CARR MALONEY PC

LEGALLY SPEAKING

Carr Maloney PC is a litigation firm providing comprehensive legal services throughout the mid-Atlantic region. Businesses and individuals use the firm as a single resource to meet all of their legal needs. Recognizing that each client's legal issue comes with its own specific complexities, **we simplify the complex.**

February 2016

In this issue:

Announcements

- Thomas McCally to Present "*Navigating the Tangled Web of Complex ADA and FMLA Issues"* at the ALA HR Conference on February 18, 2016 in Orlando, FL
- Samir Aguirre to Host H-1B Visa Webinar: *How is a Prevailing Wage Rate Calculated, and Can I Do It Myself?* On February 22, 2016
- William Carter to Present "*Coverage Issues Arising from Claims for Civil Liability"* at the DRI Insurance Coverage and Claims Institute this April in Chicago

Articles

- *Reputation on the Line: What Virginia Business Owners Can Do to Protect the Reputation of Their Businesses* by Tina M. Maiolo, Esq. and Ryan M. Walsh, Esq.
- *Fourth Circuit Affirms Decision that Coverage was Properly Denied Based on Interrelated Wrongful Acts in W.C. & A.N. Miller Development Company v. Continental Casualty Company* by Kelly M. Lippincott, Esq. and Sarah W. Conkright, Esq.
- *Recent Developments in FLSA Overtime Rules* by Edward J. Krill, Esq.

Thomas McCally to Present " Navigating the Tangled Web of Complex ADA and FMLA Issues" at the ALA HR Conference on February 18, 2016 in Orlando, FL.

On February 18, 2016 Thomas McCally will be presenting "Navigating the Tangled Web of Complex ADA and FMLA Issues" at the Association of Legal Administrators' Human Resources Conference in Orlando, FL where he will unravel the mysteries of the ADA, the ADAAA, FMLA, and Workers Compensation laws. This interactive session will explore the nuances of the laws and how they intersect in real world situations. For more information about this important presentation, please see the ALA HR Conference Schedule here.

Samir Aguirre to Host H-1B Visa Webinar: How is a Prevailing Wage Rate Calculated, and Can I Do It Myself? On February 22, 2016

U.S. Immigration law mandates that a U.S. employer petitioning to hire a foreign worker pay the foreign worker, at a minimum, the prevailing wage for the occupational classification in that specific area of employment. The prevailing wage is the minimum an employer must pay the foreign worker in wages. In doing so, an employer will ensure that the foreign worker's employment will not adversely affect the wages and working conditions of U.S. workers comparably employed. The requirement to pay prevailing wages is required of most employment based visa programs, including the H-1B, H-1B1, E-3, and PERM application. So, how is a prevailing wage determined? How long does it take? Can I do it myself?

Carr Maloney, P.C. is pleased to announce that it will continue its 2015-2016 H-1B Petition webinar series on Wednesday, February 22, 2016, at 1:00 p.m. EST. The topic of the webinar will be the prevailing wage determination process. The webinar can be accessed at carrmaloney.com and will be led by Samir A. Aguirre, Esq., an experienced immigration attorney in the areas of business and family-based matters.

The H-1B Petition webinar will offer general insider tips & guidance to petitioning U.S. employers about the PWD process, and will review in detail the three options mentioned above, and what circumstances warrant the use of each. It is vital that an employer seek legal counsel to correctly calculate a prevailing wage rate, if necessary, and strategically maneuver the PWD process to improve the employer's chances for H-B approval. We hope that you are able to join us for our discussion of the PWD process!

William Carter to Present "Coverage Issues Arising from Claims for Civil Liability" at the DRI Insurance Coverage and Claims Institute this April in Chicago

On April 7, 2016 William Carter will be presenting at the DRI Insurance Coverage and Claims Institute in Chicago regarding *Coverage Issues Arising from Claims for Civil Liability.* Bill's presentation will explore coverage issues resulting from claims for disgorgement, restitution and fines and penalties as well as claims arising from civil liability for criminal acts. For more information regarding the symposium, please visit the event page on DRI's website.

Reputation on the Line: What Virginia Business Owners Can Do to Protect the Reputation of Their Businesses

By: Tina M. Maiolo and Ryan M. Walsh, Esq.

To many people, business is personal—especially if that business is one's livelihood. When a small business's reputation is unjustifiably damaged, this damage inevitably affects the professional and personal lives of the business's employees and owners. As such, what can small business owners in Virginia do to best protect the reputation of their business in this modern era of tweets, blog-posts, online reviews, and 24-hour news cycles? Fortunately, Virginia laws provide businesses several causes of action they can use to protect themselves.

The first, and perhaps most well-known, is defamation. Defamation, put simply, is a false statement that harms a person's or business's reputation. To succeed on a defamation action, a plaintiff must prove "that a defendant published a false factual statement that concerns and harms the plaintiff or the plaintiff's reputation." Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 46, 670 S.E.2d 746, 750 (2009). For the statement to be considered "published," it merely needs to be "communicated to a third party 'so as to be heard and understood by such person.'" Katz v. Odin, Feldman & Pittleman, P.C., 332 F. Supp. 2d 909, 915 (E.D. Va. 2004) (quoting Thalhimer Bros. v. Shaw, 156 Va. 863, 871, 159 S.E. 87 (1931)). The defamatory statement must be communicated negligently or intentionally. See Hyland, 277 Va. at 46, 670 S.E.2d at 750.

In today's world, social media provides us all with a platform for publishing and communicating thoughts and ideas. As a natural consequence, defamation cases stemming from comments and posts on "Yelp" and other business review websites have steadily been on the rise. See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 289 Va. 426, 770 S.E.2d 440 (2015); Westlake Legal Grp. v. Yelp, Inc., 599 F. App'x 481, 483

(4th Cir.) cert. denied, 136 S. Ct. 541 (2015); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 252 (4th Cir. 2009); McGeorge Camping Ctr., Inc. v. Affinity Grp., Inc., No. CIVA 3:08CV038 HEH, 2008 WL 652110, at *1 (E.D. Va. Mar. 11, 2008). When a false and damaging statement about a business or individual is posted online, the "obvious remedy is an action against the author and publisher for defamation." Burfoot v. May4thCounts.com, 80 Va. Cir. 306 (2010).

Another cause of action that businesses can use to protect their reputation is tortious interference with business relations or expectancy. The necessary elements for such a cause of action are: "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff." Glass v. Glass, 228 Va. 39, 52, 321 S.E.2d 69, 77 (1984). "[I]n cases involving a 'business expectancy,' a plaintiff must also demonstrate that the defendant employed 'improper methods' in causing the alleged interference." E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 453 (E.D. Va. 2009) (citing Duggin v. Adams, 234 Va. 221, 226–27, 360 S.E.2d 832 (1987)). In such cases, an act does not need to be inherently tortious or illegal to be considered "improper means." Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 254 Va. 408, 414, 493 S.E.2d 375, 379 (1997). Moreover, courts in Virginia have determined that defamation is, in fact, considered an "improper mean." Eslami v. Glob. One Commc'ns, Inc., 48 Va. Cir. 17 (1999).

Oftentimes, damage to a business's reputation is the result of a conspiracy between two or more people. Virginia has a very specific cause of action for such cases—the Virginia Business Conspiracy statute, codified in Va. Code §§ 18.2–499 & 500. Under Va. Code § 18.2–499, "two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of . . . willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever" are jointly and severally guilty of a misdemeanor. Under Va. Code § 18.2–500, "[a]ny person ... injured in his reputation, trade, business or profession by reason of [such] a violation of § 18.2–499" has a private right of action for treble damages and the costs of the suit, including reasonable attorneys' fees. For a plaintiff to prevail under the Virginia conspiracy statute, he must prove "by clear and convincing evidence: (1) concerted action between two or more people; (2) legal malice towards Plaintiff's business; and (3) that the conspiratorial actions caused Plaintiff's business damages." Rogers v. Deane, 992 F. Supp. 2d 621, 635 (E.D. Va. 2014) aff'd, 594 F. App'x 768 (4th Cir. 2014) (citations omitted).

The Virginia business conspiracy statute only applies to injuries "to business and property interests, not to personal or employment interests." Shirvinski v. U.S. Coast

Guard, 673 F.3d 308, 321 (4th Cir. 2012) (quoting Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780, 784 (2003). As such, the Western District of Virginia recently determined that the Virginia business conspiracy statute does not protect an individual's personal brand. See Marcantonio v. Dudzinski, No. 3:15-CV-00029, 2015 WL 9239009, at *12-13 (W.D. Va. Dec. 17, 2015) (determining that a plaintiff's claim that defendants caused the destruction of his swimming scholarship with a state university involved a personal interest rather than a business interest).

These aforementioned causes of action are not the only ones available to businesses under Virginia law. Depending on the circumstances, there may be more. Here at Carr Maloney, we understand the importance of your business and employment. If your or your business's reputation has been injured as a result of unfair business practices and you are interested in learning more about available legal remedies, please do not hesitate to contact us.

Fourth Circuit Affirms Decision that Coverage was Properly Denied Based on Interrelated Wrongful Acts in *W.C. & A.N. Miller Development Company v. Continental Casualty Company*

By: Kelly M. Lippincott, Esq. and Sarah W. Conkright, Esq.

In W.C. & A.N. Miller Development Company v. Continental Casualty Company, No. 14-2327, 2015 WL 9487938 (4th Cir. Dec. 30, 2015) (per curiam) the Fourth Circuit affirmed the district court's ruling that Continental Casualty Company had properly denied coverage for defense costs sought by its former insured in the second of two lawsuits filed by the same plaintiff.

In 2002, Haymount Limited Partnership ("Haymount"), a property development company, entered into a contract with International Benefits Group, Inc. ("IBG") to help secure financing for its development project. The contract provided that Haymount would pay IBG a $3 million finder's fee if it secured a loan through IBG's introduction.

In 2006, IBG filed suit against Haymount and others seeking to recover the finder's fee. The court entered judgment against Haymount on IBG's breach of contract claim.

In 2010, IBG sued Haymount, W.C. & A.N. Miller Development Company ("Miller"), a majority owner of Haymount, and others, seeking to enforce the judgment from the 2006 case. IBG alleged that the defendants had taken steps to render themselves judgment proof. Miller had entered into a liability insurance contract with Continental in

2010 with a coverage period from November 1, 2010 to November 1, 2011. The policy included coverage for claims made against subsidiaries, such as Haymount. Miller tendered the 2010 suit to Continental seeking coverage of defense costs. Continental denied coverage on the grounds that it was outside the scope of the policy. Miller successfully defended the suit at its own expense.

Miller then filed suit against Continental alleging that it had wrongfully denied coverage under the policy and sought its defense costs for the 2010 lawsuit. The policy provided that "More than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be considered as one Claim which shall be deemed made on . . . the date on which the earliest such Claim was first made. . . ." The policy defined "interrelated wrongful acts" as "any Wrongful Acts which are logically or causally connected by reason of any common fact, circumstance, situation, transaction or event."

The U.S. District Court for the District of Maryland granted judgment in favor of Continental and held that the acts alleged in the 2006 lawsuit and the acts alleged in the 2010 lawsuit were "interrelated wrongful acts" constituting a single claim under the policy. Under the policy terms, the claim would was deemed to have been made in 2006, before the policy period began on November 1, 2010.

The Fourth Circuit affirmed the decision, concluding that the 2006 and 2010 suits shared a common nexus of facts such that they were interrelated wrongful acts under the policy. The court observed that the two suits involved allegations of a common scheme involving the "same claimant, the same fee commission, the same contract, and the same real estate transaction" and that the common scheme "logically and causally" connected the two suits. The two suits were part of the same claim under the policy, and the claims made in the 2010 suit were deemed first made when the 2006 suit was filed. Because this occurred outside the policy period, the Fourth Circuit concluded that Continental had properly denied coverage for defense costs in the 2010 suit.

Recent Developments in FLSA Overtime Rules

By: Edward J. Krill, Esq.

The FLSA is administered by the U.S. Department of Labor, Wage & Hour Division. Over the last few years the enforcement of overtime requirements has become a priority. Following the huge class action cases against large retailers, the Department focused on major technology and financial institutions. During the last ten years the cases brought for unpaid overtime have almost tripled. Similarly, private

claims for overtime are now in the thousands per year. Settlements in the several millions of dollars have become somewhat common. Disgruntled employees are a frequent source of complaints and can be joined by a class of workers in the same situation.

During 2015, the Department of Labor promulgated proposed Regulations that would fundamentally change the classifications of employees who are entitled to overtime. These Regulations are reportedly on hold until the Fall of 2016, but the Department's vigorous enforcement of the current Regulations has continued.

The two basic changes with the new Regulations would make are:

a) increase the minimum salary for exemption from overtime to about $55,000; (more than double the current required compensation) and,
b) revise the definitions of the exempt job classifications to make it more difficult to qualify.

The primary reason that claims for overtime have been so successful is that employers fail to observe the relatively clear requirements of this 1938 law. This article will highlight the major reasons that an employer can find itself liable for unpaid overtime, penalties and interest. Prudent employers will take the time to review these basic requirements for all employees that are not paid overtime for hours of work in excess of 40 in any week.

1. Overtime must be paid at time and one-half the regular rate. "Regular rate" means base hourly wage plus any additional shift pay, e.g. "evening bonus." In a week where an employee works at two jobs with two rates, a formula for calculating the base rate is in the Regulations.

2. Overtime must be paid for all hours over 40 in one week. Each week stands alone. There is normally no carryover or next week "comp time" permitted with few exceptions.

3. Employees must do certain work to qualify for exemption from overtime. Simply paying an employee a salary does not result in exemption from overtime. These exemptions have been carefully evaluated by the Department of Labor in recent years and a job title or job description is inadequate evidence; the exact duties of the job actually performed are what are assessed.

4. Exemptions available for executive, administrative and professional employees when the employee is paid at least $455 per week on a salary basis. (But there is no bar to paying an employee doing exempt work on an hourly basis.)

5. Exempt employees must do exempt work as the primary duty. If they are not, they are seen as "misclassified" and their compensation is completely

reevaluated for pay at an equivalent hourly rate with overtime for as many as three prior years.

6. To be safe, at least 50% of the time the employee should be doing exempt work; therefore, team leaders, foremen, site supervisors and crew chiefs may not be seen by the Department as entitled to exemption, but recent court decisions have supported their exemption.

    - "Executive" means white collar managerial duties with major discretion in important business decisions, hires and fires, directs the work and supervises at least 2 employees, makes final employment and decisions.

    - "Administrative" means supervisory or technical work with independent authority in work activities such as finance, procurement, human resource management and maintenance. Administrative personnel work independently in the management of the company and make significant business decisions that bind the company. They are frequently entrusted with confidential information.

    - "Professional" means licensed or highly skilled work such as law, medicine, architecture, engineering, pharmacy, teaching and finance where an advanced degree is customary and licensure is usually required.

"Salary" means set amount paid on a regular basis regardless of hours. Thus an exempt employee that comes in late or leaves early or takes a day off should be paid the full week's salary. Deductions from salary for being late or leaving early defeat exemption unless part of a detailed, written vacation, sick leave or personal leave policy.

Keeping track of hours worked by salaried employees is permitted, especially as part of a defined vacation and sick leave policies that require use for time off. It is also permitted for other legitimate purposes such as client billing and contract cost management.

Overtime enforcement actions have likewise massively increased for hourly workers. The principal basis has been failing to record time spent by the employee has actual hours of work. Examples of time that is compensable work are:

- Arriving early to prepare in any way for the day, such as putting on a uniform, loading equipment or supplies and reviewing work schedules.
- Attending any instruction or class required by the employer.
- Remaining at a work station during the lunch hour and working while eating lunch.
- Certain travel that is away from the employee's regular work place.

Although the rules regarding overtime have not changed in any material respect for decades, it is evident that many employers have not paid sufficient attention to compliance. The standards for entitlement to overtime are neither overly technical nor difficult to understand. However, perhaps for the convenience of the employer, numerous, recent, expensive Department of Labor enforcement activities have been quite successful. In this climate, a prudent employer might wish to have its compensation practices evaluated by an experienced practitioner.

Carr Maloney PC
2020 K Street NW
Suite 850
Washington, DC 20006
(202) 310-5500