Business Law

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Transportation, Travel and Tourism

Letter from the Current Chair

Dear Members,

It has been an exciting and challenging year for the Business Law Section, and I am proud to have been able to serve as Chair. Last summer, shortly after taking the position, I authored an article in this newsletter to introduce myself and set out a few goals for my time as Chair. With an immense amount of help from the Executive Committee and certain key individuals, I think we have achieved most – if not all – of these goals.

First, we committed to continue the Section's proud tradition of legislative involvement. Although this year saw a substantial reduction in the number of bills that impacted the practice of business law, we were still busy. Our ever-vigilant Corporate Act Revisions Committee authored and ushered through the legislature a small but important update to Title 23B to keep us on pace with the rest of the country. Our LLC and Partnership Committee continued its work towards comments to elaborate on the Limited Liability Company Act passed in 2015. Our Nonprofit Corporations Committee pressed onward with its restatement of the applicable law governing nonprofit organizations (we expect that to get to the legislature next session). Finally, the Opinions Committee has just completed its years-long effort of developing an updated practice guide for the State of Washington in the field of legal opinions.

Second, we challenged the Executive Committee to revise the Section's bylaws. The WSBA implemented several changes that required us to revisit those bylaws, but they also had not been touched in nearly a decade. The Section adopted an amended and restated form of Bylaws that was approved by the Board of Governors late last summer.

Third, we pledged to commit resources to updating the Section's communication strategy. While we have plenty left to do in this regard, we made some important strides. Due in large part to the outstanding work of editor Deirdre Glynn Levin, this newsletter you are now reading has returned as an institution of the Section after being dormant for many years. Also, the Section's website was updated and successfully transferred to the WSBA's platform. We will continue to look for new and better ways to use our web presence to effectively communicate to members and also provide them a benefit unique to our membership.

Finally, we endeavored to re-think the Section's traditional midyear meeting and other programming efforts. We stepped away from the traditional format of the all-day CLE with a 10-minute meeting in the middle. Instead, we hosted an evening event with cocktails and networking and invited a keynote speaker – this past year it was Washington State Senator Jamie Pedersen. We hope to grow the momentum of this format and rebuild the midyear meeting into an event that members anticipate each year. We have also extended our partnership with the Corporate Counsel Section to host multiple outreach events outside of the Seattle area each year. The Executive Committee has also recommitted to content-driven programming for the upcoming year. We are looking for opportunities to host mini-CLEs to get our members the benefit of the expertise in each of our Committees.

Thank you to each and every member for supporting the Section. The work we do is important and there is no body better suited for it. The new slate of officers, led by David Eckberg, will continue to look for new ways to bring value to the membership in the coming year.

Truly,
Drew Steen, Chair

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Message from the Incoming Chair

As we begin the next annual chapter of the Business Law Section, I look forward to stepping up and taking the reins. Drew Steen will be difficult to follow considering his outstanding leadership and high-energy personality exemplified over the past year. I look forward to welcoming the assistance of our newly elected executive committee members: Jason Cruz, our chair elect, Diane Lourdes Dick, our Treasurer, Christopher Greene, our Secretary, and Steve Reilly and James Wriston, our two members at large, in addition to all our continuing Section committee chairs.

I bring to this position over 32 years of experience in business law. I am currently a director at Betts Patterson & Mines in Seattle, where my practice emphasizes mergers & acquisitions, commercial business transactions, corporate and securities matters, design professional liability, government contracting and other related practices.

I am excited about the upcoming slate of activities. Our nine Section Committees will remain active with publications, CLE's and other activities that provide significant and timely information to our members. In addition, we will continue our efforts to enhance the participation of our young lawyers and maintain an effective and productive relationship with the Washington State Bar Association and the Board of Governors. Towards this end, we are considering a joint day-long CLE in the spring that includes some business law topics of interest to our members.

We are fortunate to have such a large membership; as we move forward into this next year, we welcome input and participation from all our members.

David Eckberg

The Communications Committee of the Business Law Section encourages section members to contact the chair about article proposals, suggestions, or submissions. Inquiries may be directed to :

Deirdre Glynn Levin
deirdre@dgllaw.net

Corporate Act Revision Committee

The Corporate Act Revision Committee ("CARC") is a committee of the WSBA's Business Law Section primarily responsible for ensuring that the Washington Business Corporation Act ("WBCA") remains up to date, and continuously considers the need for changes to the WBCA in light of developments in corporate and securities laws and practices, judicial decisions and regulatory actions.

In the past year, CARC proposed amendments to the WBCA that expressly enable Washington corporations to hold so-called "virtual-only" meetings of shareholders, where shareholders participate *only* by means of remote communications technologies and where there is no physical assembly of shareholders. The amendments provide that a corporation can "opt out" of the ability to hold virtual-only shareholders' meetings through a provision in its articles of incorporation or bylaws and include certain safeguards consistent with those adopted in other states allowing virtual-only shareholders' meetings. If a corporation's bylaws authorize the board of directors or another person (such as a corporate officer) to determine the place of shareholders' meetings, then a corporation may hold virtual-only meetings if it so chooses without making any changes to its articles of incorporation or bylaws.

The virtual-only meeting amendments were approved by the state senate on January 25, 2018 (49-0), and the state house of representatives on March 2, 2018 (98-0). The amendments were signed by the Governor on March 13, 2018, and became effective on June 7, 2018.

Members interested in the activities of CARC are welcome to contact one of the committee co-chairs: Michael Hutchings (via email at: *michael.hutchings@dlapiper.com*) or Eric DeJong (via email at *edejong@perkinscoie.com*).

How Washington's Maritime Industry is Greening Beyond Compliance

By Eleanor Kirtley and Manon Lanthier

You may not have heard of Green Marine, the most comprehensive environmental certification program for the North American maritime industry. However, you surely know Washington State Ferries (WSF), the largest ferry operator in the United States.

In July 2018, the WSF become the latest participant to join Green Marine. It is the first U.S. ferry operator to join the environmental certification program. WSF is enrolling all of its operations in the Green Marine program, namely 22 vessels, 19 terminals, and a maintenance facility, thereby showing its substantial commitment to sustainable operations.

Globally recognized, Green Marine is a voluntary, industry-led sustainability initiative for ship owners, port authorities, terminal operators, and shipyard managers. Its certification program guides participants towards reducing their environmental footprint by setting various benchmarks that exceed regulatory compliance and foster a culture of continual improvement. According to David Bolduc, Green Marine's Executive Director, "WSF's participation is a truly welcomed addition to Green Marine. WSF is a sustainability leader when it comes to marine mammal protection and electric hybridization, for example, and there's no doubt that WSF's participation will help Green Marine to achieve its objective of advancing environmental excellence within the North American marine industry."

Origin Story

Voluntarily founded in 2007 by leading marine associations and industry executives in Canada and the United States, Green Marine rapidly gained an international reputation for transparency and credibility and for challenging the participating companies to steadily improve their performance.

The program was originally conceived for the Great Lakes and St. Lawrence corridor around the issue of aquatic invasive species with the founders having no intention of expanding it beyond the region. However, the interest it sparked throughout the marine industry enabled the program to evolve and be adopted across the East Coast, Gulf, and West Coast.

The Seattle office was opened in 2014, the first remote office from the head office in Quebec City. A more local presence was needed to better support the growing membership on the West Coast and the greater potential growth in the United States.

Green Marine's core value of continual improvement has the organization's sights set on further developing both its membership and the criteria that its participants use to address specific environmental issues related to their operational activities.

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How Washington's Maritime Industry is Greening Beyond Compliance *continued*

"The industry wants a reliable framework to clearly measure and relate its environmental progress," says Bolduc. "Our framework is rigorous but welcomes maritime enterprises regardless of size, resources and starting point as long as they satisfy current regulations and commit to continual self-improvement."

Beyond Compliance

The Green Marine environmental certification program addresses key environmental issues through 12 performance indicators. Each year, participants benchmark their environmental performance through the program's detailed framework, on a scale of Levels 1 to 5. Level 1 constitutes monitoring of regulations, while Level 5 indicates leadership and excellence. Some indicators are applicable to vessels (bulk carriers, container ships, tugs, barges, harbor crafts, and, of course, ferries), others to landside operations.

- The ship owners' criteria address greenhouse gases, air emissions, oily water, garbage management, and underwater noise.
- The ports, terminal operators and shipyard managers' criteria focus on greenhouse gases and air pollutants, spill prevention, waste management, environmental leadership, community impacts, and underwater noise.

Washington State Expansion

What started out as a one-person organization now has six full-time employees with offices: one in Seattle, and two in Canada.. The program's coordination is shared among three program managers.

Operations grew to support the rising number and diversity of participants in the program. In fact, the membership has more than tripled in the course of the last decade, and now exceeds 125 ship owners, ports, terminals, and shipyards, as well as the Seaway corporations, in Canada and in the United States.

Other key members in Washington state include maritime associations such as the Washington Maritime Federation and the Washington Public Ports Associations and supporters like the Washington State Departments of Ecology and Commerce, and the Seattle Aquarium. In 2018, the Puget Sound Pilots became the first pilotage group to upgrade their Green Marine membership from a partner to participant, so that they will be certified ship owners for their two pilot boats.

Program Development and Latest Advancements

In keeping with its core mission of continual improvement, Green Marine is constantly reviewing its existing performance criteria and publishes an updated program at the beginning of each year. These three advisory committees – one for the West Coast, one for the Great Lakes, and one for the St. Lawrence region – illustrate Green Marine's collaborative approach as they bring together industry stakeholders, government representatives and environmental groups, chosen among Green Marine supporters. The Green Marine program's unique character derives from the support it earns from more than 65 environmental organizations, government agencies and scientific research facilities across the United States and Canada.

Green Marine's 2018 performance indicators were posted online in January. The latest additions to the program are the two underwater noise indicators, applicable to ship owners and ports operating in salt water. The 2018 criteria introduce several key updates, such as in the ship owners' performance indicator on Sulphur oxide and particulate matter air emissions (SOx & PM). New criteria at Levels 3, 4, and 5 apply to Green Marine's expanding membership of American domestic ship owners and their particular regulatory baseline. Level 5 recognizes liquefied natural gas (LNG) as a marine fuel and other exemplary technologies for PM reduction. Participants will conduct their self-evaluation on these performance indicators and external verification for the 2018 reporting year in early 2019. Certificates are awarded annually at Green Marine's conference called GreenTech.

Looking Ahead

The certification program continues to expand its scope in response to emerging issues, increasing regulations, and better insight into current environmental challenges and advancements. Work groups are currently developing the criteria for a new performance indicator that will split and replace the existing indicator for community impacts into two, with one addressing noise, light, dust and other nuisances, as in the past, and the other new one addressing community relations. Another work group is establishing the basis for a new indicator for ship recycling. These new issues have been established based on membership input and where Green Marine could make the biggest positive impact.

Since Green Marine's founding, the industry has developed a more collaborative culture. Participants relate not only their annual results but also their actual experiences with one another on new environmental best practices and technologies in a spirit of improving the transportation mode's overall sustainability, in Washington state and across North America.

So, on your next ferry ride heading to one of the islands, to work, a Mariners or Seahawks game or Pike Place Market, you'll know that the vessels, terminals, and even WSF's maintenance facility have committed to publicly report their environmental performance to the latest industry standards – and beyond – and to continual improvement. The same goes for the Ports of Seattle, Olympia, Everett, and the Northwest Seaport Alliance, who are already Green Marine certified.

For more information please visit: *www.green-marine.org*.

Eleanor Kirtley, Ph.D., P.E. *– Before becoming Green Marine West Coast Program Manager in 2014, Eleanor Kirtley was an ocean engineer for six years at Glosten. She was a Project Manager and Principal Investigator for vessel traffic and risk assessments studies. She lives in Seattle.* eleanor.kirtley@green-marine.org.

Manon Lanthier*–Green Marine's Communications manager since 2011, is responsible for the organization's internal and external, digital and print communications, in addition to managing the logistics of Green Marine's annual conference, GreenTech. She lives in Quebec City, Canada.* manon.lanthier@green-marine.org.

Tourism Promotion Is Back

By Becky Bogard

Tourism is among one of the top five industry sectors in Washington state. It provides more than 170,000 jobs to Washington residents. But in spite of this, the state decided to shut down its marketing efforts in mid 2011. Washington became the only state without a statewide tourism marketing program. This $21 billion industry had no way to attract tourists from out-of-state to come to Washington, spend money, generate tax dollars, and leave! In fact, it has been at least 20 years since there have been TV ads in other states to attract their residents to Washington.

Since this industry is composed of largely private sector businesses who could presumably do their own marketing, you may wonder why the state needed a program. One reason is that four out of five businesses in the tourism sector are small businesses. They simply don't have the ability to market their services nationally. Tourism is important to both urban and rural areas. It impacts more businesses than just hotels. At a minimum it is important to restaurants, retail, rental cars, attractions, and outdoor recreation, just to name a few.

When the state closed its tourism effort, an organization called the Washington Tourism Alliance (WTA) was formed. It is a 501(c)(6) organization. Its members are businesses in the tourism industry as well as organizations representing those businesses such as the Washington Hospitality Association. WTA members include local destination marketing organizations (DMO's) from around the state like Visit Seattle and Visit Spokane.

WTA has two major purposes. First, members agreed that the organization should work to propose a new, private- sector statewide tourism marketing effort. Second, WTA was charged with organizing and implementing a minimum statewide marketing program until such time as there was a more robust alternative. When the state closed its tourism office, it gave the assets of that office, such as the tourism website, to the WTA.

While WTA tried to update the state-inherited website, it was soon determined that it would be necessary to construct a new one. Since the majority of travelers make their plans through websites, it was imperative that Washington state have something that worked well for the traveler. Getting a new site connected to the large number of travel links was a major effort in the first years of WTA.

First Legislative Effort. WTA leaders spent many months traveling around the state and listening to the industry about what it wanted in a marketing program and how they were willing to pay for it. There were some basic principles for WTA. The program should be industry run and the costs should be shared by all sectors of the industry. Its success should be measured by metrics.

In 2015, legislation was proposed to impose fees on five industry sectors: lodging, restaurants, rental cars, attractions, and retail. By using business classifications provided by the Department of Revenue, the program was constructed to include thresholds for paying the fees and the fees were variable, according to the type of business. The funds would be used by a private-sector organization to develop and implement a statewide tourism marketing program.

While WTA would have preferred to have this a totally private-sector program, it was necessary to involve the state in collecting the fees. It was simply too complicated because there were too many businesses to get the necessary revenue on a voluntary basis. Once the state, through the Department of Revenue, was involved, there were additional complications. When the fees "touched" the state, they became government funds. It meant there needed to be government involvement because of the state's prohibition on gifts of public funds. Once a satisfactory mechanism was determined, the legislation was redrafted and introduced.

Then a major roadblock occurred. Many legislators viewed the assessments as a new tax. There was significant dislike on both sides of the aisle about the imposition of any new taxes or fees. Other legislators thought that the state, because it benefits, should have a stake in the program. But this was the time of *McCleary* and funds were limited. While a majority of legislators agreed that a new program was necessary, they could not agree on a way to do it.

In the summer of 2016, WTA convened a group of 10 legislators to work collaboratively to fashion an acceptable program. The group was composed of both House and Senate members and Democrats and Republicans. After four meetings with WTA representatives, the legislators outlined a program that will be the start of getting Washington state back into the tourism marketing. It became the basis for legislation and a new program.

It should be noted that during these years, the legislature had been providing some minimal funding for tourism activities. It funded the distribution of visitor guides by WTA and allocated some funds for construction of a new website. In the 2017 legislature, $500,000 was appropriated to allow the Department of Commerce in cooperation with the WTA to put together a draft marketing plan. This plan will allow the new contractor a running start when funding does become available.

The Successful Effort. For the 2017 legislative session, the legislation was introduced as SB 5251 (http://apps2.leg.wa.gov/billsummary?BillNumber=5251&Year=2017&BillNumber=5251&Year=2017) and HB 1123. This was the so called "long" legislative session so there was hope it would pass before the legislature adjourned. However, it was also a budget session and there was the home stretch effort to satisfy the courts on *McCleary*.

The components of the program were the following:

- Establishes the Washington Tourism Marketing Authority (WTMA) to oversee (not implement) a statewide tourism marketing program

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Tourism Promotion Is Back *continued*

- Directs the WTMA to contract with a private nonprofit organization to design and implement a program which would emphasize tourism development in rural areas, international markets, and outdoor recreation
- Provides for funding from both the state general fund and other sources including cash and in-kind contributions and contributions from non-state general funds
- Requires the impacts of the program to be evaluated by both the WTMA and the Joint Legislative Audit and Review Committee

As the bill made its way through the legislative process there were technical changes made, but the basics of the bill remained intact. At the end of the third special session, legislators were close to passing the bill but simply ran out of time.

Since the bill remained alive in the 2018 legislative session, WTA proposed some technical amendments to an amended version of the proposals and began efforts to get the bill passed. By now legislators were familiar with the proposal and after some procedurally required hearings, the proposal passed unanimously in both houses as 4ESSB 5251. Governor Inslee signed the bill into law on March 27 and it became effective on June 7.

Elements of the Final Proposal. 4ESSB 5251 is now Chapter 275, Laws of 2018. The following are details of the major provisions:

Washington Tourism Marketing Authority – The governor is charged with appointing nine members of the WTMA from lists provided to him by the Speaker of the House and the Lt. Governor. The representatives have to be from several different sectors of the tourism industry and be diverse geographically and otherwise. In addition, each legislative caucus is directed to appoint a member and an alternate to the WTMA. This means the WTMA has a total of 13 members. It is housed within the Department of Commerce, which provides administrative support.

In addition, the legislation provides for an advisory committee composed of representatives of government agencies and federally recognized tribes.

The WTMA must chose the contractor for designing and implementing the tourism marketing program and enter into a multi-year contract with that entity. By statute, the contractor must be "a statewide non-profit organization existing on the effective date … whose sole purpose is marketing Washington to tourists" (See section 6 (1) of 4ESSB 5251.) The intention of this provision is to expedite the award of the contract so that the program can be implemented as soon as possible. Under section 5 of 4ESSB 5251, the WTMA is directed to establish guidelines for the matches that would allow access to state general funds. Finally, the WTMA is charged with hiring a contract or to evaluate the effectiveness of the marketing program and reporting to the legislature.

This section also spells out the desired content of the marketing program. They include, as noted above, tourism development for rural areas, international tourists and outdoor recreation. Additionally, the program must include working with the local DMO's and establishing a program for responding to any crisis in tourism areas (e.g., forest fires).

Funding the program. To finance the marketing program, 4ESSB 5251 provides for both public and private sources. With respect to public funds (general fund-state), the legislation authorizes $1.5 million for each fiscal year. These funds must be appropriated. In the 2017-19 biennial budget, the legislature appropriated $1.5 million for FY 19. The legislature will have to act in the FY 2019-21 budget during the 2019 session to continue the program. It is not anticipated that this will be an issue as has been in past years.

The new law requires a $2 non-state general fund match for every $1 from the state general fund. This means that the total available for implementing the statewide marketing program is $3 million for each fiscal year. Money from the state general fund can be released as matching funds or services are provided. These monies are provided by a sales tax deferral from state sales imposed on lodging, restaurants and rental cars. There is, as noted above, a $1.5 million cap on the amount that can be deferred.

One key issue is what constitutes a match. The answer is found in section 5 of 4SSB 5251. It may include cash contributions from the private sector and cash contributions from government agencies that are not from the state general fund. Examples of this include cash contributions from port districts or state agencies such as the Parks and Recreation Commission. These organizations have funds designated for marketing its facilities. If approved by the WTMA, certain in-kind activities would be counted toward the match. An example of this is value of the state visitor guide which is published by the Washington Hospitality Association and that, for years, has been donated to the statewide tourism program.

As of this writing, the first WTMA meeting is in the process of being scheduled. Once they meet and get organized, decisions on designating a contractor and defining the match will begin. It will put Washington back on the map for tourists from out of state. It will allow us to work with our neighbors such as other Northwest states to attract visitors to this part of the world!

Make no mistake, this program is a beginning. To make Washington truly competitive, a more robust program will be needed. However, it is necessary to take these first steps and then expand the program.

Becky Bogard is the managing member of Bogard & Johnson LLC. She has represented many tourism clients and is the lead lobbyist for the Washington Tourism Alliance.

Recharge Required: Public Fleets in Washington State on the Effective Date of Public Fleet Electrification Law

By Matthew Metz

Washington law requires that all vehicles owned by cities, counties, school districts, and other local public entities in the state run solely on electricity or biofuel by June 1, 2018, "to the extent practicable." Washington state government's deadline to achieve the same goal was June 1, 2015. The law mandating use of electricity or biofuel in public vehicles, RCW 43.19.648, was first signed into law by Governor Gregoire in 2007.

This article provides an overview of the fuel used by the vehicles within Washington state's on-road, non-transit public fleets as of June 1, 2018, the date that RCW 43.19.648 went into full effect; reviews progress and obstacles concerning implementation of the law and the transition to electric vehicles; and sets forth recommendations for citizens and governments seeking to improve the law's effectiveness.

Coltura, the 501(c)(3) organization which produced the report, was founded by WSBA member Matthew Metz, and has the mission of accelerating America's transition towards clean alternatives to gasoline and diesel-powered vehicles. Coltura leads the Yes Clean Cars coalition of environmental organizations in California and Washington which seek to phase out sales of gasoline vehicles by or before 2040.

Coltura initiated public re cords requests for data concerning fleets to six state agencies (including the Department of Enterprise Services, which manages the fleet for many state agencies), the state's 10 largest counties, the 14 largest cities, the six public universities, six large school districts, and the Port of Seattle between December 2017 and April 2018. All data used in this report can be accessed through this *link*.

All entities responded to the public records requests, and data regarding their fleets were tabulated as set forth in Tables 1.

I. Vehicle Inventory Data on 42 Public Fleets

Table 1 sets forth the vehicle counts of queried public entities. Transit buses are not considered. Hybrids such as the Toyota Prius are classified as gasoline vehicles. Plug-In hybrids such as the Chevy Bolt and Ford Fusion Energi are counted as EVs.

Table 1[1]	Passenger Vehicles	EVs	Total Vehicles
Cities			
Auburn	60	**0**	110
Bellevue	184	**4**	528
Bellingham	32	**1**	287
Everett	180	**7**	669
Federal Way	56	**0**	204
Kirkland	31	**2**	145
Kennewick	60	**0**	231
Kent	89	**0**	382
Renton	61	**1**	425
Seattle	740	**178**	3410
Spokane	205	**1**	1086
Tacoma	311	**7**	1093
Vancouver	214	**3**	582
Yakima	53	**0**	570
Subtotal	**2,276**	**204**	**9,722**
Counties			
Benton	58	0	224
Clark	124	0	511
King	671	9	1999
Kitsap	37	2	423
Pierce	237	3	590
Snohomish	145	5	985
Spokane	248	0	949
Thurston	74	4	412
Whatcom	107	0	497
Yakima	70	3	622
Subtotal	**1,771**	**26**	**7,212**
State Agencies			
Ecology	160	8	350
Ent. Servs.	2,725	130	4,749
Labor & Ind.	363	10	453
Nat.Resrcs.	53	0	1022
Parks	70	4	617
Subtotal	**3,371**	**152**	**7,191**

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Recharge Required:… *continued*

Washington State Government, Cities, and Counties Are Not Following RCW 43.19.648 Because They Have Not Purchased Electric Vehicles to the Extent Practicable.

RCW 43.19.648 requires that all vehicles owned by local public entities run solely on electricity or biofuel by June 1, 2018, "to the extent practicable." The state government's deadline to achieve the same goal was June 1, 2015.

A. Practicability

1. Relevant Standards

RCW 43.19.648 and its companion statute, RCW 43.325.080 direct the Department of Commerce ("Commerce") to define "practicability" via regulation.

Commerce defined "practicable" in WAC 194-28-020(14) as "the extent to which electricity and biofuel can be used as a fuel source for state vehicles … as determined by such factors as cost differentials between fuels, availability, refueling infrastructure, functional differences, technical feasibility, implementation costs, and other factors." A similar definition exists for local government vehicles pursuant to WA C194-29-020(7).

For state agency vehicles, Commerce evaluates practicability pursuant to WAC 194-28-070 as follows:

> (a) It is considered practicable to procure a PHEV [Plug-in Hybrid Electric Vehicle] and PEV [Plug-In Vehicle] … when the following criteria are met:
>
> (i) The vehicle is due for replacement;
>
> (ii) The anticipated driving range or use would not require battery charging in the field on a routine basis; and
>
> (iii) The lifecycle cost is within five percent of an equivalent HEV based on anticipated length of service.

For local government vehicles, Commerce evaluates practicability pursuant to WAC 194-29-070, a similar standard to that for state vehicles.

2. Electric Cars Are Practicable per Commerce's Evaluation Criteria

a. Electric Cars Have a Lower Lifecyle Cost of Ownership

The City of Seattle has determined that the total cost of owning a Nissan Leaf over 10 years, including acquisition and operating costs, is $27,902, considerably less than the cost of a gas-powered Ford Focus ($38,946) or a Ford CMax hybrid ($34,836).

The State of Washington conducted a similar analysis, determining that the 10-year cost of ownership of an electric Chevrolet Bolt is $33,385, versus $34,893 for a Ford Focus, and $36,553 for a Toyota Prius.

b. Electric Cars Meet Operational Needs

The main operational concern with electric cars is battery range. The Chevy Bolt has a range of 238 miles, sufficient for the vast majority of trips.

1. Governments at all levels are not following the law

Cities: The passenger fleets of all cities contain fewer than 5 percent of electric vehicles, except for Seattle. Excluding Seattle, fewer than 2 percent of passenger vehicles are electric. About 26 percent of passenger vehicles in the Seattle fleet are electric. Auburn, Federal Way, Kennewick, and Kent have no electric vehicles in their fleet.

Counties: Five of the 10 counties surveyed, including Spokane County, have no EVs. King County has nine EVs out of 700 total passenger cars, and purchased 3 EVs out of 109 passenger vehicles purchased from 2015-2017.

State: The state fleets surveyed are comprised of more than 97 percent gas or diesel-fueled vehicles. The trend since 2017 shows a sharp increase in purchases of electric vehicles.

The Regulations Promulgated by Commerce Pursuant to WAC 194-28 and 194-29 Do Not Effectively Implement RCW 43.19.648.

A. Statutory Authority

RCW 43.325.080, required Commerce to adopt rules by 2010 to define practicability and evaluation criteria for RCW 43.19.648.

B. State Agency Regulations Implementing RCW 43.19.648

In 2013, Commerce filed WAC 194-28, a regulation governing state agency compliance with RCW 43.19.648. The regulations in WAC 194-28 do not provide a clear standard by which state agencies can be held accountable for compliance with 43.19.648. They do not state with specificity how costs are to be calculated, when one vehicle is judged "equivalent to another," or procedures or penalties for non-compliance.

C. Regulation of Local Governments

In 2016, Commerce promulgated WAC 194-29, the regulation governing compliance with RCW 43.19.648 for local governments. WAC 194-29 largely tracks 194-28, except that it includes an allowance for substitution of natural gas and propane for electricity or biodiesel not authorized within the statute.

D. Analysis of WAC 194-29

WAC 194-29 is so vague that it provides no effective guidance to agencies, and no clear basis for holding them accountable for their decisions. Pursuant to RCW 43.325.080(2)(c), the Department of Commerce was required to file rules setting forth a schedule for phased-in progress of electrification and biofuels. As of June 1, 2018, Commerce has not set forth that schedule.

Required Reporting Not Complete

Commerce reports that it has no annual reports on progress implementing the fleet electrification law from any state and local agencies, reporting which is required by WAC 194-28-080 and 194-29-080. These reports would force jurisdictions to focus on their compliance with the law and

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Recharge Required:… *continued*

provide Commerce with a baseline for measuring progress for compliance with the law.

Electrification of Washington's Public Fleets Provides Significant Benefits

A. Improved Air Quality

Vehicle emissions are the largest source of air pollution. They increase risks of asthma, heart and lung disease, dementia and cancer – especially in children and people living near busy roads.

More Americans die each year from vehicle emissions (58,000) than from vehicle crashes (38,000) or secondhand smoke (41,000). On average, every gallon of gas burned costs $1.15 in health and climate costs.

Exposure to harmful toxic air pollutants from other vehicles is higher inside vehicles than outside.

B. Climate Benefits

The transportation sector accounts for 47 percent of CO^2 pollution in Washington state. Every gallon of gas burned emits 20 pounds of carbon dioxide.

Per a study by the Union of Concerned Scientists, the average electric car running on a typical Northwest power mix is as efficient as a car getting 96 miles per gallon. In areas served by close to 100 percent clean power, such as Seattle, the benefits are larger.

The City of Seattle determined that a Nissan Leaf would reduce greenhouse gas emissions by more than 98 percent relative to a comparable gas vehicle.

Inadequate Resolve, Resources, and Accountability Hinder Implementation and Enforcement of RCW 43.19.648

1. Resolve and Accountability

Elected officials are generally unaware of the fleet electrification law, RCW 43.19.648. The author of this report could find no reported formal pronouncements from elected officials at any level of government in the state pledging their determination to see the law enforced.

Only 4 of the 31 local governmental entities surveyed have an actionable plan for electrifying their fleets.

Neither the original implementing statute, RCW 43.19.648, nor WAC 194-28 and 194-29, contain language specifying policies or mechanisms for dealing with noncompliance with the law (assuming that the vague regulations would allow for such a finding).

RCW 43.19.648 does not specifically empower Commerce (or any other agency) to enforce the law, and Commerce staff believes that they do not have enforcement authority .

2. Resources

a. Staffing

The Department of Commerce has primary responsibility for enforcement of RCW 43.19.648. One junior employee within Commerce oversees compliance, training, and technical assistance relating to the more than 1,100 cities, counties, school districts, etc., charged with complying with the law.

b. Inadequate funding for Charging Infrastructure

Significant one-time investment is often needed for installation of Level 2 (medium speed) and Level 3 (high speed) charging equipment. One fleet manager estimated that installations of fewer than five Level 2 charging units cost an average of $5,000 each.

There are a number of potential funding sources for charging station installation, including local utilities, Volkswagen settlement funds, and the Commerce-administered Clean Energy Fund, but they are inadequate for financing fleet charging infrastructure on the large scale required.

c. Lack of Financing for Higher Sticker Price of EVs

Electric vehicles still generally have higher up-front costs than conventional vehicles, although lifetime cost of ownership of electric vehicles is usually lower. The state needs to develop financing mechanisms to help local entities meet these higher costs.

Other barriers hindering compliance, include fleet managers' preference for status quo, end users lack of knowledge about EVs, and limited EV options in key product categories such as SUVs, pickups, and police vehicles.

II. Policy Recommendations

A. Redraft implementing regulations to tighten electric vehicle buying requirements and specify consequences for noncompliance.

WAC 194-28 and 194-29 do not provide effective guidance for state and local agencies concerning their obligations to buy electric vehicles and should be redrafted.

1. Lifecycle Cost Calculation

The lifecycle cost calculation set forth in the implementing regulations must be clarified so that elected officials and fleet managers can be held accountable for vehicle purchasing.

2. Vehicle Use Criteria

The regulations need to strictly define under what circumstances a gas vehicle can be purchased over an electric one.

3. Auditing and Noncompliance Penalties

Presently, there is no auditing procedure to establish accountability.

4. Public Notice of Fleet Purchases

To facilitate public oversight of fleet purchasing, planned vehicle purchases should be published in a prominent location on the jurisdiction's website 60 days prior to the actual purchase, absent exigent circumstance.

B. Provide Commerce sufficient authority and resources to enforce RCW 43.19.648, and effectively oversee Commerce's implementation of the law.

There is regulatory confusion over the scope of Commerce's ability to enforce the law. This confusion must be clarified.

C. Expand statewide training and technical assistance programs for public fleet managers

D. Expand grant and loan funding for public entities to construct charging facilities and pay the greater

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Recharge Required:... continued

initial costs associated with electric vehicles

E. Jurisdictions should adopt a clear EV-first policy which would require that all new purchases be EVs unless there is a demonstrated and urgent need to purchase a gas vehicle.

Conclusion

Every new gasoline-powered car purchased is a 10-year investment in oil extraction, transportation and refining, and air and carbon pollution, and runs contrary to the stated environmental goals of the State of Washington and most jurisdictions referenced in this report.

Compliance with Washington's existing public fleet electrification law will result in major reductions in carbon and air pollution and save state taxpayers tens of millions of dollars in fuel costs. A bold, forward thinking law was already passed--what is lacking is the development and execution of plans to realize its potential.

Matthew Metz is the founder and co-executive director of Coltura, and is of counsel to Metz Law Group, PLLC. For more information, please see coltura.org and yescleancars.org. He can be reached at mnm@coltura.org, *and urges those with a passion for phasing out fossil fuels to contact him.*

1 For purposes of brevity, only city, county, and state data is presented here. Data for universities, school districts, and the Port of Seattle is available in the full report, Recharge Required.

Legislative and Case Law Update: What's On Board for Travel & Tourism?

By Mona McPhee

As the travel and tourism industry rapidly expands across the world and here in Washington state, business attorneys have more opportunity to provide value to their clients. Over the past 18 months, a number of laws and cases positively affecting the travel and tourism industry have come down. In Washington, legislators invested in growth with a focus on the intersection of tourism and our rural and agricultural economies, and Division I of the Court of Appeals affirmed that participation in recreational activities comes with the assumption of risk that protects recreational and tourism activity providers. At the national level, the Internal Revenue Code was updated to include new deductions and, under certain conditions, eliminated corporate tax for C-corporations arising from profits made abroad. These changes, benefitting many travel and tourism businesses, are tempered by the Supreme Court *Wayfair* decision that will change the landscape for online sellers of products and services. This article offers a brief update of key legislative changes and cases to help business attorneys advise their travel and tourism clients.

Washington State: Back On the Travel and Tourism Map

Washington is no longer the only state in the United States without a statewide tourism marketing program. During the 2018 legislative session, Senate Bill 5251 unanimously passed both houses. The new law diverts 0.2 percent of existing retail sales tax collected through lodging, restaurants, and rental cars to fund the implementation of a statewide tourism promotion program.[1] As a diversion of funds already collected, these businesses will not see any effect on the taxes they collect and submit. Instead, it is intended that the industry will see an increase in revenue as a direct result of this diversion. For additional details about the importance of this law and its history, including the groundbreaking public-private funding model, see Becky Bogard's on page 5. Ms. Bogard's work on the bill and for the industry was instrumental in its creation and success.

Washington's New Agritourism Bill

Agritourism is an increasingly popular tourism offering, and a new Washington law significantly diminishes the risk of liability to farmers and ranchers engaged in this activity. The new law defines "agritourism" as an activity carried out by "a farm or ranch whose primary business activity is agriculture or ranching and that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities including, but not limited to: Farming; ranching; historic, cultural, and on-site educational programs; recreational farming programs that may include

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Legislative and Case Law Update: What's On Board for Travel & Tourism? *continued*

on-site hospitality services; guided and self-guided tours; petting zoos; farm festivals; corn mazes; harvest-your-own operations; hayrides; barn parties; horseback riding; fishing; and camping."[2] Senate Bill 5808 shields such farmers and ranchers from lawsuits and liability. While prohibiting a participant from bringing an action or obtaining recovery for "injury, loss, damage, or death" resulting from inherent risks of agritourism activities on the one hand, the law requires the defendant to plead "assumption of risk of agritourism activity by the participant" as an affirmative defense on the other hand. "Inherent risks of agritourism activity" are broadly defined as "those dangers or conditions that are an integral part of an agritourism activity including … surface and subsurface conditions, natural conditions of land, vegetation, waters, the behavior of wild or domestic animals, and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations," and include the participant's own negligent behavior "that may contribute to injury … including failing to follow instructions … or failing to exercise reasonable caution … unless the participant acting in a negligent manner is a minor or is under the influence of alcohol or drugs." However, farmers and ranchers can still be held liable for injuries if they are found to be "grossly negligent" or fail to warn guests of a dangerous situation.[3] In order to take advantage of this limitation of liability, a compliant warning sign must be placed in a clearly visible location at the entrance of the site.[4]

The new agritourism law, which became effective on July 23, 2018, follows in the steps of approximately 20 other states that have similar laws aimed at limiting the liability of agritourism professionals.[5] It also buttresses this state's established precedent enforcing assumption of risk defenses and anticipatory waivers eliminating or limiting liability for recreational and tourism activities. For example, in the decision *Pellham v. Let's Go Tubing, Inc.*, Division I of the Court of Appeals recently held that the plaintiff's negligence claim was barred because the plaintiff assumed the risk of the inherent perils associated with tubing on a river despite the facts that he was on the river with an activity company that was aware of a hazardous log that caused injury. [6]

There are a number of other activities in Washington for which individuals assume the risk of inherent dangers when taking part. Assumption of the risk limits recovery, but only to the extent the plaintiff's damages resulted from the specific risks known to and appreciated by the plaintiff and voluntarily encountered.[7] For instance, negligent claims are barred for individuals participating in sports or water sports when they know risk of injury is a natural part of participation (this includes inner tubing as noted in the case above and canoe rentals), mountaineers engaged in mountain climbing seminars,[8] baseball game attendees if they are hit by a ball,[9] and mountain skiers and snowboarders choosing to ski at commercial ski resorts.[10] There are many recreational and tourism-related activities where individuals similarly assume the inherent risks of engaging in the activity.

South Dakota v. Wayfair, Inc.

In June 2018, the U.S. Supreme Court overturned the "physical presence" rule of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and refused to strike down South Dakota's new sales and use tax law requiring out-of-state sellers to collect and remit sales taxes. Prior to *South Dakota v. WAYFAIR, Inc.*, these types of state tax laws could only be enforced against out-of-state sellers if they maintained a physical presence within the state. The "physical presence rule" was initially deemed necessary to prevent undue burdens on interstate commerce and thereby avoid violation of the Commerce Clause. In *Wayfair*, given the modern prevalence of e-commerce, the Court overruled *Quill* and concluded it is unfair and unjust to subject some sellers and consumers to the tax, while allowing others to "escape an obligation."[11]

The *Wayfair* decision means that travel and tourism products and services, a vast amount of which are sold online to a national (and international) consumer base, can expect many state jurisdictions to attempt to subject them to their sales and use taxes. However, while the *Wayfair* decision removes the "physical presence" rule from future court decisions on whether a state sales tax affecting interstate commerce is valid, precedent still requires a tax to be sustained only if it "(1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides."[12] States must still prove a substantial nexus.

In 2017, Washington started requiring out-of-state sellers to make a choice between collecting and submitting sales tax from Washington consumers, or tracking Washington consumer sales, providing notice to those consumers that they must pay a use tax, and then submitting reports of the sales made. As a result, Washington now has a law that falls under the *Wayfair* analysis. The Washington Department of Revenue's website is and will be posting information on its interpretation of the effect of *Wayfair* on out-of-state businesses and local taxpayers as the case's impact in Washington becomes clear.[13] Along the West Coast, both Washington and California regulate "Sellers of Travel" in furtherance of consumer protection, with particular focus on fair advertising and regulation of travelers' payments to this industry. In potential challenges to the out-of-state sales tax laws by entities regulated by these regulatory regimes, whether a nexus exists will be a fact-specific determination. Given that the "Court's Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects,'" clarity may be a long time coming.[14]

Section 179 Deduction

Travel and tourism operations that use heavy equipment such as boats, charter buses, or an airport shuttle have a new option for managing these costs. As of 2018, Section 179 of the Internal Revenue Code creates a new alternative to normal or

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Legislative and Case Law Update: What's On Board for Travel & Tourism? continued

bonus depreciation deductions. Businesses may now elect to deduct from their taxable income the entire purchase price of up to $1,000,000 of qualifying equipment and software purchased or financed during (and only during) the tax year it is first put to use.[15] This is a permanent change to the tax code.

As a simplified example, if a wine country tour company purchases two 12-passenger vans for a total of $100,000, it can apply the Section 179 deduction and deduct from its taxable income in a single tax year the $100,000 purchase, thereby decreasing its overall tax liability by $35,000. How this deduction applies will depend on the specific facts for each business, and it is worth making clients aware of and considering this new alternative deduction.

Tax Cuts and Jobs Act Makes Some Foreign Profits Deductible from U.S. Tax

When it comes to taxation of foreign-sourced income, the 2017 Tax Cuts and Jobs Act (TCJA) brings C-corporations further in line with other entities as their obligations relate to reporting and paying taxes on that income. Section 245A provides that:

> In the case of any dividend received from a specified 10-percent owned foreign corporation by a domestic corporation which is a United States shareholder with respect to such foreign corporation, there shall be allowed as a deduction an amount equal to the foreign-source portion of such dividend.

Section 245A allows a domestic corporate taxpayer to take a dividends-received-deduction of 100 percent for foreign-source dividends received from a controlled foreign corporation (CFC) after December 31, 2017. This dividends-received-deduction effectively exempts foreign dividends from federal corporate income taxation. The result is that instead of paying corporate taxes to the foreign country, and again to the U.S. when the profits are brought into the country, and again at the individual U.S. shareholder level, taxes may have to be paid as corporate taxes to the foreign country and at the individual U.S. shareholder level only.

There are, of course, exceptions. Most notably, Section 245A only applies to domestic C-corporations that own 10 percent or more of the vote or value in a CFC's stock for a period of at least 366 days during the 731-day period surrounding the ex-dividend date. Additionally, foreign taxes, including withholding taxes, cannot be taken as a foreign tax credit or deduction by the domestic C corporate shareholder. Also, Section 245A does not apply to C-corporations underpinned by a pure branch, foreign partnership, or disregarded entity, nor does it apply to S-corporations, U.S. partnerships, or sole proprietorships established abroad.[17]

For travel and tourism clients, Section 245A could benefit that industry's significant cross-border supply chain. In a simplified example, if a U.S. C-corporation biking tour service, in order to expand its offerings, becomes an owner holding at least 10 percent of an operator in British Columbia, then so long as the U.S. company meets the conditions of Section 245A, the U.S. company can plan this expansion to include the likelihood that it will not be taxed at the corporate level when profits are brought into the U.S. Of course, each tax situation is different and a qualified lawyer or certified public accountant should be consulted as part of the planning process.

Changes in Employment Law Affect the Travel and Tourism Industry in Washington.

On March 23, 2018, Congress repealed the tip pool rule that barred certain employers from setting up a tip-pooling system that included non-tipped employees.[18] Employers may now pool tips. Washington allows tip-pooling for non-exempt employees, but does not allow tip-pooling to include managers or supervisors. With the lifting of the federal restrictions, Washington employers can now include in their tip-pooling system non-exempt employees that do not traditionally receive direct tips.

As of January 1, 2018, non-exempt employees who work in the state of Washington are entitled to accrue paid sick and safety leave.[19] The law also covers non-exempt seasonal, temporary, on-call, and part-time employees.[20] Employees who qualify must accrue one hour of paid sick leave for every 40 hours worked.[21] There are also carry-over and reinstatement rights for unused sick and safety leave. This law affects companies who did not previously offer sick leave and, given the accrual requirement, likely alters what would be the best advisable approach for those who did. Note that certain municipalities have greater paid sick and safe leave obligations, including in some instances obligations to accrue paid sick and safe leave for exempt employees (e.g., Seattle).

These new employment laws will widely and directly impact the travel and tourism industry in Washington.

Mona McPhee is a business and regulatory attorney at Miller Nash Graham & Dunn LLP serving the travel and tourism and alcoholic beverage industries. Mona frequently works with companies expanding into new markets. *The author would like to extend her appreciation to Jessica Roberts, Leila Javanshir, and David Brandon for their assistance with this article.*

1 S.B. 5251, 65th Leg., 2018 Sess. (Wash., 2018).

2 S.B. 5808, 65th Leg., 2017 Sess. (Wash., 2017) (Section 2(1)).

3 *Id.*

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5 *Governor Signs Warnick Agritourism Legislation*, SRC (May 8, 2017), http://judywarnick.src.wastateleg.org/governor-signs-warnick-agritourism-legislation/.

6 Pellham v. Let's Go Tubing, 199 Wn. App. 399, 398 P.3d 1205 (2017).

7 Read-Jennings v. Baseball, 188 Wn. App 320, 332, 351 P.3d 887 (2015).

8 Blide v. Ranier Mountaineering, Inc., 30 Wn. App 571, 574, 636 P.2d 492 (1981).

9 *Id.* at 334.

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10 *See* Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 492, 834 P.2d 6 (1992).

11 South Dakota v. Wayfair, Inc., 585 U.S. __ (2018), slip op. at 7.

12 *Id.* slip op. at 8 citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

13 https://dor.wa.gov/find-taxes-rates/retail-sales-tax/market-place-fairness-leveling-playing-field

14 Wayfair, Inc., slip op at 13 (quoting West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994)).

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The Invisible Wall: Limits to Business Immigration Under the Current Administration

By Jeng-Ya Chen, Marsha Mavunkel & Amy Royalty

The current Administration's immigration policies have been at the forefront of public attention in the U.S.; however, most of the attention has been on the Administration's recent policy of family separation, the travel ban, and ICE enforcement actions within communities. Far less public attention has been focused on the legal and policy changes pertaining to employment-based immigration and the effect of the President's "Buy American and Hire American" Executive Order on U.S. employers and their foreign national workforce. This article seeks to identify critical recent policy or legal changes implemented and underway by the current Administration, and to highlight the impact of these changes on companies, business travelers, nonimmigrant workers, and potential immigrants to Washington state. Immigration policy changes will necessarily impact Washington communities and businesses – roughly one in seven residents of Washington state is an immigrant, and one in eight residents has at least one immigrant parent.

This article will provide a brief overview of the significant policy changes as well as the potential issues a company might face under the current administration. Significant policy changes will be divided into the four sections below:

- Challenges to H1B work visas, including the definition of "specialty occupation," prevailing wage adjudication, and off-site employment issues
- The Supreme Court's recent decision on the travel ban and the resulting impact on business travelers and visas
- Employment authorization for spouses of H1B workers – a forthcoming new rule eliminating this benefit
- Concerns at the Canadian border
- Policy changes on the horizon

Each section will briefly describe the new enacted or proposed policy, as well as the impact it has or will have on immigration processes.

Challenges to H1B Work Visas, Including Prevailing Wage Adjudication, the Definition of "Specialty Occupation," and Off-Site Employment of H1B Workers

H1B work visas allow foreign nationals to work temporarily in the United States for up to six years, with extensions under limited circumstances. The employee in a "specialty occupation" has a work visa petition sponsored by an employer, usually a company. The validity of the H1B work visa is tied

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to the employer. This means that if the employee changes jobs, the new employer must petition for a new H1B work visa approval. H1B visa holders are highly educated foreign nationals who have attained at least a Bachelor's degree or its equivalent because, by definition, a specialty occupation is a position that requires the understanding and performance of highly specialized knowledge and requires at least a bachelor's or higher degree for entry into the occupation.

H1B visa petitions have become increasingly complicated since March 31, 2017, when the United States Citizenship and Immigration Services (USCIS) rescinded prior guidance relating to computer programmer positions' standing as a specialty occupation according to the regulatory definition. Although the USCIS memo pertained to computer programmers, this shift signaled the beginning of a number of policy changes in the Service's position impacting the H1B adjudication process. In line with the administration's drastic turn is the Department of Homeland Security (DHS)'s proposal regarding the re-definition of "specialty occupation," which may impact a company's ability to recruit qualified candidates. In its regulatory affairs publication, DHS signaled an intent to re-define "specialty occupation" for the "best and brightest foreign nationals." While USCIS already has specific categories for the best and brightest foreign nationals through its extraordinary and outstanding alien classifications popularly known as the "Noble Prize" visa, how the new definition of specialty occupation will distinguish from these categories is uncertain.

Recent figures for Washington state demonstrate that approximately 25,000 Labor Condition Applications (LCA) were filed with the U.S. Department of Labor for H1B petitions in the fiscal year of 2017, with the leading companies being Microsoft, Amazon, and Infosys Technologies. This figure does not reflect the number of H1B work visas approved in Washington – the number of filed LCAs will always be greater than the number of approved H1B work visas because obtaining a certified LCA is a prerequisite step in obtaining an approved H1B work visa. In order to obtain a certified LCA, the company will need to show that the employee is being offered a salary comparable to the prevailing wage of the region and occupation, in accordance to salary figures compiled by the United States Department of Labor Employment and Training Administration's Office of Foreign Labor Certification (OFLC) and comparable to the wages of other employees in the same position at the sponsoring company. Wage levels are divided in accordance with the level of experience required for the position, with Level I Wage indicating an entry-level position and a Level IV Wage being the most advanced.

The Executive Order "Buy American and Hire American" (BAHA) perhaps best reflects the Administration's underlying intentions and sentiment towards skilled foreign workers. It is a complete change from past policies, which supported the notion that foreign workers bolstered the U.S. economy. In 2017, immigration attorneys experienced a 45 percent increase in the issuance of Request for Evidences (RFEs), a notice sent by USCIS after the immigration officer requires more information to make a determination on the petition, as well as an overall increase in denials for H1B petitions.[1] A majority of the RFEs questioned the offered position's qualification as a specialty occupation, with pushback from USCIS particularly for Level I Wage positions. A company seeking to hire entry-level foreign national talent should approach work visa petitions cautiously, and with counsel guidance in order to minimize the chances of further USCIS agency scrutiny.

Finally, in February of this year, USCIS enacted policies regarding third-party worksite H1B petitions. These new policies have been a considerable deterrent for companies petitioning H1B employees who will primarily work off-site, perhaps at a client site. This type of H1B petition has long been subject to heightened scrutiny due to suspected fraud. However, the new policy imposes evidentiary requirements on a petitioning company so beyond the norm of business practices and corporate relationships as to completely deter some companies from filing H1B petitions involving a third-party worksite altogether. The policy requires the petitioning company to not only provide contracts, itineraries, and work orders, but sometimes even similar documentation from their *contracted clients* as well. As any service-based company knows, such requests may be politely declined and noted during the next bidding cycle, leading to a loss of clients. Furthermore, immigration attorneys have also experienced an increased issuance of RFEs questioning in-house employment and employer-employee relationships for on-site employers, reflecting a turn from prior adjudication processes where these issues came up rarely, if at all, for on-site H1B filings.

SCOTUS Decision on Travel Ban and Impact on Business Travelers and Visas

While it has been over a month since the Supreme Court of the United States (SCOTUS) upheld a limited version of President Trump's Executive Order banning individuals from six mostly Muslim countries from traveling to the U.S., the effects of the SCOTUS decision are still unclear. The decision upheld the Administration's authority to impose a 90-day ban on travelers from Libya, Iran, Somalia, Sudan, Syria and Yemen and a 120-day ban on all refugees entering the United States. Prior to the recent Supreme Court decision, applicants had experienced heightened vetting processes for immigrant and non-immigrant visas. Now all travelers from the affected countries are banned from receiving any immigrant visa, with Somalia being the only country where all nonimmigrant visa categories are still open to its nationals. High hurdles still exist in the form of a vetting process before an available visa approval may be obtained.

Visa applicants from the banned countries have experienced great difficulties in obtaining the necessary waiver for approval of their visa classification. The most recent

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USCIS official statement on the Executive Order, issued in February before the SCOTUS decision, states that they are still adjudicating waivers according to the Executive Order. The Executive Order sets out the three elements necessary to obtain a waiver: (1) denial of entry would cause the foreign national undue waiver; (2) grant of entry would not pose a threat to the national security and public safety of the United States; and (3) grant of entry would be in national interest. Whether a company may successfully petition for a waiver based on economic national interest is uncertain. Unfortunately, grant of the waiver is so sporadic, standards relating to its determination have yet to be identified by the American Immigration Lawyers Association.[2]

Employment Authorization for Spouses of H1B Workers – A Forthcoming New Rule Eliminating This Benefit

The Administration has repeatedly signaled its plan to eliminate or limit the issuance of Employment Authorization Documentation (EAD) for spouses of H1B workers holding H-4 dependent status. On Feb. 24, 2015, pursuant to an executive order issued by former President Obama, USCIS began issuing EADs (work permits) to certain spouses of H1B visa holders. As many workers from lengthy visa backlogged countries such as India and China hold H1B status while awaiting their green cards, this policy will disproportionately impact spouses of employees from these backlogged countries. The current USCIS Director, Francis Cissna, confirmed on April 4, 2018, the Service's plans to propose "regulatory changes to remove H-4 dependent spouses from the class of aliens eligible for employment authorization." It would be highly advisable for companies to take inventory of their employees working with H-4 EADs and determine with experienced immigration counsel the best route for their continual employment.

As thousands anxiously await news regarding H-4 employment authorizations, slower processing of applications for employment authorization documents (EADs) has already started. Since the rescission of the USCIS requirement to issue EADs or interim EADs within 90 days, there have been significant delays in individuals receiving their renewed EADs. Employers should ensure all employees working on EADs file for EAD renewal as soon as they are eligible.

Qualified foreign national workers may balk at working in the United States if their spouses cannot receive work authorization. If the Administration eliminates employment authorization for the spouses of H1B workers, it may create a shortage of qualified workers who are willing to come work and lend their talents to U.S. companies. Regardless, this policy means that spouses of workers with H1B visas will not be able to utilize their talents and bring value to the U.S. economy.

Concerns at the Canadian Border

Closer to home, rates of denials and heightened scrutiny from the Customs and Border Patrol (CBP) across the Canadian border are on the rise. In particular, scrutiny has increased for Canadians applying to enter as temporary business visitors under the B-1 visa category. If companies have cross-border events such as conventions or other activities that require a Canadian employee or business visitor to enter the U.S., it would be highly advisable to inform their employees of CBP's current heightened scrutiny.

Further, in accordance with a directive issued earlier this year, *Border Search of Electronic Devices*, CBP now has authority to demand a password to access electronic devices, though they do not have the right to access information stored remotely. The individual crossing the border has the right to refuse to do so, but refusal may result in the device being seized or the individual detained by the CBP. If the individual is not a U.S. citizen, CBP may even deny entry. It would be advisable for individuals crossing to border to delete private material or transfer it to a remote server prior to crossing the border.

New Policy Changes on the Horizon

The overall trend with the current Administration is to restrict and narrow all immigration pathways. Another example of this is the USCIS' new policy of not giving any deference to previously approved nonimmigrant petitions, including the aforementioned H1B work visa as well as the intracompany transferee (L-1) work visas. The result of this policy is that companies now need to prepare even more extensive visa petitions, even if prior petitions for the same position and individual have already been approved many times by the Service. We would advise companies, especially multi-national corporations, to standardize human research policies and retain critical employee documents for all teams that sponsor applicants for work visas. It is imperative to hire immigration counsel that can give specialized advice for these types of situations.

Also on the horizon are critical USCIS policy changes which will procedurally broaden the ability of USCIS to issue a Notice to Appear (NTA), a charging document instructing the foreign national to appear before an immigration judge on a certain date, after an application is denied. Further, for petitions filed on or after September 11, 2018, USCIS will have the authority to deny a benefit, application, and petition without issuance of a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). Both RFEs and NOIDs are notices sent by USCIS after the immigration officer reviewing the petition determines that more information is required to make a decision on the petition – with the main distinction being a Notice of Intent to Deny states the officer's reasons and intention to deny the visa petition. An experienced immigration attorney may help companies determine the type of documentation as well as brainstorm potential creative ways to prove a case without divulging too much corporate information. In practice, these policies have drastically increased the burden on petitioning companies to provide more corporate documentation, as well

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as increasing the inherent risks involved in any immigrant or nonimmigrant petition filing.

Conclusion

Based on the fast rate at which the Administration is issuing policy changes, it is highly likely that more information will become available upon publication of this article, whether in the form of further information regarding the aforementioned policy decisions or completely new policy changes.

Generally, when dealing with the U.S. Citizenship and Immigration Services or the U.S. Consulates in today's climate, petitioning companies and employees should budget twice as much time for processing than in their prior experience. The average processing times in the past year for almost all forms and adjudications have doubled if the application is not eligible for an expedited process. Regardless, we advise our clients to plan ahead because processing times have increased at all immigration-related agencies from the USCIS to the U.S. Consulates under direction of the State Department. Interview times at the U.S. Consulates can be delayed for months. This is in addition to policy changes requiring an interview for all employment-based green cards, meaning that all employees petitioning for a green card, regardless of the immigrant visa category, will need to attend an interview.

From the pace of changes underway, the policy of tomorrow will differ from even today's policies. Experienced immigration attorneys also have reported case-by-case success in taking these policy changes – whether stated or implied – to federal court. In this fast-moving and ever-changing immigration climate, seeking experienced immigration counsel is even more critical in order to help your company and employees navigate choppy legal waters.

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2 *Deconstructing the Invisible Wall: How Policy Changes by the Trump Administration Are Slowing and Restricting Legal Immigration*, American Immigration Lawyers Association, https://american-immigrationlawyersa.app.box.com/s/s3gwp3n9mb88qxha4x-sn8kx5dwhvb41i (last visited Jul. 30. 2018) (explaining that as of February 15, 2018, only 2 waivers had been granted, although DOS has since indicated that more than 100 additional waivers have been granted. However, with a lack of guidance as to how the waiver criteria are interpreted and no clear application process, travel ban waivers remain elusive).

Jen Chen (chen@ryanlaw.com), Marsha Mavunkel (mavunkel@ryanlaw.com) and Amy Royalty (royalty@ryanlaw.com) are attorneys in Ryan Swanson's Immigration group. Jen, Marsha and Amy work with clients on a wide range of cases, assisting both corporate and individual clients with all aspects of the immigration process. Special thanks and acknowledgement to Ryan Swanson's senior immigration attorneys Joel Paget and Janet Cheetham, Rule 9 Summer Associate Allie Sisson, and paralegal Manny Comas for their contributions to this article.

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Privacy & Data Protection in the Travel Industry

By Radhika Prabhakar

I. Introduction

Travelling is educational, refreshing, and a passion for increasing numbers of people. Travel is also big business and a significant revenue generator for America. Just in 2017, domestic and international travelers spent over one billion dollars in the country, generating a whopping $2.4 trillion in economic output.[1] There were over 460 million trips taken within the U.S. in that same time and that number has consistently been on the upswing.[2] In 2015 the U.S. received a record 77.5 million visitors. That is a sizeable number of people generating massive amounts of data, which was collected, processed, and stored by travel companies. Because of increased data breaches accompanying the booming travel industry,[3] governments are enacting stringent laws to protect their citizens' data. In light of the recent growing trend of privacy and data protection concerns, travel and hospitality companies must be wary of how they handle this data.

II. What is Privacy and How Does It Intersect With Travel?

The right to privacy has long been recognized under the law and was thought of as "the right to be left alone." In the current information era, our personal information and data are essential to the world of business in its quest to customize services for clients. This has led to a struggle in balancing data protection to ensure individual privacy and data usage for better, more streamlined business.

In the travel sector, the data of millions of individuals is collected, stored, and used as part of customizing travel for each potential traveler. Some such data collected are passport details and I.D. card information, photographs of individuals, financial and payment information, and travel preferences and patterns. In dealing with such sensitive information, businesses in the travel space are susceptible to data breaches which may cause misuse of the travelers' data, thus leaving the businesses open to lawsuits by the individuals.

To curb this wide sharing of an individual's data, governments around the world are gradually enacting legislation to make businesses more aware of and accountable for the data they gather and use. The biggest evolution in privacy law comes in the form of the European Union's (EU) General Data Protection Regulation (GDPR), which came into effect on May 25, 2018. This was followed very closely by California's California Consumer Privacy Act (CCPA), which was signed into law in July 2018 and is slated to come into effect on January 1, 2020.[4]

III. The General Data Protection Regulation

The GDPR imposes stringent requirements on part of businesses to protect an individual's data. Below is a summary of the GDPR and how it applies to the travel industry:

A. What is GDPR?

The GDPR came into effect on May 25, 2018, from the EU and seeks to strike a balance between the free flow of data in the digital world and protecting an individual's personal data. The regulation establishes one uniform and standard set of rules across the EU countries instead of businesses having to navigate each individual country's privacy laws. The GDPR applies not just to businesses within the EU but also to any organizations which collect data of an EU resident. It has spillover effects on the rest of the world and those doing or seeking to do business involving European citizens, like tourists.

B. What is Personal Data Under the GDPR?

Under the GDPR, personal data is defined as "any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is a person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, such as National Insurance number, address, email address, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."[5] Under this expansive definition, rendering an individual anonymous is a critical part of GDPR compliance. It is notable that at this stage only personal data, and not corporate data, is included under the GDPR.

C. To Whom Does the GDPR Apply?

The GDPR not only applies to the organizations located within the EU but also to those outside of the EU if they offer good and services to, or monitor the behavior of, EU individuals. It applies to all companies processing and holding the personal data of those individuals residing in the EU, regardless of the company's location.

More specifically, the GDPR refers to "data controllers" and "data processors." Both entities are legally obligated, but in different ways, to protect an individual's privacy and data under the GDPR.

D. Data Controllers vs. Data Processors[6]

Both data controllers and data processors deal with a natural person's data. A "data controller," however, determines the purpose for, and the means by which, personal data is processed. A "data processor," on the other hand, merely implements data processing on behalf of the data controller.

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12. *Historical National Average Processing Time for All USCIS Offices*, U.S. Citizenship and Immigration Services, https://egov.uscis.gov/processing-times/historic-pt (last visited Jul. 30, 2018).

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Typically a data processor is a third party external to the data controller company.

The GDPR obligates data controllers to engage only those processors that provide "sufficient guarantees to implement appropriate technical and organizational measures" to protect the data subjects' rights. Controllers and processors are both required to "implement appropriate technical and organizational measures" taking into account "the state of the art and costs of implementation" and "the nature, scope, context, and purposes of the processing as well as the risk of varying likelihood and severity for the rights and freedoms of individuals."

To comply with the GDPR requirements, data controllers must encapsulate in their contract the obligations and duties of the data processors towards the controllers (and end users). A data processor is legally obligated to maintain records of personal data and processing activities, and incurs legal liability if it is responsible for any data breaches.

E. Failure to Comply with the GDPR

The GDPR imposes a punitive fine on noncompliant companies posing a risk to EU residents and their privacy. This steep fine can be up to U.S. $24 million, or 4 percent of the non-compliant company's global turnover for the prior fiscal year, whichever is more. This fine is per violation and so the total fine may be prohibitive to travel providers due to the volume-driven nature of the travel business.

IV. How Does the GDPR Affect the Travel Industry?

Consumer protection is key in the travel industry and the GDPR is the latest piece of legislation (alongside the CCPA) to underscore its importance.[7] Because the GDPR regulates the use of personal data, it is likely to have more impact on industries that have direct contact with consumers and therefore process consumers' personal data as part of their activities. It will particularly have an impact on all direct marketing and advertising operations, as well as on loyalty programs prevalent in the travel sector.

Travel companies handle customer data when they process bookings, register potential interest, and push marketing campaigns. Many travel businesses hold personal information in sales and marketing databases. Information may be collected directly from individuals, but also through other avenues like marketing agencies. Such businesses also use website and email tracking tools to help target marketing campaigns. Additionally, these businesses also hold large amounts of personal information on their workforce – whether directly employed or engaged through contractors. In doing so, the company deals in a data set belonging to the customer which typically includes the following: passport details; photographs; client's travel and personal preferences; name and date of birth; phone number(s); email address(es); postal address; financial and payment information; health details; ethnic identity; and employment information. While some of this data may not be sensitive or may already be public knowledge, as a composite the data set tends to identify a natural person and thus intrude on their privacy.

V. GDPR Compliance for Travel Companies

A critical first step to ensure compliance is for travel companies to ***review the data*** they collect. Conducting this internal GDPR compliance audit will help identify: (1) the types of data collected; (2) why it is collected; (3) where the data is stored and if applicable, who stores it; (4) how secure the storage system is; (5) and how long the company retains this data.

Customer consent is at the cornerstone of compliance with the GDPR. Obtaining customer information to make a booking is necessary to provide travel services to the customer and so does not require consent from the customer. However, if the travel provider collects the data for something other than its original purpose, such as marketing or promotions, then the company must receive explicit consent from the customer to do so. Customer consent may be written or oral so long as the company can demonstrate that this consent was in fact given and when it was given to the company. One way to obtain and record clear consent is to hand out consent forms when making a travel booking, and also including multiple tick boxes for each type of consent sought, marketing, promotions, travel advice, etc.

The GDPR requires many travel companies to ***appoint Data Protection Officers*** (DPOs) to monitor how data is gathered, used, and stored. A DPO is a mandatory role under Article 37 of the GDPR for all companies that collect or process an EU resident's personal data. DPOs are responsible for educating the company and its other employees on important compliance requirements, training staff involved in data processing, and conducting regular security audits. DPOs also serve as the liaison between the company and any governmental supervisory bodies.

Travel businesses should also ***understand the reasons for processing the data*** required and proceed with collecting and processing such data only for a legitimate business interest. Personal data collected to complete a travel booking or registering a hotel stay is a legitimate business interest, but the same data if collected to track the individual's spending habits is in violation of the GDPR. One way of evaluating whether personal information is necessary to a transaction is to determine whether the data subject would agree that this information was relevant to conducting business with the company.

VI. Suggested Best Practices for GDPR Compliance

Bearing all the above in mind, travel businesses must be vigilant in ensuring GDPR compliance. There are a number of measures these businesses may take to monitor GDPR compliance; a few are listed below:

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- Create and maintain an information register to monitor personal data collected, and what, where, why, how, and with/by whom such data is processed;
- Determine a solid business and legal basis for the data collection and processing activities;
- Obtain clear customer consent by having data consent forms and multiple tick boxes outlining the various company needs (marketing, travel booking, etc);
- Ensure that all data collection forms and privacy policies and notices are in line with the GDPR provisions;
- Provide prompt notifications in case of data breaches through specified channels and within any timeframes as set out in the updated privacy policy and notice;
- Anonymize data to protect the traveler's privacy;
- Appoint a DPO and provide training to employees to ensure the business is in accordance with GDPR provisions; and
- Thoroughly review and update any agreements with data processors, such as marketing and recruitment agencies or booking systems, and ensure they are GDPR compliant.

VII. Conclusion

The GDPR is a new and broad framework to protect consumer data in our increasingly digital world. Travel companies run a huge risk of not complying with the GDPR due to the vast amounts of customer data involved as part of their business. Further, the GDPR may well have caused a domino effect in privacy laws originating in more countries around the world to protect their respective citizens' personal data. Indeed, California's own CCPA was signed into law mere days after the GDPR came into effect. Given the current climate of an increased sensitivity to how businesses deal in consumer data, travel companies must have heightened scrutiny of their clients' data and ensure compliance with the GDPR at the earliest.

Radhika Prabhakar is a business law attorney with Locus Legal Solutions in Seattle. She advises startups and established businesses on a range of legal needs including intellectual property, privacy, and corporate law issues. Radhika focuses on the Travel & Hospitality, Food & Beverage, and Retail industries as they intersect with technology. She can be reached at radhikap@locuslegalsolutions.com.

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3 In 2017 alone there were 235 publicly disclosed data breaches: https://securityintelligence.com/six-major-data-breach-trends-from-2017/

4 Because of the proximity in time between the GDPR and the CCPA, it is highly probable that other countries and U.S. states might enact their own version(s) of the GDPR thus signaling the increasing sensitivities to data collection.

5 GDPR, Article 4(1): Definitions.

6 GDPR, Articles 4(7)-(8), 24, 26, 28-31, and Recitals 22-25, and 81-82.

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