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## ANNOUNCEMENTS

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**HH&K ATTORNEYS VOTED AS**

**2010 NEW YORK SUPER LAWYERS UPSTATE EDITION**

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## ELECTRONIC SECURITY IN THE WORKPLACE

In the age of technology and the internet, employers' efforts to monitor and control their employees' time at work have taken on new forms. Some of these include monitoring computer keystrokes, reviewing employee e-mail, and blocking certain websites. Many of these activities are legitimate exercises of an employer's control over employees. Others, however, can lead an employer toward trouble. Below are some tips to help the responsible employer avoid trouble while maintaining a productive, efficient workplace:

- Have a clear, specific internet and computer usage policy. Let employees know exactly what kinds of monitoring you plan to use, such as recording keystrokes, monitoring computer screens, reviewing business e-mail, etc.
- Be sure to enforce your policy consistently. Not only does inconsistent enforcement of company policies reflect poorly on your business, but it can also become a major legal pitfall if claims arise out of those inconsistent policies.
- Do not, under any circumstances, access your employees' personal communications. It is illegal, under the Stored Communications Act, to access any personal e-mail account without express permission from the account owner. Even if the employee saves account access information on his employer's computer, the employer has no right to access the personal e-mail account. You may, however, provide notice to your employees and monitor e-mails—even those of a personal nature—sent by employees using the employer's e-mail system.
- To preempt internet usage issues, be proactive about blocking popular websites that contain content you do not wish your employees to access during work hours. Stopping an issue at the source will also help you be consistent in your policy enforcement.

- Do not take these issues lightly. Feeling secure in the workplace, and being confident that one's personal information is secure is important to the comfort and productivity of your employees.

As always if you are unsure or have questions regarding these issues, seek legal counsel before taking action.

*Article written by Dawn J. Lanouette, Esq., and Patrick Noonan. For more information, Ms. Lanouette can be reached at (607) 231-6929 or via email at dlanouette@hbh.com.*

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Photographed by Nancy Honey

DEALING WITH EMPLOYEE BANKRUPTCY

The recent economic downturn has resulted in a significant increase in the number of bankruptcies filed across the country. This has led employers to wonder what they can and should do about employees who file for bankruptcy.

Some employers believe the financial stability of an employee or a potential employee is a good gauge for how well the employee can be trusted at work, particularly with financial matters. Hold that thought! Federal Law (11 USCS § 525) prohibits termination of an employee solely on the basis of that employee filing for or going through a bankruptcy. The same law also states that an employer may not take adverse action short of termination against an employee solely as a result of the bankruptcy. Thus, employers who learn of a current employee's bankruptcy are generally not allowed to act on that information.

With regard to hiring potential employees, the law is less clear. Although a Pennsylvania court recently ruled that a private employer may deny an applicant employment because the applicant had previously filed for bankruptcy, other courts have come down on the other side of the issue. As with all issues pre-employment, the employer should consider how relevant the bankruptcy is to a particular position and should look at the total picture of the applicant and the position before making a final decision. For instance, where an applicant's personal finances are irrelevant to the position or where the applicant has a legitimate reason for the bankruptcy (such as overwhelming medical debt), an employer would be wise not to take any action as a result of the applicant's bankruptcy.

Of course, as with most rules, there are exceptions for certain jobs (such as particular positions in the financial sector). Employers seeking more information should contact their legal counsel.

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Photographed by Peter Dazeley

CHANGES TO THE NEW YORK POWER OF ATTORNEY FORM

They've done it again! For the second time in as many years, New York State has made substantial changes to the standard Power of Attorney (POA) form.

Last September, the New York Legislature completely overhauled the General Obligations Law, resulting in changes in both the content and manner of execution of POAs (the "2009 POA"). The new law, which went into effect September 12, 2010, clarifies some of the ambiguity and difficulties created by last year's reform.

There are two important changes implemented by the 2010 POA law. Perhaps the biggest change is the amendment of the Statutory Major Gifts Rider ("SMGR"). Last year, the 2009 POA added the requirement of an additional document, the SMGR, in the event the party creating the POA wishes the agent to be able to make gifts or other transfers that total more than \$500 per year. The addition of the SMGR requirement created substantial confusion, particularly in real estate transactions. The confusion arose because the language of the 2009 POA required an SMGR for gifts or other transfers. Title insurance companies interpreted this to include real estate transactions. Therefore, if you wanted to empower your agent to make a real estate transfer, you needed to sign an SMGR, even if you didn't want the agent to make gifts. The

2010 POA clarifies this ambiguity by explicitly limiting the applicability of the SMGR to gift transactions.

The second important amendment relates to the revocation of previously executed POAs. Under the 2009 POA law, the signing of a POA automatically revoked all prior POAs—a POA that you gave to your child as part of your estate plan was automatically revoked by a subsequent power that you executed for a real estate transaction, even if only granted to give the bank's attorney the right to make clerical corrections. The new law rectifies this situation by providing that the execution of a POA does not automatically revoke prior POAs.

Though POAs signed before September 12, 2010 are still valid, you should consult an attorney to ensure that your current POA accurately reflects your wishes, particularly with respect to revocability and gift transactions.

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2010 NEW YORK SUPER LAWYERS

The following Hinman, Howard & Kattell, LLP attorneys have been voted and listed as 2010 New York Super Lawyers—Upstate Edition.



**Banking:**  
James W. Orband, Esq.



**Business Litigation:**  
Albert J. Millus, Jr., Esq.



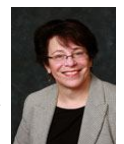
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**Employment and Labor:**  
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**Real Estate:**  
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**Real Estate:**  
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**Worker's Compensation:**  
Eugene D. Faughnan, Esq.

**Worker's Compensation:**  
Christopher Richmond, Esq.  
(Not Pictured)

## FALSE PATENT MARKING: WHAT IS IT AND WHY DO YOU NEED TO BE CONCERNED?

### What Is False Patent Marking?

Under the Patent Act, it is an offense to mark on or affix to an article either “the word ‘patent’ or any word or number that imports that the article is patented.” Using such words or numbers in advertising in connection with the unpatented article is also an offense.

According to the statute, an article is unpatented if it is “not covered by at least one claim of each patent with which it has been marked.” One district court has ruled that “unpatented article” includes those bearing expired patent numbers. The Federal Circuit confirmed that marking an article with an expired patent number constitutes false marking. Qualified statements such as “may be covered by one or more pending or issued patents” also constitute an offense if the statements are intended to deceive the public.

A key element to any false marking claim is evidence that the patent owner had “intent to deceive the public.” The Federal Circuit recently ruled that the presumption that a party intended to deceive the public is rebuttable if the party can prove by a preponderance of the evidence that it did not have the requisite intent to deceive the public. At least one court has ruled that “an honest, though mistaken, belief” would not result in culpability for false marking. Good faith reliance on advice of counsel can also negate liability that would otherwise exist.

### Why Should You Be Concerned About False Patent Marking?

Section 292(a) of the Patent Act provides that the fine for a false making offense may be as much as \$500 for every such offense. The Federal Circuit recently ruled that the fine must be imposed on a per article basis for false marking. For mass-produced items, the number of articles could be in the millions, thus creating the possibility of significant fines.

Additionally, Section 292(b) allows anyone to claim the fine associated with false marking. The Federal Circuit has provided a strong incentive for plaintiffs to file such claims, by commenting that

the plain language of the statute allows “false marking litigation by plaintiffs who have not suffered any direct harm.” Moreover, the statute clearly states that a successful plaintiff is entitled to one-half of any fine imposed. The Federal Circuit recently heard oral arguments regarding the standing of a plaintiff who has not been injured to sue for false marking. Reversing the district court, the Federal Circuit ruled that a plaintiff who has not suffered direct harm is entitled to sue for damages for false patent marking. The Federal Circuit remanded the case back to the district court to address the merits of the case.

The rationale behind the creation of such incentives to root out false marking is to protect the public. The public is entitled to rely upon patent marking to determine the intellectual property status of an article. Indeed, the purpose of marking an article as patented is to put others on notice that the product is protected. It allows the patent owner to maximize damages without having to file a lawsuit or send letters telling a target that it may be an infringer and specifying the accused product or device. Thus, proper patent marking serves the interest of full and free competition in ideas.

False patent marking, by contrast, damages the interest in full and free competition by misleading the public and the status of an article. It also transfers the cost of making a determination as to the patented status of an article and the risk of error associated with doing so, to the customer or competitor. Thus, as the Federal Circuit stated, “by permitting members of the public to sue on behalf of the government, Congress allowed individuals to help control false marking.”



Illustrated by Geoff Brightling



Photographed by Don Farall

Not surprisingly, a large number of false marking cases have been filed this year, in light of the Federal Circuit’s decision last December that the offense is the act of false marking and each falsely marked article results in a separate offense. In response to the Federal Circuit’s decision and the spate of newly filed cases, Congress has reacted. The Senate has proposed legislation that would amend the Patent Act to limit claims by parties that have suffered a competitive injury. If enacted the legislation would also apply to all cases pending on the date of enactment. A similar bill was referred to the House Judiciary Committee in March, but no further action has been taken.

### What Should Patent Owners Do?

Patent owners would be well advised to consider their current patent marking practices to determine whether the products they are marking are, in fact, covered by a valid patent. Additionally, as one court has stated that good faith reliance on advice of counsel can also negate liability that would otherwise exist, patent owners who have any questions about patent marking may want to consult legal counsel for further advice.

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COVERAGE OF THE EPA'S  
NEW LEAD-BASED PAINT RENOVATION REGULATIONS

The United States Environmental Protection Agency (“EPA”) has long recognized the risks associated with lead-based paint, especially for small children. Lead-based paint was common in residential and other buildings, as well as for other consumer goods like toys, until it was banned in 1978. In 2008, the EPA issued new regulations, known as the Renovation, Repair, and Painting (“RRP”) regulations, to address the dangers of lead-based paint that arise specifically in connection with renovations.

In April 2010, most of the RRP regulations took effect. However, the enforcement of some provisions of the RRP rules has been delayed. Specifically, the EPA has stated that it will not enforce the firm certification provisions until October 1, 2010 and it will not enforce the worker certification provisions as long as the worker enrolls in a certification program by September 30th and completes the program by December 31, 2010. The other provisions of the new rules, including the lead-safe work practices provisions, have taken effect and will be enforced as scheduled.

The RRP rules represent a significant regulation of the renovation industry. They include rules requiring training and certification of renovation firms and certain renovation employees. There are also requirements related to recordkeeping and provision of information to affected parties, and new work safety standards to be followed when dealing with lead-based paint.

Penalties for non-compliance with these regulations are high. Each day that the provisions of the regulation are not followed is a separate violation, and each violation carries with it a potential civil penalty of \$25,000. There may also be criminal penalties of up to \$25,000 or one year of imprisonment.

### Scope of the RRP Regulation

The RRP rule applies to anyone who performs renovations, for compensation, in target housing or child-occupied facilities. The contours of each of these key terms deserve some individual attention.

#### Buildings covered

##### *Target Housing*

Only certain buildings are covered by the RRP regulations. The term “target housing” means any housing unit built before 1978. The regulations exempt any housing solely for elderly people or people with disabilities, or any zero-bedroom dwellings

(such as studio or efficiency apartments). “Target housing” also includes the common areas in any multi-housing units. There are also exceptions for certain owner-occupied housing where no small children reside.

##### *Child-occupied facilities*

Renovations in any non-residential “child-occupied facilities” are also covered by the RRP rules. “Child-occupied facilities” means any building or part of a building, built prior to 1978, that is visited by the same child less than six years old on at least two days within a given week, for at least three hours each visit, with a combined annual visitation time of at least sixty hours. This reflects the EPA’s recognition that long-term exposure to lead-based paint by very young children is the true danger, rather than intermittent exposure or exposure by older children and adults.



Photographed by Tim Hall

“Child-occupied facilities” can include day care centers, pre-schools or kindergarten classrooms. Public and commercial buildings built before 1978 but which are not “child-occupied facilities” are not affected by the RRP rules.

#### Renovations

“Renovations” is very broadly defined to include any activities which modify a building structure and which can result in disturbance of painted surfaces. This includes any removal, modification, or repair of painted surfaces, removal of building components, any surface preparation activities in conjunction with further painting, or any other activities likely to contribute to lead dust in the air. “Renovation” does not include minor repairs or maintenance; specifically, any activities which will disturb less than six

square feet of interior painted surfaces or twenty square feet of exterior painted surfaces. Large renovations cannot be split into several small parts in order to fit into this exception for minor maintenance.

Renovations that affect only parts of the house that are proven to be free of lead-based paint are not “renovations” under the RRP rules. This test must be done by a certified renovator using an EPA-approved test kit, or by a certified inspector or risk assessor.

#### Compensation

Covered renovation work is not limited to work performed by contractors for an agreed-upon contract price. Instead, it includes work compensated by wages, such as to employees of the owner or any other party, as well as work essentially paid for by rent for covered property.

The inclusion of rent reflects the idea, that while a tenant does not often pay a property manager or owner for particular renovations at the time the work is performed, their rent payment does in fact form the basis for these renovations. This means that any renovation by a property owner or contractor of covered rental property (whether “target housing” or a “child-occupied facility”) must comply with the RRP rules.

#### Conclusion

The RRP regulations issued by the EPA represent a significant change in the renovation industry. While implementation of some of the provisions has been delayed until later this year, other provisions are currently in effect. Any firm or individual covered by the scope of these regulations should take steps to come into compliance well before their scheduled effective dates, and anyone planning renovations in a property subject to these regulations should request a copy of their contractor’s lead paint certification.

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NO-FAULT DIVORCE BECOMES LAW IN NEW YORK

After decades of debate, New York State became the fiftieth state to adopt no-fault divorce, ending the requirement that a party seeking a divorce had to claim one of a limited set of reasons as the basis for doing so. On August 15, 2010, Governor Paterson signed into law a package of four bills that fundamentally restructure matrimonial law.

The following is a brief summary of the four bills:

**Bill A.9753A/S.3890**—This bill allows a judgment of divorce to be granted to either party to a divorce action without assigning fault to the other party. Specifically, it amends Section 170 of the Domestic Relations Law (DRL) by adding subdivision 7 allowing divorce when a marriage is irretrievably broken, for a period of at least six (6) months, provided that one party has so stated under oath. However, a divorce can only be granted after the following ancillary issues have been resolved: the equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and expert fees and expenses, and custody of and visitation with the infant children of the marriage. This law becomes effective on October 14, 2010 and applies to matrimonial actions commenced on or after such effective date.

**Bill A.10984/S.8390**—This bill establishes a process for determining the presumptive amount of temporary maintenance awards with factors for deviation where the award is “unjust or inappropriate.” To determine the guideline amount, the court must compare two calculations (any income of the payor’s that exceeds \$500,000<sup>1</sup> is not included):

- (1) 30% of the payor’s income minus 20% of the payee’s income; or
- (2) 40% of the combined income of the two spouses. The payee’s income is then subtracted from this figure.

The court must then select the lesser of these two figures as the guideline amount. For example, if the husband earns \$200,000 per year, and the wife earns \$100,000 per year, the first equation would result in a presumptive award of \$40,000 per year (or \$3,333 per month):

30% of \$200,000	=	\$60,000
Less 20% of \$100,000	=	\$20,000
		\$40,000

The second equation would result in a presumptive award of \$20,000 per year (or \$1,666 per month):

40% of \$300,000	=	\$120,000
Less	=	\$100,000
		\$20,000

Accordingly, the guideline amount would be \$20,000.

If the payor has an annual income exceeding \$500,000, the court shall determine any additional guideline amount of temporary maintenance through consideration of the following factors:

- (a) the length of the marriage;
- (b) the substantial differences in the incomes of the parties;
- (c) the standard of living of the parties established during the marriage;
- (d) the age and health of the parties;
- (e) the present and future earning capacity of the parties;
- (f) the need of one party to incur education or training expenses;
- (g) the wasteful dissipation of marital property;
- (h) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (i) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (j) acts by one party against another that have inhibited or continue to inhibit a party’s earning capacity or ability to obtain meaningful employment, including but not limited to acts of domestic violence;
- (k) the availability and cost of medical insurance for the parties;
- (l) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party’s earning capacity or ability to obtain meaningful employment;
- (m) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (n) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- (o) the tax consequences to each party;
- (p) marital property subject to distribution;
- (q) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
- (r) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (s) any other factor which the court shall expressly find to be just and proper.

In other words, the temporary maintenance guidelines

would only result in an award when there is an income gap between the two parties, such that the less-monied spouse’s income is less than two-thirds of the more monied spouse’s income. For example, if the payor’s annual income is \$90,000 a year, the guidelines will only



Photo from Geobyte Collection

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<sup>1</sup> Note—Beginning January 31, 2012 and every two years thereafter, this “income cap” will increase by the product of the average annual percentage changes in the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor Bureau of Labor Statistics for the two-year period rounded to the nearest \$1,000. The Office of Court Administration will determine and publish the “income cap.”

## NO-FAULT DIVORCE BECOMES LAW IN NEW YORK

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result in an award if the payee's annual income is less than \$60,000. The numerical guideline is only applied to the payor's income up to \$500,000 of his/her income, with a set of factors to be applied by the court to determine any additional amount of temporary maintenance on the payor's income above this \$500,000 cap. The guidelines also include protections for individuals whose annual income is less than the self-support reserved (i.e. 135% of the Federal Poverty Guidelines – currently \$14,620 per year).

The court must order the presumptive award of temporary maintenance unless the court finds that the presumptive award is "unjust or inappropriate" and adjusts the presumptive award accordingly based upon consideration of the aforementioned factors. The parties still have the right to voluntarily enter into an agreement deviating from the presumptive award of temporary maintenance provided that such agreements comply with certain requirements. For example, a validly executed agreement or stipulation entered into between the parties must also include a provision stating that the parties have been advised of the provisions of this law and that the presumptive award provided for therein results in the correct amount of temporary maintenance. In the event that such agreement or stipulation deviates from the presumptive award of temporary maintenance, the agreement or stipulation must specify the amount that such presumptive award would have been and the reason or reasons that such agreement does not provide for payment of that amount.

The court may base an award of temporary maintenance on the greater of either (1) the needs of the payee or (2) the standard of living of the parties prior to the commencement of the divorce action if the payor defaults and/or the court is otherwise presented with insufficient evidence to determine gross income.

This bill also provides that temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first. It does not make any statutory change to the current law on determining final or post-divorce maintenance awards, except for supplementing the existing statutory factors for determining

final or post-divorce maintenance awards.

Finally, the bill also directs the New York State Law Revision Commission to assess the economic consequences of divorce on married couples, to review the spousal maintenance laws of the state and to submit a preliminary and final report to the legislature and the governor with recommendations for revisions to spousal maintenance laws.

The bill took effect immediately; however, the sections on temporary maintenance awards and post-divorce maintenance awards become effective on October 14, 2010 and they apply to matrimonial actions commenced on or after the effective date of such sections.

**Bills A.9753A/S.3890 and A11576/S.8391**—Bill A.9753A/S.3890 amends DRL Sections 237 and 238 and provides for a rebuttable presumption that interim counsel fees shall be awarded to the less-monied spouse in a matrimonial action or in proceedings to enforce a judgment therein. It also authorizes the court to order expert fees to be paid by one party to enable the other party to carry on or defend the action. The parties are also required to provide financial information to the court to enable the court to make its determination regarding counsel and expert fees.

Under prior law, the party seeking interim counsel fees carried the burden showing why the interests of justice required it. This new law requires that an order for interim counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less-monied spouse from the commencement of the proceeding, and it is left up to the affected party to show why, in the interests of justice, the order should not be made.

As originally drafted, this bill was to become effective 120 days after it was signed into law. However, bill number A11576/S.8391, which was the fourth bill signed into law on August 15, 2010, changes the effective date to October 14, 2010. The law applies to actions or proceedings commenced on or after such effective date.

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