximum of $2,500.

Liquidated Damages

The New York State Labor Law previously provided that if an employer is found liable for unpaid wages or overtime, in addition to the amount found to be unpaid and due to the employee, plus interest and attorneys' fees, it shall also be liable for liquidated damages in an amount equal to 25% of the unpaid wages. Under the WTPA, the amount of liquidated damages increases to 100% of the unpaid wages.

> "Under the WTPA, the amount of liquidated damages **increases to 100% of the unpaid wages."**

If you have any questions or need any guidance in complying with the WTPA or any other federal, state or local labor or employment law, please contact Kane Kessler's Labor and Employment practice group.

Judith A. Stoll is a Partner in the Firm's Labor and Employment practice group. She has been representing employers for more than 27 years in all aspects of the law related to employment, including wage and hour laws, employment discrimination, collective bargaining and contract compliance, and has extensive experience litigating and arbitrating employment matters. Judith can be reached at jstoll@kanekessler.com or (212) 519-5165.

THE COVENANT YOU NEVER NEGOTIATED FOR

Lawyers who represent buyers of a business often negotiate for some form of restrictive covenant to be included in the contract of sale in order to protect their client from the seller competing after the sale closes. Enforcement of restrictive covenants in New York can be problematic since they must be reasonable in terms of scope, duration and geography (although they are more likely to be enforced in the context of the sale of a business).

If the seller adopts a difficult negotiating posture and insists on strict limitations to the requested covenant, the buyer actually may be better off with no written covenant at all. In the case of *Mohawk Maintenance Co. v. Kessler*, 52 N.Y.2d 276, 437 N.Y.S.2d 646 (1981), New York's highest court adopted principles of law first developed over a century ago and engrafted onto every contract transferring a business (where goodwill is part of the conveyance), an implied covenant by the seller not to solicit the customers of the business. Although under this implied covenant, the seller is generally free to compete with the buyer, he cannot do so by affirmatively soliciting the customers of the business that existed at the time of the sale. The Mohawk Maintenance doctrine was recently approved by the Court of Appeals in *Bessemer Trust Co. v. Branin*, 2011 WL 1583932 (April 28, 2011), where it provided guidance as to the meaning and reach of the implied nonsolicitation covenant.

Significantly, this implied covenant – unlike a negotiated covenant that typically lasts for a period of only a few years or less – is of indefinite duration. In other words, the implied covenant is not limited to the general rule of reasonable duration but rather is a permanent obligation that is not divested after the passage of any period of time. The underlying basis for the implied covenant, i.e., not to impair the very asset being transferred, exists so long as it is apparent that goodwill was intended to be transferred, even if the contract of sale does not expressly mention goodwill.

Eight years after the Mohawk Maintenance decision, the Court of Appeals ruled that a general indefinite limitation on solicitation may not be implied, as least where the parties have negotiated and expressly defined the reach of a nonsolicitation covenant. Other courts have followed this rationale, finding that the inclusion of an express restrictive covenant excludes any implied covenant. Thus, an express covenant that has a nonsolicitation obligation for a limited period of time or covering specific customers will suffice to exclude the implied covenant of indefinite duration prohibiting solicitation of all customers existing at the time of sale.

Therefore, a strategic decision must be reached by buyer and his/her counsel as to whether it is better to accept a limited restrictive covenant negotiated between the parties or to forgo any written covenant in favor of the nonsolicitation covenant implied under the common law that lasts forever. A key factor that will inform this decision is how important a noncompete is to the buyer (which will necessarily be for a limited period of time in order to satisfy the reasonableness requirement) and how achievable that goal is in negotiating with the seller, as opposed to whether the buyer is better served by a nonsolicitation covenant of indefinite duration.

The Litigation practice group at Kane Kessler regularly litigates disputes involving sales of business and the enforceability of restrictive covenants, together with the availability of injunctive relief. If you have a question in this area of the law, feel free to contact us for counsel and guidance.

Jeffrey H. Daichman is Co-Chair of the Firm's Litigation practice group and has been litigating commercial cases for over 30 years. He has tried numerous cases in the New York courts and argued before the Appellate Divisions and the Court of Appeals. Jeff can be reached at jdaichman@kanekessler.com or (212) 519-5142.

Dealing With the Patent Trolls

You may have heard the term "patent troll," which is used to describe a patent owner who is not manufacturing or selling a product but who sues companies over a patent that allegedly covers some technology the client is using. Many of these lawsuits (or threatened lawsuits) are nothing more than shakedowns; a settlement is quickly offered for an amount less than it would cost to litigate the matter. This kind of lawsuit or threat has become popular in the last few years as patent owners (or those they sell their patents to) have built up war chests and hired attorneys to sue large numbers of companies, knowing that most will settle quickly for a relatively small amount. Law firms that bring these cases often take them on a contingency basis, offer alternative billing arrangements, and/or obtain litigation financing from companies willing to share the risk.

"Many of these lawsuits (or threatened lawsuits) are nothing more than shakedowns."

Our IP group has on multiple occasions successfully discouraged patent trolls who contact our clients from pursuing their claim and/or defended a number of these matters for our clients. We have found that in dealing with these patent trolls, it is key from the outset to identify and present a strong noninfringement/invalidity position, if possible. This involves, first, a thorough investigation of the facts of the situation. We typically attempt to get a solid understanding of exactly how the client's product or method is made and operates and the technology involved. We also conduct a detailed study of the subject patents and their prosecution file histories. We identify other lawsuits that have been filed on the patent in question and study any substantive documents from public records of these cases. The patent owner's assertion that our client's product infringes the patent can then be attacked with a strong combination of technical facts and legal arguments.

We also look into the possibility of obtaining indemnity from third-party vendors or suppliers of the allegedly infringing product or method. In appropriate cases, the strategy of filing a declaratory judgment action to get a jump on a troll and litigate in a forum favorable to the client is evaluated.

Several important recent developments in case law and strategy are relevant in dealing with patent trolls. For example, recent cases including the Supreme Court's famous ruling in *KSR International Co. v. Teleflex, Inc.*, et al., 550 U.S. 398 (2007), have raised the bar on the "obviousness" standard for patent examination and are helping both to reduce the improper granting of patents on "commonsense" techniques and to make it easier to invalidate such patents in court. (In KSR, the Court reversed a Circuit Court ruling and held that a commonsense combination of known devices was obvious and therefore not patentable, even though the prior art did not contain a specific teaching, suggestion or motivation to make the combination.) Courts also are requiring better proof in support of a patent owner's claim to monetary damages. *Uniloc USA, Inc., et al. v. Microsoft Corp.*, Nos. 2010-1035, 1055 (Fed. Cir. Jan. 4, 2011). And the Supreme Court has made it more difficult to obtain injunctive relief in patent cases. eBay Inc. and *Half.com v. MercExchange*, L.L.C., 547 U.S. 388 (2006).

There is still a long way to go in stemming the tide of patent troll litigation, and such threats will likely never be eliminated, only reduced. But every case has weaknesses, and every patent has weaknesses. With a complete knowledge of the technical facts and the legal issues, we can assist in presenting the strongest possible rebuttal and defense for our client and hopefully discourage the troll from presenting its claim.

Paul E. Szabo is a registered patent attorney in the Firm's Intellectual Property practice group and has practiced patent law for over 25 years. He has obtained hundreds of issued patents for clients and has advised both those who hold patents and those against whom patents may be asserted. Paul can be reached at pszabo@kanekessler.com or (212) 519-5143.

Residential Units for Short-Term Rentals

In our representation of cooperative corporations and condominium associations, a problem that we have been asked to address on a frequent basis is the increasingly common use of a residential unit for short-term rentals. Managing agents, bombarded by complaints from resident owners that the units adjacent to their apartments are being advertised on the web and used as apartment hotels, have looked to Kane Kessler, P.C. for guidance.

Clearly, there are competing interests at play and the situation in each building must be viewed on its own merits. Attorneys for sponsors who write the offering plans, in an effort to allow the sponsor greater flexibility to sell units to individuals or entities for investment purposes, often include language in the plan documents that is ambiguous with regard to an owner/shareholder's ability to rent the unit.

In reviewing the offering plan and by-laws, the first thing to look for is a prohibition against transient usage of residential units. Even if such a prohibition exists, the operative documents generally do not set forth a definition of "transient." It is up to the board and managing agent to set forth specific leasing policies with minimum lease terms of six or twelve months, as the board deems appropriate, if permissible under the co-op's or condo's operative documents. The building's leasing procedures should be distributed to all unit owners/shareholders upon purchase of their units and specifically signed for prior to or at closing. Buildings should consider including language in their leasing procedures that sets forth consequences for failure to abide by the building's leasing procedures, including invalidating any nonconforming rentals and providing for an ongoing fee/penalty to be added to the monthly maintenance/common charges for the unit.

In some instances, when the building's operative documents are unclear or permissive on the issue of transient usage, the offering plan and by-laws may provide the condominium or co-op with a right of first refusal to buy or lease a unit upon a proposed sale or lease by a unit owner. Unit owners who rent their units on a short-term basis most often do not follow the procedures set forth in the operative documents with regard to providing notice that would trigger the building's right of first refusal, which is often exercisable within a 30-day period. In such cases, a failure to comply by the unit owner would be a breach of the by-laws and a violation of the building's leasing procedures, making it all the more important for a building to maintain and strictly enforce such procedures and the consequences for violations thereof.

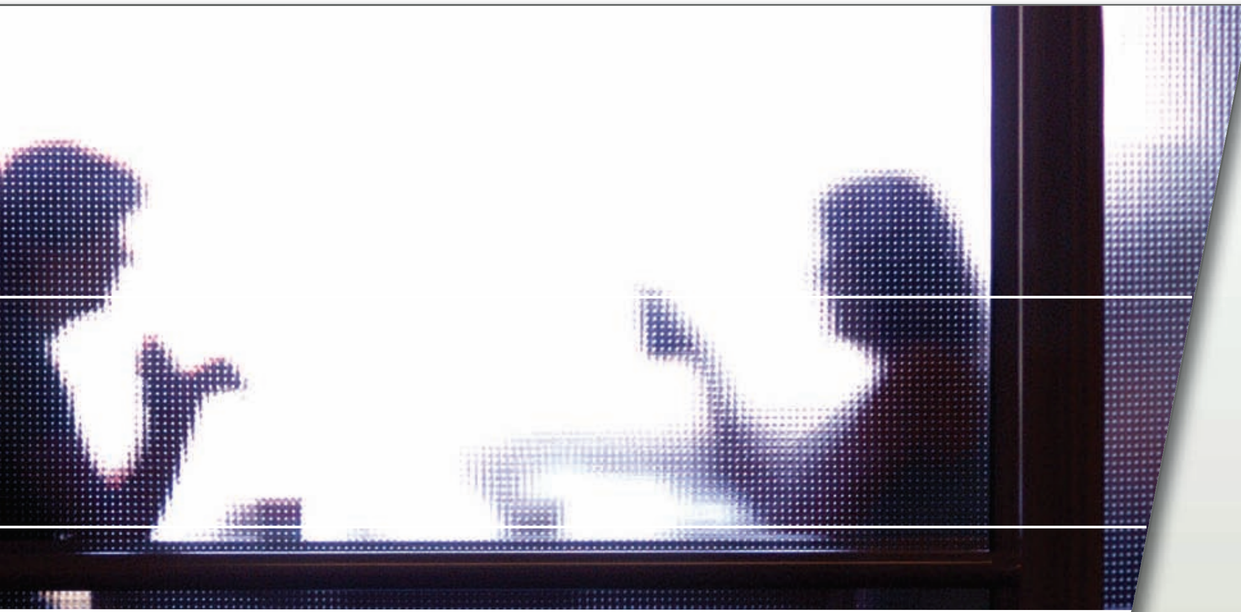
Bruce M. Schloss is counsel to the Firm and practices in the Firm's Real Estate, Corporate and Securities and General Business practice groups. Bruce has been practicing in these areas of the law for over 30 years. Bruce can be reached at bschloss@kanekessler.com or (212) 519-5197.

Looking Over Your Shoulder: The SEC Implements Dodd-Frank's Whistleblower Incentives

Among the many sweeping provisions intended to restore public confidence in the financial system that the Dodd-Frank Wall Street Reform and Consumer Protection Act contains, those aimed at encouraging corporate whistle-blowing may be the most controversial. The Dodd-Frank Act not only strengthens the whistleblower protections already found in the Sarbanes-Oxley Act and the False Claims Act, but also provides whistleblowers with the opportunity to receive potentially large monetary rewards. On Wednesday, May 25, 2011, the Securities and Exchange Commission issued its final rules implementing Dodd-Frank's whistleblower incentive program. Under the final rules, individuals who voluntarily provide original information to the SEC or the Commodity Futures Trading Commission disclosing a securities law violation will receive a mandatory cash award equal to 10% to 30% of the penalties collected if the resulting enforcement proceedings result in sanctions of over one million dollars.

> *"Individuals who voluntarily provide original information to the SEC or the Commodity Futures Trading Commission disclosing a securities law violation will receive a mandatory cash award equal to* ***10% to 30% of the penalties collected*** *if the resulting enforcement proceedings result in sanctions of over one million dollars."*

The main criticism lodged against Dodd-Frank's whistle-blower incentive program has been that it could effectively undermine the many corporate compliance programs created in response to Sarbanes-Oxley. The SEC's final rules do not require that whistleblowers utilize internal compliance and reporting procedures before making a report directly to the SEC. As a result, many companies fear that their employees will be encouraged to bypass internal corporate compliance systems in order to get a government award. However, this is partially addressed in the final rules, which authorize the SEC to grant higher awards to whistle-blowers who first report their information through their company's compliance programs and lower awards to those who interfere with internal compliance. Whistleblowers who report original information to their company's internal compliance program instead of the SEC will still be eligible to receive awards if the information they provided internally is later reported to the SEC and leads to a successful enforcement. Under this provision, all the information later provided by the company to the SEC will be attributed to the whistleblower – allowing the whistleblower to get credit, and potentially a greater award, for any additional information generated by the company's internal investigation. The final rules also allow whistleblowers the opportunity to report internally without risking the loss of a potential award. In an attempt to provide whistleblowers with less of an incentive to skip internal reporting and rush to be the first to report to the SEC, the final rules consider the date that a whistleblower internally reports as if it were the date the information was provided to the SEC, as long as such information is then submitted to the SEC within 120 days of the internal report.



The SEC has stated its intention to contact the target company when it receives a whistleblower complaint in order to provide the company with the opportunity to conduct its own internal investigation and report its findings back to the SEC.

The Dodd-Frank Act also protects whistleblowers against retaliation for reporting wrongdoing by creating a powerful new private right of action against the employer for employees who have suffered retaliation or discrimination as a result of their whistleblowing. This action may be brought in federal court and remedies include reinstatement and double back pay with interest, as well as litigation costs and expert witness and attorney fees.

We believe the best way for a company to protect itself continues to be to install and enforce an updated, comprehensive compliance and ethics policy that enables and encourages employees to report possible securities law violations internally. Companies should ensure that executives, senior managers and supervisors are trained to be receptive to, properly and timely report and, if the situation warrants, promptly and thoroughly investigate and take appropriate action with respect to good-faith complaints from employees of claimed securities law violations.

Kane Kessler advises clients in developing and implementing corporate compliance and "best practices" governance programs. Kane Kessler also conducts internal investigations and guides clients in how to report potential violations to the SEC.

Jeffrey S. Tullman is Co-Chair, **Mitchell D. Hollander** is Partner and **Russell S. Klein** is an Associate in the Firm's Corporate and Securities practice group. Jeffrey can be reached at jtullman@kanekessler.com or (212) 519-5101. Mitchell can be reached at mhollander@kanekessler.com or (212) 519-5119.

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The information contained in this Newsletter is of a general nature and does not constitute legal advice. Under the rules of certain jurisdictions, this material may be considered attorney advertising. Consultation with our attorneys is recommended before taking any action based upon any of this information. To comply with the requirements imposed by the IRS and Treasury Department rules governing tax practice, we inform you that any advice contained herein is not intended or written to be used and cannot be used by a taxpayer to (i) avoid tax penalties; or (ii) promote, market or recommend to another person any transaction or matter addressed herein. You are receiving this newsletter because you are or have been a client or friend of our Firm.

Firm News...

KANE KESSLER PARTNERS NAMED "SUPER LAWYERS"

Kane Kessler is proud to announce that **S. Reid Kahn**, Co-Chair of the Litigation practice group, and **David R. Rothfeld**, Chair of the Labor and Employment Law practice group, have been selected as New York Super Lawyers for 2011. The Super Lawyers designation recognizes outstanding attorneys in more than 70 areas of practice using a rigorous, multiphase selection process that considers 15 separate indicators of peer recognition, professional achievement and high ethical standards.

KANE KESSLER LAWYERS' SPEAKING ENGAGEMENTS

Adam M. Cohen, Chair of the Intellectual Property practice group, was a panelist at the 2011 Columbia Law School Entertainment, Arts & Sports Law Society annual event. He was also a moderator for "Lawyers on the Clock: The Legal Issues You Need to Know" at the 2010 annual meeting of the Association of Independent Commercial Producers.

Niki P. Franzitta, Senior Associate in the Labor and Employment Law practice group, gave a presentation on April 11, 2011, at the Preston Robert Tisch Center for Hospitality, Tourism and Sports Management. The presentation to students in a course on Accelerated Restaurant Operations focused on labor law as it affects the restaurant industry.

David R. Rothfeld, Chair of the Labor and Employment Law practice group, was a featured presenter at Cornell University's Center for Hospitality Research at the 2011 Labor and Employment Law Roundtable sponsored by Cornell's International Labor Relations School and Law School. The Roundtable was held on May 15 and 16, 2011.

ACHIEVEMENTS

Kane Kessler takes great pleasure in announcing that **Gary E. Constable** (Corporate and Securities practice group) and **Gary E. Ostroff** (Real Estate practice group) were named Partners of the Firm and **Lois M. Traub** (Labor and Employment Law practice group) was named counsel to the Firm, effective January 1, 2011.

Recent achievements of Kane Kessler's Corporate and Securities practice group include the following:

- Successful auction of a division of a multibillion-dollar defense company
- Successful completion of a $1.2 billion secured bank refinancing of a New York Stock Exchange-listed company
- Advised a hedge fund in a three-way proxy contest, resulting in the election of the hedge fund's nominee to the board of the target portfolio company
- Advised an activist investor in having his candidate appointed to the board of a New York Stock Exchange-listed company

Recent achievements in the Real Estate practice group include the following:

- Successful completion of lease negotiations on behalf of landlord for specialty-themed restaurant
- Negotiated construction trade contracts on behalf of international not-for-profit organization for build-out of entire floor addition
- Successfully closed underlying mortgage refinance transactions for several high-end cooperative and condominium buildings

PRACTICE GROUPS

Bankruptcy, Reorganization and Creditors' Rights
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