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PRIORITY Read

DOL Releases Final White Collar Overtime Rules

By: Marcus W. Campbell; campbellm@millerjohnson.com; 616.831.1791 and Daniel R. Schipper; schipperd@millerjohnson.com; 616.831.1748

On May 17, 2016, the U.S. Department of Labor (DOL) published its much-awaited final regulations changing the overtime exemption for "white-collar" workers under the Fair Labor Standards Act (FLSA). The new rules increased the minimum required salary for exempt administrative, executive, and professional employees from $455 per week (or $23,660 per year) to $913 per week (or $47,476 per year). Additionally, the new rules increased the minimum required salary for exempt highly compensated employees from $100,000 to $134,004. As a result, an estimated 4.2 million previously exempt white-collar employees may soon be eligible for overtime pay.

The DOL included a mechanism that will automatically increase these minimum salary amounts on a periodic basis. The minimum salary for exempt administrative, executive, and professional employees will be recalculated every three years to ensure that it remains equal to the 40th percentile of earnings for full-time salaried workers in the lowest-range census region. The minimum salary for highly compensated employees will also be recalculated every three years, to equal the 90th percentile of full-time salaried workers. Thus, if overall earnings rise throughout the country, employers can expect the minimum required salary for their exempt white-collar employees to rise as well.

Notably, the new rules permit 10 percent of exempt employees' minimum $913 weekly salary to come from non-discretionary bonuses, incentive payments and commissions, paid at least quarterly. Employers are permitted to make catch-up payments at the end of each quarter if the employee did not earn enough to meet the minimum salary requirements for a white-collar exemption. This is a significant departure from the previous rules, which did not allow employers to attribute any of the minimum salary to bonuses.

Continued on next page.

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Overtime Rules, *continued*

In addition to receiving the required minimum salary, employees must perform specific job duties in order to qualify for the exemptions. Paying the required minimum salary alone is not enough to make your employee exempt under the FLSA. Although the new rules did not change the job duties tests for exempt white-collar employees, the new rules provide employers with an excellent opportunity to review the job duties of their exempt white-collar workers and make any necessary changes.

The new rules go into effect on December 1, 2016. This gives employers approximately six months to come into compliance. This is certainly an improvement from the 60 day window initially contemplated by the DOL. Employers should begin analyzing this issue now so they can be prepared to make all necessary payroll and employment policy changes by the December 1, 2016 deadline.

Employers should review their exempt white-collar employees' current salaries and identify the employees whose salaries will not meet the minimum requirements as of December 1, 2016 (i.e., current exempt employees who are paid less than $913 per week). Employers must then decide whether to increase the salaries of these employees or to reclassify them as non-exempt. When making this decision, employers should keep in mind that the required minimum salary of $913 per week will likely increase when it is recalculated in three years.

Employers will want to evaluate whether or not they are prepared to properly track the work hours of formerly exempt white-collar workers and be prepared to calculate overtime rates of pay for these employees if they are changed to non-exempt. Employers may want to provide training for newly non-exempt employees regarding timekeeping and overtime policies. Finally, employers should keep in mind that these regulations may have a major impact on many employees – not only on their pay, but on morale and workplace culture as well. Employers should therefore develop an effective communication plan, which includes training for managers, to minimize any negative effects on workplace morale and culture.

To help employers manage the changes that are required by the new rules, we will be conducting workshops over the next few months. Please visit our website to register for a workshop. If you have any questions about the new rules or about wage and hour law in general, please contact your Miller Johnson attorney or the authors of this article.

Workshops Being Offered

The U.S. Department of Labor (DOL) announced on May 17, the "final rule" changing the overtime exemption for millions of "white-collar" workers under the Fair Labor Standards Act (FLSA). To help you prepare for these changes, we are offering workshops.

KALAMAZOO OFFICE: Wednesday, June 1
Morning session from 8:00 am – 9:30 am

GRAND RAPIDS OFFICE: Wednesday, June 8
Morning session from 8 am – 9:30 am or afternoon session from Noon – 1:30 pm

HOLLAND - Haworth Inn and Conference Center: Wednesday, June 22
Afternoon session from Noon – 1:30 pm

For more details, or to register, please go to our website and the event section.

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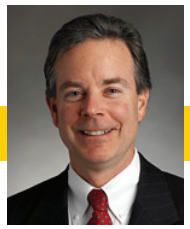

Whose Bathroom is it Anyway?

By: Gary A. Chamberlin; chamberling@millerjohnson.com; 616.831.1709

Few issues have generated as much recent controversy in the American workplace as the movement to protect transgender workers from employment discrimination, including the awkward topic of bathroom use based on gender identity. This highly polarizing subject has pitted those who endorse diversity and inclusion of the LGBTQ community against those who believe it reflects a loss of family values. It's one of the most rapidly evolving trends in employment law for HR to contend with.

A 2011 study estimated that there may be upwards of 1 million transgender individuals in the U.S. (UCLA's Williams Institute). That number may increase as employees become emboldened by the current spotlight shining on workplace rights and accommodation of employees who manifest a gender expression different than their birth gender.

The spotlight has been fueled by an explosion of entertainment tabloids, daily news stories and the power of social media 'buzz.' We've all read the national news about the economic and public relations fallout from North Carolina's controversial "Bathroom Law." This issue is not going away anytime soon.

Federal Agency Activism

Many of the agencies that enforce federal employment laws have recently taken very public steps in an attempt to 'move the needle' to protect transgender status/gender identity from employment discrimination as another form of sex discrimination. Congress has attempted and failed many times to expand Title VII to include gender identity and sexual orientation. These agencies are no longer waiting for Congress to act.

Their launch pad is a 25-year old U.S. Supreme Court decision holding that unlawful sex discrimination includes adverse treatment of an employee because he/she engages in attire, grooming and behavior that is not consistent with traditional gender stereotypes for men and women. Many courts have adopted this view in the years since. Relying on that Supreme Court

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Save the Date

Miller Johnson's Annual Employment Law Seminar

Our Employment Law Seminar provides practical solutions to your employment and labor law challenges. The dates for the 2016 seminar are **Wednesday, September 14** in **Grand Rapids** at DeVos Place and **Tuesday, September 20** in **Kalamazoo** at the Radisson Plaza Hotel.

Descriptions, the agenda and other program information will be sent this summer. We are submitting the seminar for 3.5 general continuing credit hours through HRCI. It is free for current clients.

For more details, you may view the brochure on our website at www.millerjohnson.com in August or contact Amy McCaffrey at 616.831.1886 or mccaffreya@millerjohnson.com.

Goodbye Calder Plaza Building. Hello Arena Place.

"The New Grand Rapids Starts Here" was the promise made when we broke ground on the Arena Place site in the summer of 2014. Finally on May 2, we opened in this dynamic new space with the firm spanning the top four floors along with a rooftop patio which has a stunning city view.

We dared to be different when we moved into Arena Place's vibrant active area of downtown. Clients and the practice of law are more sophisticated and the office reflects that. We incorporated new design and embraced technology and efficiencies while still providing personalized, high-level legal representation. When you come for a meeting or to attend a workshop, we think you'll agree that we're no longer just your grandparent's law firm.

Gender Stereotypes, *continued*

case, in 2012 the EEOC ruled that 'sex stereotype' discrimination theory also applies to a transgender worker. In 2015 EEOC went further and determined that this line of discrimination theory also applies to sexual orientation, because ultimately, an adverse employment decision against an LGBT person is "based on sex" of the person.

In 2014 President Obama passed an Executive Order that prohibits federal contractors/subcontractors (covering about 25 percent of the American workforce) from discriminating against applicants and employees based on gender identity and sexual orientation. In 2015 OSHA relied on its general Sanitation Standard regulation and issued guidance that employees must be allowed to use a bathroom that coincides with their gender identity, regardless of birth gender. Otherwise, according to OSHA, workers will feel stigmatized and elect not to use any bathroom, resulting in a physical and mental health hazard. The U.S. Departments of Justice (DOJ) and Education (DOE Title IX) have taken similar positions.

Private Sector Employers Too?

Many of these recent agency developments involve federal employee cases, or federal administrative policy guidance. As a result, they do not necessarily have the force of law binding private sector employers. However, the handwriting is on the (bathroom) wall. It's clear how EEOC, DOL, DOE, DOJ and OSHA are leaning, and they've taken legal action against private sector employers.

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Gender Stereotypes, *continued*

The EEOC is now accepting discrimination charges based on transgender status and sexual orientation. In 2014 and 2015, the EEOC filed lawsuits against private sector employers alleging discrimination or harassment based on transgender status. In March 2016, EEOC filed its first lawsuits against private sector employers alleging that harassment against employees based on their sexual orientation is unlawful sex discrimination under Title VII.

> ***"This highly polarizing subject has pitted those who endorse diversity and inclusion of the LGBTQ community against those who believe it reflects a loss of family values."***

These cases will soon be winding their way to federal courts to decide whether they, too, will expand the sex stereotyping theory to encompass transgender status, gender identity, or sexual orientation. When issued, those decisions will clearly become binding on private sector businesses within the reach of those courts.

Practical HR Advice While It All Shakes Out

There are several steps employers should be taking now to prepare. These include:

- **EEO Policy.** Consider whether to expand protected groups. It may depend on Company culture, diversity & inclusion philosophy, recruitment efforts, public relations, federal contractor obligations, or customer expectations.
- **Harassment Complaints.** Treat complaints of harassment, threats or violence based on an employee's gender identity or transgender status in the same manner as you would for any other complaint. Investigate promptly and take appropriate remedial action. Don't forget to build this into regular harassment training of managers and employees, and be sure to document it.
- **Pre-Employment Screening.** The name and gender of an applicant will likely correspond to their current expression. Background, criminal and driving record checks may involve something different. As will the common internet searches (Google, LinkedIn, etc.) if conducted on an applicant.
- **Names/Pronouns.** Several EEOC cases have involved the emotional issue of a supervisor or co-workers who refused to use an employee's preferred new name as presented. Changing a name and gender can involve a new self-identification form, EEO-1 Report designation, change to HRIS records, etc.
- **Dress/Uniform Policy.** EEOC will likely take the position that a uniform or dress code should be applied to an employee consistent with their gender identity. This will undoubtedly be a very challenging issue during a transitioning period.
- **Bathrooms/Locker Rooms.** Will be covered in the next article on gender stereotypes so stay tuned!

If you have any questions about this article or other employment discrimination issues, please contact the author or your Miller Johnson employment attorney.

Preparing For the Unimaginable: Your Workplace Violence Prevention Program

By: Gregory P. Ripple; rippleg@millerjohnson.com; 616.831.1797 and Andrew A. Cascini; cascinia@millerjohnson.com; 616.831.1705

Workplace violence has been a serious safety hazard in American workplaces for some time. In 2014, according to the Bureau of Labor Statistics, there were 403 workplace homicides in the United States, accounting for approximately 9 percent of all workplace fatalities. The overwhelming majority of workplace homicides are committed by non-employees. Women are most likely to be murdered at work by a current or former domestic partner. Men are most likely to be killed in a robbery.

Although the Michigan Occupational Safety and Health Administration (MIOSHA) has not promulgated specific standards for protecting employees from workplace violence, Michigan employers have a general duty to furnish to each employee "employment and a place of employment which is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee." MIOSHA has cited employers for exposing their employees to workplace violence hazards under this "General Duty" clause following incidents of assaults committed by customers and visitors.

MIOSHA encourages employers to implement a workplace violence prevention program to identify workplace violence risks in their workplace. This process involves identifying workplace violence hazards, determining methods of controlling or eliminating these hazards, training employees and supervisors, and preparing to respond to a violent incident.

Audit Your Workplace

The first step in drafting any workplace violence prevention program is to conduct an assessment of the workplace to identify existing or potential hazards that may lead to incidents of workplace violence. Employers should review their injury records and conduct a thorough review of their policies and operations to identify risks of workplace violence.

Implement Controls

After conducting this comprehensive worksite analysis, an employer should then consider steps to prevent or control the hazards identified. Engineering controls are physical changes to the workplace that may eliminate hazards. Installing physical barriers, locks, or panic buttons; placing better or additional lighting in poorly lit areas, or creating additional exits are all engineering controls that may reduce workplace violence risks. Administrative and work practice controls are changes to how work is performed. Implementing log-in/log-out policies, limiting when and where employees work alone, and establishing policies and procedures for secured areas and emergency evacuations are examples of administrative controls that may target workplace violence hazards.

Train Employees

An employer should train its employees so that they are aware of potential workplace violence hazards and how to protect themselves and their coworkers. Topics that should be covered in any training include: identified workplace violence hazards; the location, operation, and coverage of safety devices, such as alarm systems and panic buttons, and safe rooms; a standard response action plan for violent situations, including the availability of assistance; response to alarm systems and communication procedures; and policies and procedures for reporting and recordkeeping. Managers and supervisors should receive additional training to recognize high-risk situations, so they can ensure that workers are not placed in dangerous situations.

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Workplace Violence Prevention, *continued*

Your "Go Team"

An employer should also consider developing a crisis management team that can be mobilized quickly in the event of an incident or a viable threat. The response team should include representatives of management, human resources, and security. Employers may also wish to include legal counsel, who may be of assistance in obtaining a restraining order, and professional medical assistance that may be able to assist in deciding on how to respond to a specific threat. The crisis plan should also include strategies for communications with employees, including a method of being able to confirm the safe location of employees following an incident.

Unfortunately, no workplace violence prevention program will be able to prevent every instance of workplace violence or stop every individual who is intent on doing harm to others. A proactive approach to the problem, however, and developing and maintaining a workplace violence prevention program can eliminate easy targets and perhaps provide life-saving protections.

If you have any questions about this article or need assistance implementing a workplace violence prevention program, please contact one of the authors or your Miller Johnson employment attorney. In addition, we are offering workshops "Violence and Active Shooters in the Workplace: What Every HR Professional Needs to Know" on June 6 in the Kalamazoo office and June 28 in the Grand Rapids office. See the description on page 9 of the newsletter.

Workplace Violence: Policies to Protect Your Organization



By: Rebecca Strauss; straussr@millerjohnson.com; 269.226.2986 and Sarah K. Willey; willeys@millerjohnson.com; 269.226.2957 and Andrew A. Cascini; cascinia@millerjohnson.com; 616.831.1705

Mass shootings in places like Kalamazoo (2016) and Grand Rapids (2011) resonate in our communities and across the nation. Sadly, we can no longer take for granted that our workplaces are safe from active shooters and other violence. In addition to implementing a workplace violence prevention program (see Preparing for the Unimaginable: Your Workplace Violence Prevention Program on page 6), employers should take proactive steps to adopt policies that protect both employees from potential violence and the organization from potential liability.

Zero-Tolerance Workplace Violence Policies

Ask any human resources veteran to open their employee handbook, and a quick peek at the index will probably reveal a policy prohibiting employees from engaging in any violent behavior towards others at work. But it is time to review and revise those policies to make sure that they are effective. Consider the following:

- **A Clear Reporting Procedure.** Some incidents of workplace violence are preceded by an ominous phone call, an explicit email, or some other signal that an attacker is on his or her way to the workplace with intent to harm someone. Clearly inform employees who to notify when they become aware of a threat and what to do after they provide this notification.

Continued on next page.

Workplace Violence Policies, *continued*

- **Domestic Violence Coverage.** When women are killed at work, the perpetrator is most frequently a current or former romantic partner. Make employees aware that domestic violence can become a work-related concern if a violent spouse or partner follows an employee to work. Further, direct employees to notify a supervisor if they witness a co-worker being stalked or harassed by a spouse while at work.

- **A Defined Response Procedure.** It is too late for an employer to select a response team if they wait until an attack is underway. Define how managers should behave if they receive a credible report of potential violence.

Weapons in the Workplace Policies

The common thinking has been that employees should not be allowed to bring weapons to work. Now there is debate about whether employees should be able to arm and protect themselves at work. Whichever approach your organization chooses, it's important to consider the following:

- **A Clear Written Policy.** Any employer allowing employees to carry weapons at work should define who may carry, when they may carry, and under what circumstances weapons may be used. For example, allow only employees to carry concealed, registered firearms at work.

- **CCW-Free Zones.** Under Michigan law, individuals are absolutely prohibited from carrying a concealed firearm in certain places, no matter what an employer's policy may allow. These locations include child care/day care centers, sports arenas, bars, hospitals, or certain large entertainment facilities.

- **Third-Party Liability.** Accidents can occur even for the most highly-trained and responsible firearm operators. Balance the potential safety of having armed staff with the potential risk of injury to other employees, customers, or clients. If an employer has enacted a weapons policy, they may be liable for injuries that may result from the actions of its employees under certain circumstances.

- **Workers Compensation Insurance Coverage.** Because weapons in the workplace have the potential to cause injuries in the workplace, consult with your workers compensation insurance carrier before allowing employees to carry weapons to work.

- **State Laws.** Michigan law allows employers to affirmatively prohibit employees from bringing weapons on their premises. But other states are not always so permissive. Make sure your organization knows the rules in all states in which you have operations.

Criminal Background Check Policies

Conducting reasonable and lawful pre-employment background checks is a quick and easy way to know whether an applicant has a history of violence. Employers should make an individualized assessment of criminal history, considering the nature and gravity of the offense, the time that has passed since the offense and the nature of the position that they are applying for.

ADA and EAP Policies

An employee may notice unusual behavior in a co-worker and express concern to Human Resources for the co-worker's own health or for the safety of the workplace. The Human Resource representative may be tempted to ask the co-worker a question about whether the co-worker has a health concern that is causing the behavior. Generally, mental health issues including anxiety and depression are considered disabilities under the ADA, and the ADA limits an employer's ability to ask disability-related questions.

However, employers can ask questions or require a medical exam in some situations if it is job-related and consistent with business necessity. This includes a reasonable belief, based on objective evidence, that an employee will pose a direct threat to themselves or others due to a medical condition. In situations where an employer has a reasonable belief, based on objective evidence, that an employee may commit an act of violence, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

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Workplace Violence Policies, *continued*

Many employers provide "employee assistance programs" or EAPs. Many referrals to EAPs are voluntary for the employee after the employee has discussed some sort of personal struggle. In some circumstances, including a threat of violence, employers may consider requiring an employee to attend an EAP. Be cautious, however, because a mandatory referral could be portrayed as the employer perceiving the employee as having a mental health disability. If mandating EAP attendance, the key for the employer is to focus on the troubling behavior, and not base the referral on a hunch as to what is causing the behavior.

Miller Johnson has partnered with local law enforcement to create a task force focused on how employers can prepare for, respond to, and help prevent incidents of workplace violence. We will offer workshops regarding "Violence and Active Shooters in the Workplace: What Every HR Professional Needs to Know" on June 6 in the Kalamazoo office and June 28 in the Grand Rapids office. See the description below. Miller Johnson attorneys will also be speaking on this topic at the Lakeshore Human Resource Management Association (LHRMA) meeting on June 15.

If you have any questions about this article or need assistance reviewing or revising your workplace violence policies, please feel free to contact a member of the Miller Johnson task force (Andrew Cascini, Greg Ripple, Rebecca Strauss and Sarah Willey) or your Miller Johnson employment attorney.

Violence and Active Shooters in the Workplace: What Every HR Professional Needs to Know

This workshop is offered in **Grand Rapids** on **June 28** and **Kalamazoo** on **June 6**. We will educate attendees on how to lawfully prepare for, respond to, and help prevent incidents of workplace violence. Miller Johnson attorneys will address the legal obligations as well as policies, procedures and practices. In times of crisis, we call in the professionals. When we are advising you about how to prepare for a crisis, we decided to do the same. Officers from the local Sheriff's Department will provide information on how to respond if an active shooter has entered the employer's workspace.

For more details, or to register, please go to our website and the event section.

Welcome New Miller Johnson Attorneys

Catherine J. Rische is our new employee benefits attorney in the Grand Rapids office. She specializes in health care issues and general plan administration assisting clients in developing benefit strategies and overseeing the development and implementation of participant and sponsor communications. Before becoming a Member at the firm, Catherine was at Johnson & Krol in Chicago. She is a member of the International Foundation of Employee Benefit Plans. Ms. Rische earned her J.D. from DePaul University College of Law followed by a LL.M. in Employee Benefits from The John Marshall Law School. She has a B.A. from Aquinas College.

Daniel R. Schipper joined Miller Johnson as an Associate in the Grand Rapids office. He received his J.D. from the University of Notre Dame Law School in 2015 and was a summer associate at the firm in both 2013 and in 2014. He has his B.A. from Western Michigan University. Mr. Schipper studied abroad in Alexandria Egypt in 2009 and 2010 and is proficient in Arabic.

U.S. Department of Labor's New Persuader Rule Finally Hits

In March, the Department of Labor (DOL) finalized its new "Persuader Rule." This rule imposes reporting requirements on employers and labor relations consultants, including law firms, who engage in certain "indirect" activities on behalf of an employer for the purpose of persuading employees to defeat a union organizing drive.

The Persuader Rule is highly controversial and changes more than 50 years of settled law. If you would like to see a summary of the changes and timeline, please refer to the *Client Alert* which we sent on March 29 or contact Keith Eastland with any questions.

In the News

Mary Bauman was interviewed for the ABA Journal article "Covered: More law firms find savings, stability through self-insurance." She was also interviewed for "IRS Clarifies FSA Carryover and HRA Coverage Issues" which was posted online for the Compensation & Benefits at the Society for Human Resource Management in January.

David Buday and **Nate Plantinga** presented the annual employment law update "Changes in Employment Law That Matter to Human Resources Professionals" at the Michigan Healthcare Human Resources Conference on April 14 in Lansing.

Gary Chamberlin presented "Accommodating Transgenders in the Workplace: Legal Issues and Suggested Guidelines" in Boston at the Meritas Labor and & Employment Meeting and again at the AHRM meeting in February.

Keith Eastland and **Peter Kok** presented the Third Annual Employment Law Update for the Associated Builders and Contractors Western Michigan Chapter on May 17.

Jeff Fraser conducted a three-part webinar "Disciplinary Action: The Appropriate Balance" with the Michigan Chamber of Commerce on January 27, February 24 and March 23. Jeff also presented on April 28 for Michigan Works' Spring Into Action Series regarding 2016 HR Issues. Finally, he presented to non-profit HR Managers in Lansing on May 10 regarding significant 2016 HR Issues.

John Koryto was a panelist for "Focus on Business Migration: Exploring Immigration Law Opportunities within Meritas" at the Meritas' global annual conference on April 28 in Las Vegas, NV.

Nate Plantinga is now the Chair of Miller Johnson's Employment and Labor Section and Sarah Willey is the new Vice Chair.

Stephanie Quist has rejoined the firm as an Associate in the Grand Rapids office. She was previously at Miller Johnson from 2010-2012.

Greg Ripple was quoted extensively in the article "Misclassification of Bizav Workers a Growing Concern" in *Aviation Industry* News online.

Rebecca Strauss was recently elected to serve on the Board for the Kalamazoo County Bar Association and was selected to serve on the Executive Committee of the Federal Bar Association for the Western District of Michigan. She has presented on the proposed new FLSA regulations to several groups including the Kalamazoo Human Resource Management Association, the Lakeshore Human Resource Management Association, and the Michigan Golf Association.

Mary Tabin, Tripp VanderWal and **Nate Plantinga** presented HR Employment Law Update on March 17 for the Human Resource Group at GVSU.

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Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at www.meritas.org.

U.S. News Media Group and Best Lawyers awarded Miller Johnson with top rankings for 25 practice areas in Grand Rapids and 8 in Kalamazoo as part of their 2016 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, litigation, mediation, real estate, tax law, trusts and estates, and family law.