MILLER CANFIELD

GLOBAL AUTOMOTIVE NEWSLETTER

The Law Firm for the Industry's **Next Generation Vehicles**

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Headquartered in Detroit, the birthplace of the global automotive industry, Miller Canfield counsels and represents companies that are active in all segments of the automotive industry - including next generation vehicle manufacturers and innovators worldwide.

The following articles contain important information for owners and directors of both established and growing automotive companies.

Conflict Mineral Due Diligence in the Automotive Industry

Enacted in July 2010, §1502 of the Dodd-Frank Act authorized the Securities and Exchange Commission (SEC) to implement rules requiring publicly-traded companies to disclose their use of "Conflict Minerals" originating from the Democratic Republic of Congo (DRC) or any country that shares a border with the DRC. Conflict Minerals consist of cassiterite, columbite-tantalite, gold, wolframite or their derivatives. The objective of §1502 is to reduce trading in Conflict Minerals from the DRC and surrounding region, which helped finance the continuing violence in the DRC.

The SEC issued proposed rules implementing the §1502 disclosure requirements in December 2010, and it is expected that final rules will be released later this month. The SEC's final rules will likely require that, beginning in 2010, public companies conduct due diligence, audit their supply base and file annual reports with the SEC on the use of Conflict Minerals in their products. As such, public companies will need to conduct due diligence of their entire supply chain in order to delineate the origin of any Conflict Minerals.

In addition, non-public companies may not be immune from the reach of §1502. Public companies will likely require their suppliers, regardless of whether the supplier is subject to SEC oversight, to provide information on the supplier's use and procurement of Conflict Minerals. In the automotive industry, OEMs have already begun discussions with their suppliers on how to address these due diligence concerns.

Because Conflict Minerals are found throughout many vehicles, the due diligence and reporting requirements imposed by the SEC on the automotive supply chain is expected to be significant. In determining and certifying whether their parts contain Conflict Minerals, suppliers might even need to investigate which smelters are used in their components and the origin of scrap materials integrated into their components' raw materials.

Work on coordinating many of these efforts is beginning within the automotive supply chain, such as the efforts being undertaken by the AIAG. Miller Canfield attorneys will participate in these efforts as well as be available to advise clients. In addition, to best prepare for the forthcoming final rules, public and non-public companies in the automotive industry should begin to take the following steps:

- Determine which of their products contain Conflict Minerals.
- Outline each product's supply chain.
- Communicate, cooperate, and verify with their suppliers the origin of Conflict Minerals.

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Protecting Your Competitive Advantage

In many high-technology industries, such as the computer software and next-generation automotive industries, companies sometimes enter into agreements with their closest competitors promising that each will not hire the other's employees.

Not losing key employees to competitors at crucial times is a useful method for maintaining your competitive advantage. Non-solicitation or "no-poach" agreements, common among high-tech companies, may look attractive to automotive companies seeking to retain their most highly-skilled employees.

Auto Companies Beware

The Department of Justice (DOJ), however, has determined that some of these agreements violate U.S. anti-trust laws.

The DOJ recently initiated actions against Apple, Google, Adobe Systems, Pixar, Intel, and Intuit asserting that each had entered into no-poach agreements with a competitor and that these agreements restrained competition between them for highly-skilled employees.

The DOJ's Complaint states that Apple and Google executives agreed not to cold-call each other's employees; that Apple and Adobe placed each other on a "do not call" list when recruiting new employees; and that Apple, Pixar, Google, Intel and Intuit took similar steps.

In the DOJ's view, these actions reduced the companies' ability to compete for employees, disrupted the normal price-setting mechanisms that apply in the labor market, and substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.

The DOJ's proposed settlement against these companies requires them to discontinue such agreements, permit cold-calling of each other's employees, and prohibits them from entering into any other agreement that prevents any person from recruiting or otherwise competing for employees. The DOJ's press release notes that its action arose out of a larger investigation by the Antitrust Division into employment practices by high-tech firms and that the division continues to investigate other, similar agreements.

What can an automotive company do?

Adopt Written Internal Policies
Set forth, in clear terms which employees have access to confidential, sensitive, and trade secret data.

Limit Access
Take appropriate security measures to protect data, including requiring those with access to confidential and trade secret information to sign confidentiality and non-disclosure agreements, encrypting files containing trade secret information, and monitoring trade secrets to ensure that employees with access to them are not accessing the information more than is required.

Make Use of Non-Compete Contracts
The final and most powerful weapon in an employer's arsenal is the use of non-competition and non-disclosure agreements. A non-compete agreement may prevent a former employee from improperly using confidential business data. Michigan law allows employers to utilize non-compete agreements that are "reasonable" in scope. That is, the agreement must be reasonable in duration, geographical area and type of employment or line of business.

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China Releases Draft Interim Measures for the Participation in Insurance of Foreigners Employed in China

On June 10, 2011, China's Ministry of Human Resources and Social Security released "Interim Measures for the Participation in Social Insurance of Foreigners Employed in China (Draft for Comments)" for public comment. The comment solicitation period ended June 17, 2011. The finalized Interim Measures have not yet been released but are expected soon.

The draft Interim Measures, if adopted, would for the first time require foreign employees legally working in China to participate in China's social insurance system. Foreign employees in China fall into two categories under the draft Interim Measures:

> Foreign employees employed by companies, enterprises, public institutions, law firms, accounting firms, and other employing units registered in China including wholly foreign owned entities (WFOEs) and foreign invested joint ventures.
>
> Foreign employees working for their foreign parent company in a branch or representative office (RO) registered in China.

According to the draft Interim Measures, foreign employees in both categories would be required to participate in China's basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, and maternity insurance programs. The employing unit would be responsible for registering the foreign employees for the social insurance programs. The social insurance premiums would be paid by the employing unit and the foreign employee presumably on the same basis as current regulations provide for the employing unit and domestic employees.

The draft Interim Measures exempt foreigners who are nationals of countries that have entered into bilateral or multilateral treaties with China relating to social insurance. The United States does not have a social insurance treaty with China. To our knowledge, only Germany and South Korea currently have social insurance treaties with China.

The draft Interim Measures address a number of issues relating to foreign employees participating in China's social insurance programs including retaining individual pension accounts when leaving China before retirement age, cumulating payment periods for foreigners who leave and subsequently reenter employment in China, applying for payment of individual pension accounts in lump sums, treatment of pension balances upon death, requirements applicable to foreigners receiving social insurance benefits outside China, and dispute resolution provisions including mediation, arbitration, and litigation.

The draft Interim Measures are relatively short and leave many questions unanswered. Additional information may be available in the final Interim Measures or implementing regulations. We will keep you posted.

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How Independent Are Your Contractors?

As businesses of all sizes utilize contingent workers to maintain payroll flexibility, heightened focus by the government on employee misclassification may expose employers to legal challenges, tax liabilities, penalties, and fines.

Virtually all automotive companies are covered by the Fair Labor Standards Act (FLSA). The FLSA requires that employees receive no less than the current minimum wage and not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 hours per workweek (overtime). Exempt executive, administrative, and professional employees who meet certain tests regarding their job duties and are compensated on a salary basis, are not subject to minimum wage and overtime requirements.

Because independent contractors are also exempt from coverage under wage and hour laws, many automotive companies, especially new market entrants, looking to save costs during these tough economic times turn to the common practice of classifying certain individuals as "independent contractors." However, labeling someone an independent contractor does not mean that an automotive company is not the employer.

Whether an employment relationship exists under the FLSA depends on an "economic reality" test

- whether a worker's services are an integral part of the company's business
- the permanency of the relationship
- the amount and extent of the worker's investment in facilities and equipment
- the nature and degree of a company's control over the worker
- whether the worker has an opportunity for profit and loss and
- the degree of skilled involved

The exposure arising from independent contractor relationships does not end with potential liability for past wages and employment taxes. There is also potential for liability based on a joint employment status under other employment and labor statutes and current collective bargaining agreement obligations.

Generally speaking, a direct employment relationship provides the usual basis for liability under state and federal employment discrimination statutes such as the Michigan Elliott-Larsen Civil Rights Act (ELCRA) and Title VII of the Civil Rights Act of 1964 (Title VII). Automotive companies typically would not have statutory obligations with respect to independent contractors or employees of other entities (such as engineers hired through a third party). However, state and federal courts have adopted several doctrines under which an entity that does not directly employ an individual may nevertheless still be subject to liability under one or more of those statutes. These include the "single employer" or "integrated enterprises" doctrine, the "joint employer" doctrine, and common law agency principals.

Current collective bargaining agreement obligations

Most automotive companies are well aware of obligations under existing collective bargaining agreements. Nevertheless, prudent managers should review current collective bargaining agreements covering the job classifications in which the company intends to place workers through a direct independent contractor relationship, or through a third party, to clarify any ambiguity that might affect its ability to contract with third parties to provide services. Failure to recognize a labor agreement's limitations on contracting for services (directly or indirectly) through a third party could lead to unfair labor practice charges and/or breach of contract grievances.

What should you do if you have existing independent contractors?

Now is the time to ensure compliance with the FLSA. Employers are noticing an increase in wage and hour claims by terminated individuals. Automotive companies should consider conducting an immediate review of their current pay practices to ensure overall compliance with the FLSA and, in particular, that all employees, contractors, and third-party relationships are properly categorized.

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Complying wth Antitrust Laws

The current administration has made enforcement of the antitrust laws a top priority, and is investigating potential criminal violations in a number of industries. Complying with the antitrust laws has never been more important.

The most basic antitrust rule is that it is *per se* (that is, automatically) illegal to agree with a competitor to fix prices or to rig bids, divide markets or allocate customers. It does not matter whether an exact or uniform price is agreed upon. Agreeing on formulas to calculate prices, on price differentials among products, or on ***elements*** of price, like terms of credit, amount of discounts, inclusion of freight charges, etc. is *per se* illegal.

An *agreement* between competitors does not have to be formal or written. It does not require a handshake or even the words "I agree" or their equivalent. Evidence of an agreement can take many forms. For example, changing prices after talking with a competitor about prices can be evidence of an agreement to fix prices. Staying away from certain customers, declining to bid on a project, or staying out of certain lines of business after communicating with competitors on these subjects, can be evidence of an agreement to fix prices, rig bids or allocate customers. ***Therefore, do not discuss or exchange information with competitors about prices, pricing policy, bids or customers***.

This is where it gets complicated. Restraints of trade that are not subject to *per se* treatment are analyzed under the "rule of reason." This includes a wide range of conduct, for example mergers; the formation of joint ventures and certain agreements related to them; restrictions on resellers' prices or territories; agreements to deal exclusively with a vendor or customer; most tie-in sales or product bundling; and denial of membership in a trade organization or buying group. The legality of any specific restraint depends on a detailed analysis of competitive conditions, and consideration of legitimate justifications that may outweigh the impact on competition. In general, only justifications that increase efficiency or promote competition can be considered. Abstract "ethical" principles cannot justify a restraint of trade.

The federal antitrust laws are enforced by the Antitrust Division of the U.S. Department of Justice. Violations are felonies, punishable by fines and imprisonment. Many states have antitrust statutes that track the federal laws. Private individuals or corporations injured by antitrust violations may file lawsuits and recover treble damages, injunctions and attorney fees. Class actions by customers and even (in some states) by *their* customers are now available to recover alleged over-charges. A class action can turn a small individual claim into a large lawsuit.

You should never engage in conduct that might violate the antitrust laws without consulting counsel knowledgeable about the antitrust laws. The Department of Justice has a corporate amnesty program that offers significant benefits to the first company to report a violation. If you know of conduct that might be a violation, you should immediately consult counsel and consider applying for amnesty.

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Contact us if you'd like assistance with your global automotive initiatives. We can discuss the challenges, identify the obstacles, and lead you to solutions.

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