

Commentator

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When new legislation passes and it might affect you or your business, we want you to know about it. In response to *The Corporate Transparency Act* enacted in December 2020, George W. Gregory unpacks why it is imperative for business owners to watch for upcoming FinCEN guidance regarding this new requirement in the United States. Also in this issue, Mark Filipp shares an excerpt from his Employment Law Answer Book that reviews overtime compensation under the *Fair Labor Standards Act*.

We hope you are staying safe and looking forward to the warmer days ahead.

Best Wishes,

The Coming National Registry of Entities

GEORGE W. GREGORY



Congress has created a new registration requirement designed to target money launderers, tax evaders, and terrorists. As

collateral damage it also hits small businesses and probably other entities. This requirement was created by The Corporate Transparency Act, (“CTA”) part of the over 10,000 pages of legislation enacted in December 2020. It has a variety of penalties for non-compliance, the lowest of which is \$500 a day. The legislation gives the Financial Crimes Enforcement Network (FinCEN) a lot of leeway in enacting legislative regulations.

The intended target of this new requirement was shell companies used for money laundering, tax evasion, terrorism, and similar activities. The United States entered into agreements with many countries involved in the global financial community. These agreements resulted in the abolition of secret trusts in the Isles of Mann and Jersey; United States citizens having secret bank accounts in Switzerland; secret bank accounts and corporations in the Bahamas, etc. Today many other countries regard the United States as a country with secret accounts and entities. For example, an LLC owned by a South Dakota trust would be sheltered from the prying eyes of most foreign authorities most of the time. The

CTA requires tracing through entities down to the individual level to identify both (1) those who own 25% or more of the entity, and (2) those who directly or indirectly exercise substantial control over the entity.

The United States, as one of the founders of the Financial Action Task Force (“FATF”) was the first country to encourage other countries to adopt such legislation but is one of the last to do so. All of the European Union countries have done so. Some of the traditional “offshore” and “tax haven” countries have as well. Closer to home, Ontario requires the name of the entity, each owner’s last name, social insurance number (SIN, comparable to our social

number), date of birth, and complete postal code. Ontario has a registered representative (power of attorney or agent) equivalent. For a business it requires the name of the entity, business number (there is a new assigned number for this), type of entity (Ontario includes sole proprietors and charities as entities), social insurance numbers of owners and each of their mailing and physical addresses, and a description of entity activity. Ontario ties all of this into corporate income tax, goods and services tax, payroll taxes, and more. I have talked to people in Europe and the pattern is similar. Although, all members of the European Union have adopted a National Registry and are in FATF compliance, not all countries are exactly the same. Different countries recognize different types of entities. For example, legislatively, most charities are exempt from the National Registration requirement in the United States.

The United States National Register legislation clearly covers corporations and probably covers limited liability companies. It may cover partnerships and trusts. Much of this will depend on FinCEN Regulations. The National Register will cover a lot of what is regarded as small businesses (corporations with more than \$5 million in gross receipts on their Federal income tax return, or who employ 20 or more full time employees are exempt). Small businesses were not the target, but without more information they are indistinguishable from money launderers, tax evaders, terrorists, and the like. The target was shell companies used for such purposes. Because the target groups could

acquire legitimate small businesses, changes in ownership need to be reported when they happen.

The legislation is retroactive. FinCEN is supposed to publish guidance and set up a National Register for entities created in 2020. FinCEN is supposed to have a system in place for other entities no later than two years later.

Regulations and guidance now would be useful. On the other hand, having a data base of all small businesses, its address etc.; and the name of its business owners and those in charge including their social security



numbers and home addresses would be a tempting target for hackers. The legislation talks about coordinating with the financial industries requirements for Customer Due Diligence (know your customer rules) in other ways. Other parts of the legislation affect the financial industry in particular. The CTA is part of the Anti-Money Laundering Act of 2020 which is part of the National Defense Authorization Act. If a financial institution had access to the data, it would simplify the due diligence requirement. However, some in the financial industry have abused their knowledge or relationships. The CTA allows FinCEN to disclose information to federal law

enforcement agencies, including requests on behalf of non-U.S. law enforcement agencies, with consent of an entity to certain financial institutions, and state, local and tribal law enforcement agencies pursuant to a court order.

Not addressed here is what to do about hiding the identity of an owner for traditional business reasons. For example, if the disclosure of the real purchaser of real estate would adversely affect the price, it is not unusual for a lawyer to set up an LLC and provide no information to anyone about the actual owner. Such practices may have to be modified in the future.

WHAT TO DO

NOW:

Discuss with your advisors who should be monitoring this situation for you, (1) who will make sure you are in compliance and (2) how they should be compensated. This is an area where some entities will assume that

their accountant will take care of it, some accountants will think the client's lawyer will take care of it (in Canada and Europe, lawyers or business owners handle compliance). The legislation imposes ultimate responsibility on the business, the business owner and/or the person in control. \$500 a day can add up quickly. We will not have any real guidance until at least September. For some the due date will be December. For others it might be as much as two years later.

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Employment Law Q & A

MARK R. FILIPP

The following Q & A has been selected from *Employment Law Answer Book*, co-authored by Mark R. Filipp.

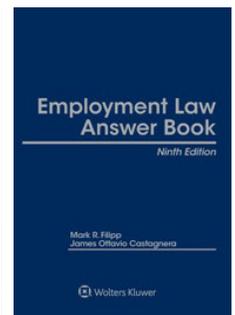
Q 1:2 What is the *Fair Labor Standards Act*?

The *Fair Labor Standards Act* (FLSA) [28 U.S.C. §§ 201 et seq.] establishes the federal minimum wage, the payment of required overtime pay, and childlabor standards. The FLSA covers all employees of employers that are engaged in interstate commerce or the production of goods for interstate commerce and that meet a volume-of-business requirement. Businesses with fewer than two employees are not covered by the FLSA.

The federal minimum wage rose to \$7.25 per hour beginning July 24, 2009. The overtime pay provisions of the FLSA require that employees who are not otherwise exempt under its regulations be paid no less than the federal minimum wage and be paid time and a half for hours worked in excess of 40 hours during a workweek. Employees who are exempt from the overtime pay requirements of the FLSA include those employed in a bona fide executive, administrative, or professional capacity or as an outside sales person. The regulations provide guidance and rules for determining whether an employee fits the criteria for an exempt classification. In addition, an employee who fits within a designated exempt category must be paid on a salary basis. [29 C.F.R. § 541.118] Subject to limited exceptions, this means that the employee must receive his or her full salary for any workweek in which he or she performs any work, regardless of the number of hours or days worked. However, just because an employee is paid a salary does not make him or her exempt from overtime pay. Rather, only exempt employees who are paid on a salary basis are exempt. The Department of Labor (DOL) administers the FLSA, and, through the Secretary of Labor, it may bring an action for violations of the Act. Individuals can exercise a private right of action under the Act as well. Relief for violations are many, including the recovery of unpaid minimum wages, overtime compensation, liquidated damages, and penalties. Willful violation can subject an employer, or somebody acting on behalf of the employer, to criminal penalties as well. (See chapter 8 for a more detailed look at the FLSA.) Unless supervised by the DOL, a court or unsupervised settlements reached due to a bona fide FLSA dispute over hours worked or compensation owed, an FLSA claim cannot be waived or released. In *Bodle v. TXL Mortgage Corp.* [2015 WL 3478146 (5th Cir. June 1, 2015)], the court held that the language in a settlement of a non-compete suit which, by its terms, relinquished claims for overtime compensation under the FLSA was not given effect when there was no discussion or disputes involving the FLSA at the time that the settlement documentation was signed.

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Upcoming Seminars

Martella is a Subject Matter Expert in Recent Webinar Series

Christopher Martella is one of four panelists featured in a three-part webinar series, *Cover You're a** from Security Breaches!*, hosted by Apex Digital Solutions. The webinar includes three, 45-minute panel discussions hosted on May 5, 12 and 19. The series covers how to prepare for a security breach, how to react to a security breach in real-time and how to handle the aftermath. Experts also cover best practices for contracts, insurance, incident response planning and the value of assessments. Find more information at apexdigital.com.

Umphrey to Speak at 61st Annual Probate & Estate Planning Institute

Attorney Cynthia L. Umphrey will be presenting at the 61st Annual Probate & Estate Planning Institute hosted by ICLE on May 21. Her talk is titled "Drafting Trusts for the Business Owner" and will review S corporation matters, including QSST, ESBT and BDOTS, liquidity considerations, special "fairness" considerations with family businesses, and financial security issues with keeping or selling a closely held business during incapacity or after death. The seminar will be held via livestream and on demand. Register at icle.org.

Filipp to Speak at MICPA Virtual Conference

Attorney Mark Filipp will be presenting live at Elevate, a virtual conference hosted by the Michigan Association of CPAs on June 30. His talk, *Reducing Exposure and Risk to Employee Claims*, will provide attendees with the information they need to reduce employee claims. Topics covered include sexual harassment, discrimination, retaliation and role of proper discipline, useful information for both CPAs and their clients. Learn more at micpa.org.