

# HH&K

## Hinman, Howard & Kattell<sup>LLP</sup>

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- Wills

#### SOLAR ENERGY LEASES

New York State has recently promulgated an energy policy that emphasizes obtaining a significant portion of the State’s energy from renewable energy sources, such as solar power. To further this goal, the State has implemented income tax credits which encourage the production of electricity through solar power. As a consequence, over approximately the last seven or eight months, several companies have begun soliciting land owners throughout the Southern Tier area of New York to sign solar energy “ground leases.”

The solicitation of landowners is not that dissimilar from the natural gas rush that transpired in 2008 and 2009. Over the last several months, hundreds - if not thousands - of landowners have received offers from several solar energy companies, seeking to lease vacant land for solar energy arrays. This article will assess the pros and the cons of a landowner signing a solar energy lease.

**PROS:** The most obvious positive attribute of the solar lease is the potential for compensation. Landowners are being offered \$1,000.00 per acre, per year (or more) to lease their land to a solar energy company. Thus, if a landowner leases 40 acres at \$1,000.00 per acre, per year, the landowner will receive \$40,000.00 a year. Another positive attribute is that a landowner leasing to a solar energy company will be contributing to the production of New York State energy by renewable, “clean” sources. Production of electricity by solar panels does not involve the burning of fossil fuels such as coal, oil, or gas, and solar energy reduces the production of carbon dioxide, thus reducing the global warming phenomenon.

**CONS:** There are several potentially negative consequences with a landowner signing a solar energy lease:

One potentially negative consequence is that the land owner will lose the use of the area leased to the solar energy company. That is, the solar energy company will have exclusive use of the area leased. Leases can run anywhere from 10 acres to hundreds of acres, and the landowner will not have the use of the property leased to the solar energy company. In this regard, it should be noted that many solar energy leases run for a minimum of 20 years and some leases run upwards of 40 years or more. Therefore, the landowner may not be able to utilize his or her property for a significant time period.

A landowner must also consider the effects of a solar energy lease on the landowner’s possible future sale of the landowner’s property, or the effect that the landowner’s lease

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## HH&K

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WITH  
GREATER BINGHAMTON’S CHAMBER  
OF COMMERCE

WILL PRESENT THE  
27TH ANNUAL LABOR AND  
EMPLOYMENT LAW UPDATE  
OCTOBER 18, 2016  
AT THE TRADITIONS AT THE GLEN

SEE PAGE 5  
FOR RESERVATIONS



Ryan Mead assisted by Jeremy Sedelmeyer at the 2016 MHASt—Men Who Cook Competition.

## SOLAR ENERGY LEASES

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may have on the landowner's heirs after the landowner is deceased. In almost all cases, the landowner will not be able to unilaterally terminate the solar energy lease and, as a result, the landowner's property will be encumbered for so long as the solar energy lease is in effect. The existence of the solar energy lease may discourage a prospective buyer from purchasing a landowner's property.

As with natural gas leases, it is critical that a landowner seek competent legal counsel with respect to the terms and conditions of the solar energy lease. That is, the leases presented by the solar energy companies are drawn in favor of the solar energy companies and lack some important landowner protections.

A few of the possible problems with solar energy leases that can crop up include:

Some solar energy leases give the solar energy company the unilateral right to prohibit any subsurface natural gas exploration or production underneath the surface area being leased by the solar energy company. Although gas production is now at a standstill in New York State, it is possible that in the future that there will be gas exploration and production and a landowner would not want to have the landowner's subsurface gas development rights unduly restricted by a solar energy lease.

Most solar energy leases do not include language providing that the solar energy company will subordinate its lease to future lending by the landowner or by a prospective purchaser of the landowner's property. This lack of proper subordination language could effectively preclude the landowner from selling the property or obtaining a mortgage on the property.

Most solar energy leases also contain language giving the solar energy company the right to an easement over all of the landowner's property to facilitate connection to the electrical grid by power transmission lines. These easements generally allow the solar energy company to install or construct power lines and power

poles, as well as roadways. However, it is important that the landowner have some say relative to the location of power lines, roadways, etc. and the typical solar energy lease does not give a landowner the ability to have any input relative to the location of power lines and roadways.

The landowner will also want to be sure that there is language in the solar lease protecting the landowner at the end of the solar energy lease, or prior to the expiration of the lease in the case where the solar energy company abandons the solar energy facility. Without appropriate language, the landowner may be stuck with solar panels and solar equipment on the landowner's property after the abandonment of the project by the solar energy company.

Another factor that a landowner should consider in the lease is whether there is any prohibition against herbicides or chemicals upon the leased premises. It is also important to have appropriate insurance coverage and indemnification language in the solar energy lease. Finally, the landowner should consider and research the possibility that the existence of the solar energy facility may affect real property tax exemptions such as forestry program exemptions or agricultural exemptions.

There are other important considerations for the landowner and therefore it is imperative that a landowner seek appropriate counsel if the landowner is considering entering into a solar energy lease. As described in this article, the effect of the solar energy lease may be very significant and may last as long as 40 or 50 years, so it is well worthwhile for the landowner to engage appropriate legal counsel to assist the landowner in this significant legal commitment.

*Article written by [Robert H. Wedlake, Esq.](#) For more information, contact Mr. Wedlake at (607) 231-6855 or via email at [rwedlake@hbh.com](mailto:rwedlake@hbh.com).*

## MAJOR CHANGES TO NEW YORK'S STAR PROGRAM FOR RECENT HOMEBUYERS

With the passage of the 2016-17 State budget came major changes to how New York State homeowners will obtain their savings under New York's STAR program. Most importantly, for some homeowners, this bill changed the STAR *exemption* into a STAR *credit*. In previous years, homeowners who qualified for the STAR *exemption* benefitted from upfront savings by way of a reduced school tax bill. Now, certain homeowners will receive a *credit* by way of a rebate check each fall *after payment of their full school tax bill*. The amount of one's school tax relief will remain the same; it will simply be realized in a different way.

Not all current homeowners will be affected by the change to the STAR program. Only those homebuyers considered to be "new" homebuyers will notice the change; being a "new" homebuyer depends solely on the date of closing of one's current home, whether it be that individual's first-ever purchase, or their tenth.

The rules for determining "new" are as follows:

- If you purchased your current residence prior to May 1, 2014, you will continue to benefit from the STAR *exemption* and paying the reduced school tax; no action need be taken.

- If you purchased your current residence between May 1, 2014 and August 1, 2015, and the purchase was after that year's STAR application deadline (March 1, 2014 unless listed here: <https://www.tax.ny.gov/pit/property/star/2015-star-deadlines.htm>), you will be transitioned over to the STAR *credit* and receive a rebate check beginning Fall 2016, after payment of your full school tax. **You must take action and register with New York State to continue receiving STAR relief, even if you have previously applied for and received the STAR Exemption.**
- If you purchased your current residence after August 1, 2015, you will be introduced to the STAR *credit* system. **You must take action and register with New York State to receive your STAR savings, even if you have recently applied for the STAR exemption.**

As you can see, a "new" homebuyer need not necessarily be a recent homebuyer; those who have purchased their current home up to two (2) years ago will be transitioned over to the STAR credit program.

(Continued on page 3)

MAJOR CHANGES TO NEW YORK'S STAR PROGRAM  
FOR RECENT HOMEBUYERS (CONTINUED)

(Continued from page 2)

For those who qualify as a “new” homebuyer, registration for the STAR credit takes only a few minutes and can be completed at the following link: <https://www.tax.ny.gov/pit/property/star/register-for-star-credit.htm>. Those to whom the credit applies and who registered *prior to July 1, 2016* should receive their rebate

check in September; those registrations received after July 1, 2016 will receive a rebate check “at a later date”, per New York State.

*Article written by Joel N. Patch, Esq. For more information, contact Mr. Patch at (607) 231-6987 or via email at [jpatch@bhb.com](mailto:jpatch@bhb.com).*

ANNOUNCEMENT



**MICHAEL KEENAN, ESQ.**

Attorney Michael Keenan was recently selected to serve on the Publications Committee for the New York Intellectual Property Law Association (NYIPLA). The Publications Committee is made up of about a dozen intellectual property attorneys throughout New York State and is responsible for producing and editing the NYIPLA’s quarterly bulletin, which contains articles discussing intellectual property law developments and ways that intellectual property lawyers can improve their practice.

RECLASSIFYING EXEMPT EMPLOYEES TO NON-EXEMPT

The U.S. Department of Labor Final Rule increasing the minimum salary of white collar exempt employees to approximately \$47,000 per year has left many employers with the difficult task of reclassifying formerly exempt employees to non-exempt status. In addition to converting a salary into an hourly wage (or a legal salary for non-exempt employees), and planning for overtime where needed, employers must consider a whole host of other issues affecting their now non-exempt employees.

**Handbook Rules and Benefits**

When was the last time you looked at how your benefits are classified under your employee handbook? Many employers are surprised to see that they give different vacation, sick, or personal day benefits to their exempt employees than they give their non-exempt employees. They may also pay holidays differently. This means that, in addition to facing a new wage structure, employees may be facing a change in their benefits.

Employers may have other work rules that apply only to non-exempt employees or may grant other benefits to exempt employees. While this may have made sense before, it may not be what an employer intends as employees are reclassified. The good news is that employers can, generally, make changes to their employee handbooks on short notice. Taking time now to plan for these changes will make for a smoother transition.

**Technology**

Smart phones, laptops, tablets—all can make employees more efficient and increase flexibility in the workplace. Unfortunately, they can also all create wage and hour headaches for employers. While there is generally no concern with exempt employees answering text messages or e-mails while away from work, it is a different story for non-exempt employees. Non-exempt employees may be entitled to compensation for work done even while outside the office. Just a few e-mails a day (say, 5 minutes worth) can add up to over half an hour a week—an amount that is not considered *de minimis* by the courts. Add in supervisors who are used to having employees

respond to e-mails over the weekend, and you have all the makings of a lawsuit.

Employers must re-evaluate the use of technology outside of regular working hours. Newly non-exempt employees must be required to record any time spent reading or responding to e-mails and text messages for work, and any time spent doing other work tasks outside of work. Supervisors must be educated to adjust their expectations (or their budgets) for their newly non-exempt employees.

**Meal Breaks, Time Cards and Travel Time**

While the Department of Labor does not require any specific format for a time card, you should act now to develop and train employees on their use. This means recording their time (or marking a pre-recorded card), and keeping track of their New York half-hour, unpaid lunch break. Speaking of lunch breaks, the change from exempt to non-exempt will also require employers to strictly comply with New York State’s meal break provisions, and to make sure employees record such breaks. Again, employee and supervisor education may be needed to comply with the law.

One final concern for employers is travel time and attendance at conferences. The rules for these issues are tricky, but in general, non-exempt employees are entitled to be paid (including overtime) for travel to and attendance at conferences unless certain exceptions are met.

**Conclusion**

The reclassification of employees goes far beyond wages paid and hours worked. Smart employers will start preparing their workforce now for the transition ahead.

*Article written by Dawn J. Lanouette, Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at [dlanouette@bhb.com](mailto:dlanouette@bhb.com).*

2016 UPSTATE NEW YORK SUPER LAWYERS

What is Super Lawyers? Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. The selection process includes independent research, peer nominations and peer evaluations. Hinman, Howard & Kattell is happy to announce that sixteen firm attorneys have been named in the 2016 listing of Upstate New York Super Lawyers.

The following Hinman, Howard & Kattell, LLP attorneys have been selected and listed as 2016 New York Super Lawyers—Upstate Edition.



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



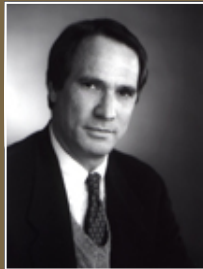
**Real Estate:**  
Lillian L. Levy, Esq.



**Employment and Labor:**  
James S. Gleason, Esq.



**Family Law:**  
Katherine A. Fitzgerald, Esq.



**Business Litigation:**  
Harvey D. Mervis, Esq.



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



**General Litigation:**  
Paul T. Sheppard, Esq.



**Business Litigation:**  
Linda B. Johnson, Esq.



**Environmental Law:**  
Kenneth S. Kamlet, Esq.



**Estate and Probate:**  
Jon J. Sarra, Esq.



**Employee Litigation: Defense**  
Dawn J. Lanouette, Esq.



**“Rising Star”  
Real Estate:**  
Megan E. Curinga, Esq.



**“Rising Star”  
General Litigation:**  
Tina Fernandez, Esq.



**“Rising Star”  
Business Litigation:**  
Daniel R. Norton, Esq.



**“Rising Star”  
Tax:**  
Alexander D. Racketa, Esq.



**“Rising Star”  
Workers’ Compensation:**  
Brent M. Whiting, Esq.



Present the

## 27<sup>th</sup> ANNUAL LABOR AND EMPLOYMENT LAW UPDATE

**Tuesday, October 18, 2016**

**7:30 – 11:30 a.m.**

7:30 a.m. Registration and Buffet Breakfast  
8:00 – 11:30 a.m. Program

**Traditions at the Glen**  
**4101 Watson Blvd., Johnson City**

**\*New this year\***  
**Webinar included!**  
↓

This event has been called A MUST ATTEND for small businesses! This is the perfect opportunity to learn how to avoid problems before they begin, to have the laws described in understandable language and to ask questions about issues of concern.

Attorneys from **Hinman, Howard & Kattell, LLP** will present the 27<sup>th</sup> Annual Update on **Labor and Employment Law**.

Topics will include:

- **Employee Benefits Update:** ACA changes, DOL Fiduciary Rule Changes
- **Worker's Compensation and Disability Benefits Update**
- **Wages & Hourly Rates:** NYS Minimum Wage Increase, DOL laws
- **Discrimination Law:** NYS Paid Family Leave Act, Supreme Court Updates
- **NLRB (National Labor Relations Board) Activity**

As an added benefit, your registration also includes **FREE** access to a webinar on the topic of the DOL's new change to Exempt Salary Threshold (overtime rule). This will be on Wednesday, October 5<sup>th</sup> at 9:00 a.m.

Please make your reservations by October 14, 2016.

**Members: \$30 Advance/\$35 After 10/14    Non-Members: \$75 Advance/\$80 After 10/14    Webinar ONLY: \$20**

Labor and Law Update-October 18, 2016 • DOL Webinar – October 5, 2016

Name(s) \_\_\_\_\_  
 Company \_\_\_\_\_  
 Address \_\_\_\_\_  
 City, State, Zip \_\_\_\_\_  
 Phone \_\_\_\_\_ Fax \_\_\_\_\_ E-mail \_\_\_\_\_

Number of Attendees: _____	Labor and Employment Law Update ONLY	Total \$ _____
Number of Attendees: _____	Labor and Employment Law Update AND Webinar	Total \$ _____
Number of Attendees: _____	Webinar ONLY (Members & Non-Members)	Total \$ _____

Credit card # \_\_\_\_\_ Exp. Date \_\_\_\_\_ V-Code \_\_\_\_\_ Billing Zip \_\_\_\_\_

**Please mail your registration and payment to:** Greater Binghamton Chamber, P.O. Box 995, Binghamton, NY 13902-0995; Fax to (607) 722-4513, Attn: Events; E-mail to [events@greaterbinghamtonchamber.com](mailto:events@greaterbinghamtonchamber.com); or call (607) 772-8860. **Payment/Cancellation Policy:** Reservations and payments made after **October 14, 2016** will be \$35 for Members and \$80 for Non-Members. If cancellation is necessary, please cancel by **October 14, 2016**, for a full refund.

*Cancellations after October 14, 2016 are NON-refundable.*

Sign up and pay on-line at [www.greaterbinghamtonchamber.com](http://www.greaterbinghamtonchamber.com)

The subject of “Corporate Governance” has slowly migrated from the board rooms of business to become a topic for mainstream media stories. The impetus for recent interest is triggered by a number of dramatic corporate scandals involving wrongdoing and cover-ups. These embarrassing events may have been prevented by more effective Corporate Governance procedures. This evolution of Corporate Governance has been a work in progress for decades.

The most recent contribution to this discussion appeared this past July, when Warren Buffett, the billionaire investor who controls Berkshire Hathaway, led a small and diverse group of thirteen businesses in issuing their “Commonsense Corporate Governance Principles.”<sup>1</sup>

### What is Corporate Governance?

In 1992, the concept of Corporate Governance was described by an international committee (the Cadbury Committee) as “... the system by which companies are directed and controlled.” Corporate Governance, when functioning at its best, must balance the sometimes competing interests of a company’s executive management, its Board of Directors, its large controlling shareholders, small shareholders, and other “stakeholders.”

The “stakeholder” group includes past and present employees, local communities, customers, suppliers, and regulatory authorities protecting the environment and other public interest groups. With the proliferation of social media options to express their views, this stakeholder group has grown in size and influence in recent years. As a result, businesses have become more responsive to the criticism and requests presented by the stakeholder groups. While Corporate Governance was historically seen as focused on having all of the necessary structures, people and controls in place to maximize profit for shareholders, this focus has shifted to include the interests of other stakeholders who have no financial investments in the business. As a result, the business community also must demonstrate greater focus and resources on maintaining the integrity, reputation and accountability to a broader group of stakeholders, even at some cost to the bottom line profitability of the enterprise. The issuance of business ethics statements and employee ethics training are now common in the corporate world. Many companies utilize confidential “hotlines” to permit employees to report potential problems to a company ombudsman. This trend is not limited to large international corporations whose stock is traded on international markets. Private corporations and smaller businesses are now more aware of the need to implement policies and procedures to promote more transparency in their operations. Businesses large and small now routinely establish and publish their own business ethics statements in order to gain the confidence of their local communities of interested stakeholders.

### Implementing Good Corporate Governance

The first step toward achieving a viable Corporate Governance structure for a business involves establishing a set of clear goals which balance the ultimate profitability of the enterprise with the reasonable interests of the business’ stakeholder groups. Attaining the appropriate Corporate Governance structure begins with the recognition and publication of the ethical principles which will guide the business. The people controlling the business must have a management structure and organization which will implement the business goals and strive towards profitability while recognizing the reasonable interests of stakeholders. Finally, a business should establish a reporting mechanism to promote its Corporate Governance philosophy and its related transparency and

accountability. Large international corporations must meet disclosure requirements of the U.S. Securities and Exchange Commission (“SEC”) and other regulatory agencies which have jurisdiction over their business. Private businesses can promote and disclose their own Corporate Governance practices on the many social media options which are available.

### The New Commonsense Corporate Governance Principles

In its introduction to the recently proposed Commonsense Corporate Governance Principles, Warren Buffett’s group of representative companies stated: “Our future depends on these companies being managed effectively for long-term prosperity, which is why the governance of American companies is so important to every American.”<sup>2</sup> The primary focus of these proposals is to promote further discussion between all interested parties, whether in the business world or not, to promote economic growth to benefit all Americans. While the authors of these proposals generally come from the ranks of large businesses, many of their concepts can be applied by smaller, privately owned businesses, as appropriate, to improve their business operations, profitability and relationships with their communities.

These proposals by the Buffett group can be summarized in four general points, each of which has a number of more detailed suggestions related to the basic premise.

**FIRST:** The Board of Directors: The Board of Directors is a vital party in establishing effective Corporate Governance. The Board should be independent and loyal to the company and all shareholders. The Board should meet regularly and contribute to the ongoing agenda of their business. Directors should be able to devote meaningful time and effort to their duties. Boards comprised of members with a diversity of skills, background and experiences will make better decisions after candid discussions. The Board should take a long-term strategic view when making decisions, whether the Directors serve a privately owned business or a larger corporation. Larger Boards will establish specialized Board Committees to concentrate on key topics such as corporate strategy, finance, audit, and employee issues. Procedures and guidelines involving the selection and election of Directors, their compensation and tenure in office should be established to fit the needs of each Company. Larger companies will designate one independent Director as a Lead Director with specific responsibilities on behalf of the independent Directors. The agenda of the Board should include focus on maintaining and strengthening the Company’s culture, values, and standards of performance.

**SECOND:** Financial Statements: It is critical for businesses, both large and small, to follow common accounting standards in order to promote the preparation of accurate reports for its owners, its financial partners, its service providers, and required government filings.

1. In addition to Berkshire Hathaway, this group of businesses included, among others, General Motors, J.P. Morgan Chase, J.P. Morgan Assets Management, Blackrock, GE, Verizon, Vanguard, State Street Global, and T. Rowe Price.
2. See [www.governanceprinciples.org](http://www.governanceprinciples.org)

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Generally Accepted Account Principles (GAAP) is the best standard to follow. Under some circumstances it is recognized that non-GAAP principles may be used to explain or clarify the financial reports of a business, provided it does not obscure the GAAP report.

**THIRD:** Shareholders Relations: For larger corporations, effective Corporate Governance is characterized by the promotion of good communication with its shareholders. With the importance of large institutional investors in the public stock markets, it is important for corporations to have access to the decision makers of such influential shareholders to discuss key strategic issues to promote the economic interests of their clients and all shareholders of publicly traded corporations.

**FOURTH:** Public Reporting: Corporations whose shares are traded in the public markets should be transparent in reporting their quarterly and annual financial result as required by the U.S. Securities and Exchange Commission. The Board should not feel obligated to provide future earnings guidance or projections unless it is beneficial to shareholders. The corporation should concentrate on its long-term goals and communicate these goals to shareholders and avoid the trend of financial markets which are too obsessed with short term earnings forecasts. The importance of accurate financial reporting also applies to small, private businesses which must also comply with applicable state laws governing the local filing of annual financial reports, which vary in required details. Businesses which borrow money from banks normally have obligations to provide current financial reports to their lenders.

### CONCLUSION

The evolution of effective Corporate Governance has been continuing for decades. It is clear that a number of influences have had a significant impact on this process. Various corporate scandals have prompted Congress and government agencies such as the SEC, as well as the other national and global stock exchanges, to require new regulatory standards. At the same time, public interest groups and shareholder activists have used social media to promote additional Corporate Governance reforms. It is noteworthy that the

Buffett group’s recommendations do not comment on the current trend by stakeholders (other than shareholders) to implement actions to influence corporate policies and actions. This omission may demonstrate that large corporations have not reached a broad consensus on their collective response to requests by activist stakeholders who now try to influence the business policies and actions which impact social policy rather than profitability. Each business must develop its own policy responses to these issues. The rules of the SEC permit even small shareholders to submit proposals to be submitted to the vote of all shareholders provided the proposals have some reasonable relationship to the operations of the business. A number of social issues can be presented for a vote of all shareholders by this procedure. However, only shareholders have this procedure available to them.

The general response of the Buffett group to all parties interested in Corporate Governance is summarized in this statement: “But we share the view that constructive dialogue requires the finding of common ground—a starting point to foster the economic growth that benefits shareholders, employees and the economy as a whole.” Many large privately owned businesses have become more aware of the importance of adopting good Corporate Governance practices such as Ethics Standards for their businesses and employees which also recognize the concerns of their other stakeholders, such as suppliers, consumers and local communities. It is now more widely recognized that effective Corporate Governance is good for all business interests.

It is recommended that business owners who have questions about this topic should consult with their attorney concerning these issues including the preparation of an appropriate “Ethics Statement” which would be suitable for their business.

*Article written by [Ralph K. Kessler, Esq.](#) For more information, contact Mr. Kessler at (914) 694-4102 or via email at [rkessler@hhk.com](mailto:rkessler@hhk.com).*

### PRESENTATION



#### DAWN J. LANOUILLE, ESQ.

Partner Dawn Lanouette spoke at the Southern Tier Association for Human Resources September Program held September 15 at the Binghamton Club. Dawn presented on the DOL’s update on White Collar Exempt Employee Salary Threshold; EEOC’s new rules and guidance on retaliation, employee leave for disability, harassment prevention,

and protection of transgender and employees; and New York State’s Women Equality Act, regulation on gender identity and minimum wage increases.

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