

# *Complying with State and Federal Laws*

## *Chapter 10*

## United States Department of Labor Resources

In a small handbook such as this, it is impossible to cover all of the subjects that apply to you in your business life, particularly those dealing with federal compliance issues. However, the U.S. Department of Labor (DOL) provides a great deal of legal information for small businesses through its Web site at ([www.dol.gov/elaws/](http://www.dol.gov/elaws/)).

Through this site you can access explanations of a wide range of federal statutes and regulations administered by the Department of Labor, and determine whether or not various laws and guidelines apply to your business by clicking on *FirstStep* Employment Law Advisor. The Department of Labor's Office of Small Business Programs also has a Small Business Resource Center you can access by visiting [www.dol.gov/osbp/sbrefa/main.htm](http://www.dol.gov/osbp/sbrefa/main.htm).

### Contacting the Department of Labor:

#### By Mail

U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

#### By Phone

**National Toll-Free Call Center.** Live assistance is available Monday through Friday from 8 a.m. to 8 p.m. Eastern Time by calling (866)4-USA-DOL, TTY: (877)889-5627.

### Small Business Regulatory Enforcement Fairness Act of 1996

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) places obligations on federal agencies and provides rights to small businesses. The Department of Labor's Office of Small Business Programs oversees the Department's SBREFA activities. You may also obtain information on SBREFA from the Small Business Administration (SBA).

For information about the rights provided to small businesses by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), contact the DOL Office of Small Business Programs at (202)693-6460 or toll-free at (888)9-SBREFA. You may also contact the U.S. Small Business Administration (SBA) ombudsman's office online through [www.sba.gov/aboutsba/sbaprograms/ombudsman/index.html](http://www.sba.gov/aboutsba/sbaprograms/ombudsman/index.html) to comment directly regarding the enforcement actions of any federal agency.

Under SBREFA, the SBA has established an SBA Ombudsman and SBA Regional Fairness Boards. If you wish to comment directly to SBA on the enforcement actions of any Department of Labor agency, call (888)734-3247. You also may call your local DOL Regional Office or the Department of Labor's Office of Small Business Programs at (202)693-6460.

### U.S. DEPARTMENT OF LABOR - MIDWEST REGIONAL OFFICE

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## What You Should Know about Securities Laws

For anyone who is forming a business, raising capital or soliciting proxies to elect directors and enact important company business, securities laws regulate what information must be provided and how it is communicated. Many people are probably familiar with the long, fine-print disclosure statements provided by their broker before they buy stock. But most do not realize that it is not only large businesses that are required to provide information under securities laws. These laws also govern the information required to be provided by small, closely held businesses. The kind of information required and how it must be communicated is based upon the nature of the solicitation and the sophistication of the investors.

Small business owners and operators should be alert to the circumstances in which securities laws can apply to their companies. Because securities laws are actually a collection of federal and state statutes, regulations, rules and interpretations, you, as a business owner, will need the services of an experienced attorney in order to identify the least costly and most effective method of compliance. If you fail to identify obligations under these laws in a timely manner, you may not be able to use some of the simplest methods, leaving much more expensive and time-consuming alternatives. So, if you have any doubt about your compliance with securities laws, ask a lawyer first.

***Q: Who are securities laws designed to protect?***

**A:** Securities laws are designed to protect investors by requiring businesses to provide enough information that investors can make informed decisions before committing their capital and making decisions. Because different people have different levels of experience in business, financial matters and certain industries in particular, securities laws require different levels of disclosure. Some solicitations of capital are exempt from filings with any state or federal agency. These exemptions may not require any disclosure. This is because these investors may be actively involved in the management of the business. These investors or their investment advisor may have an education in finance and years of experience in investing in this kind of stock. They may also have a sufficient net worth and/or income to reduce the amount of risk to their home and lifestyle should they lose their investment. In short, *exemptions* may be available for persons who are more able to fend for themselves.

Securities laws are designed to protect investors from taking inappropriate risks. An experienced investor knows that businesses usually raise capital for the purpose of promptly investing in assets or services. When the company spends raised capital, as intended, the investment has been converted to equipment, goods or services. This makes it difficult or impossible for the investor to get back quickly his or her money even if the company wishes to return it. Publicly traded companies make a market in their shares, not the underlying assets, thus making the investment liquid. Few companies have a public market for their shares or other ownership interests. Indeed, most closely held businesses severely restrict the transfer of their stock, because they want to know the persons who will have the power to vote their shares.

Investment in closely held businesses is best suited to people who can afford to lose their investments or can otherwise comfortably afford to maintain their lifestyles without prompt access to their invested capital. It is also suited for persons who manage the day-to-day affairs of the business which is employing their capital. Consequently, securities laws may make it difficult or impossible for a closely held business to even offer to sell

its ownership interests to many investors without having investment advisor review each offer and provide counsel.

***Q: When will securities laws apply to my business?***

**A:** Know the circumstances in which securities laws are most likely to apply to your business. If you are about to form a corporation, limited liability company, limited partnership or even a general partnership, securities laws can apply. They also apply to raising capital from new or existing owners and investors. Even a *loan* can be a security requiring compliance. While the sale of a franchise is not often considered a security, Ohio and other states have similar laws governing the solicitation and sale of these and other business opportunities which also regulate the information that must be provided. Furthermore, in most circumstances, a business cannot even make initial contact with a potential investor without first complying with securities laws. Therefore, in any of these instances, ask an experienced lawyer early in the planning stages so that you will know who you can solicit and devise a strategy for how to go about it.

***Q: I have been preparing to open a new business. I'm only asking a few friends to help me with seed money and then I'm going to pay them back when I turn the corner. These laws do not apply to me, do they?***

**A:** Yes they can and often do. There is no exemption for friends, and being a friend does not mean the investor has the net worth or sophistication to absorb *illiquidity* or loss of investment.

***Q: What are "exemptions" and how do I use them effectively?***

**A:** Securities laws generally require some form of registration with the federal government's Securities and Exchange Commission (SEC) and/or state division of securities. Formal registrations typically involve a significant expenditure of time and fees that are much less cost-effective for small companies than large. Small- to medium-sized businesses rely almost exclusively on various exemptions to registration in order to comply with securities laws. Federal and state exemptions are required in each instance. Some require a simple but timely notice filing with governmental agencies.

Others may not require any filing, but prohibit advertising of any kind and/or prohibit the charging of sales commissions. If you so much as offer securities to those who are not qualified to buy them, or if you fail to file a notice on time, you may lose your exemption and be required to register or refund all of the funds you raised, and have to start over at the beginning.

***Q: What happens if I do not comply?***

**A:** As with most laws, securities laws have enforcement provisions. One almost universal remedy an investor may use is to *rescind* the investment, which means you would have to refund all the investors' capital. If the money has already been spent, that can prove to be fatal to the business. There are also civil sanctions, even criminal penalties, especially for willful violations or fraud.

If the failure to comply is inadvertent, often there is an opportunity to correct the mistake without harm to the business. Sometimes merely offering the investors' money back and confirming this in writing will help. However, sometimes these corrective filings require time-consuming and costly disclosures. These costs and the corrective effort can increase over time, so if you learn of a problem, do not delay.

If you are concerned, ask a lawyer. Remember, attorney-client communications and advice are confidential and privileged.

*—by Gary M. Harden, an attorney with the Toledo firm, Eastman & Smith, LTD.*

## Federal Trade Commission (FTC) Enforces “Consumer Protection” Laws

**Q:** *I sometimes see TV ads that I think are misleading, I’ve heard about telemarketing scams, and I’m reluctant to do business on the Internet. Is there any government agency that tries to protect consumers from unfair or deceptive business tactics?*

**A:** The federal government has enacted a number of consumer protection laws and regulations which are enforced by the Federal Trade Commission (FTC). Its mission is to eliminate from the marketplace all acts or practices that are unfair or deceptive.

**Q:** *What is the FTC?*

**A:** It is an independent federal agency created by Congress in 1914 to combat “unfair methods of competition.” In 1938, its mission was expanded to include prevention of “unfair or deceptive acts or practices.” Under this authority, the FTC has become the premier protector of our nation’s citizens against consumer fraud. In addition, Congress has, over the years, given the FTC authority to enforce a wide variety of other consumer protection statutes relating to such matters as product warranties, product packaging and labeling, *truth in lending* disclosures, *fair credit* billing and reporting procedures, and, more recently, telemarketing fraud prevention and children’s online privacy protection.

**Q:** *How does the FTC decide what to investigate?*

**A:** An investigation can begin in various ways—for example, by a Congressional inquiry, an FTC staff member spotting something questionable in the marketplace, or even with a letter or phone call from a consumer.

**Q:** *How does the FTC try to stop unfair or deceptive practices?*

**A:** First, it will investigate. If it concludes that consumers are being deceived, it may ask the guilty party to enter into a so-called *consent order* agreeing to stop the harmful conduct. If the party refuses, the FTC may start a formal proceeding before an administrative law judge; this is similar to a court case, where there is submission of evidence and legal arguments. If the judge finds that the law has been violated, a *cease-and-desist* order is issued. Such an order may be appealed to the full commission. If either party is not satisfied with the outcome, it can appeal to the federal courts.

If an FTC consent or cease-and-desist order is later violated, the FTC may seek monetary penalties and/or an injunction in federal court. Further, in cases involving “dishonest or fraudulent” conduct, the FTC may ask a federal court to order consumer redress, such as monetary restitution to victims of the violation.

In some cases, the FTC will go directly to court. For example, if there is an ongoing consumer fraud, instead of starting an administrative proceeding, the FTC will seek an immediate injunction to stop the fraud before too many consumers get hurt.

The FTC may also issue *trade regulation rules* to prevent unfair or deceptive practices affecting an entire industry. Such rules have the force of law.

***Q: Is the FTC involved in issues like Internet fraud prevention or online privacy? In what other areas is it concentrating its enforcement efforts?***

**A:** As part of its mission to protect consumers from unfair or deceptive practices, the FTC's Bureau of Consumer Protection is active in multiple areas. It has, in recent years, increased and tailored its law enforcement efforts to detecting online fraud and related practices. It is the national leader in fighting Internet, telecommunications, and direct-mail fraud, deceptive spam, and violations of Do-Not-Call rules. Part of its focus is on high-tech products and Internet concerns like the dissemination of spyware. It safeguards consumers' financial privacy, investigates breaches of data security, tries to prevent identity theft, and aids individuals whose identities have been stolen. It enforces truth-in-advertising laws—for example, investigating claims for food, over-the-counter drugs, or dietary supplements. It runs national campaigns to alert consumers to their rights. It also plays a role in preventing deceptive or unfair loan servicing, debt collection, and credit counseling practices, and regulates the credit reporting industry.

***Q: To whom at the FTC should I complain about a fraud or about telemarketers who ignore the national "Do-Not-Call" registry?***

**A:** To file a complaint or to get free information on these or other consumer issues, visit [www.ftc.gov](http://www.ftc.gov) or call (877)FTC-HELP (877-382-4357). The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into a secure online database available to hundreds of civil and criminal law enforcement agencies across the country.

***Q: If an FTC complaint is made against me or my business, what should I do?***

**A:** You should handle an FTC complaint as if it were a lawsuit. You should refer it to in-house counsel or outside counsel.

***Q: How can I get more information about these consumer protection issues?***

**A:** A good source is the FTC's own Web site, [www.ftc.gov](http://www.ftc.gov).

*—by Mark L. Silbersack, a partner in the Cincinnati office of Dinsmore & Shohl, LLP.*

## Ohio Law Mandates “Fairness” in Construction Contracting

***Q: I have been involved in the construction industry as a contractor and subcontractor for a number of years, and when it comes to contract negotiations, it seems I'm always at the mercy of the owner or general contractor. Does Ohio law protect me in contract negotiations?***

**A:** Effective September 30, 1998, the Ohio Legislature enacted the Fairness in Construction Contracting Act, *Ohio Revised Code* Section 4113.62 (the Act), which makes certain generally-used contract provisions void and unenforceable. The Act came into being because Ohio legislators decided that these commonly used contract provisions were unfair and against public policy.

***Q: Can you give me an example of a provision which has been made unenforceable?***

**A:** Owners often require general contractors to provide *payment bonds* to ensure that subcontractors and/or materialmen can still collect payment even if the general contractor fails to pay. Currently, many general contractors avoid the owners' requirement to post a payment bond by including, in their contracts with subcontractors and materialmen, a clause waiving the payment bond requirement imposed by the owner. When a general contractor does this, the subcontractor is deprived of a reliable source of payment. Under the Act, such waiver clauses are no longer valid.

***Q: On almost every project, it becomes necessary to file a claim for extra compensation because of additional work required by the owner. Oftentimes, there are provisions in contracts provided by owners which take away my right to claim extras. Does the Act address this?***

**A:** It is true that many contracts used by owners include provisions which automatically waive a contractor's and/or a subcontractor's pending claims for extras upon their acceptance of final payment. Because of the bargaining power of the owner, this standardized waiver provision has found its way into many contracts. Indeed, numerous times, contractors and subcontractors, because of the financial pressures of business, have decided to receive final payment, even though this meant their claims for extras would be lost. Under the Act, these one-sided waiver provisions are now unenforceable, provided a contractor or subcontractor has given notice of a claim for extras *prior to* accepting final payment.

***Q: I have seen many contracts stating that no damage compensation will be awarded to a contractor or subcontractor for delays in contract performance caused by others. This clause has always struck me as being unfair. Does the Act address this issue?***

**A:** Yes. The Act makes unenforceable construction contract provisions which prevent a party from recovering damage compensation for delays caused by a party other than him/herself. For example, on a large construction project, a subcontractor who mobilizes his crew for performance on a specific date may find that the general contractor's improper coordination of the work has delayed the subcontractor's scheduled performance. Under the Act, the subcontractor may recover compensation for such a delay, even if the subcontractor's contract with the general contractor contains a “no damage for delay” clause.

***Q: I am a subcontractor. In the past, I have lost mechanic's lien and bond rights due to a general contractor's failure to pay under a so-called "pay-if-paid" clause. Does the Act address this situation?***

**A:** Yes. A *pay-if-paid* clause in a contract between a general contractor and a subcontractor means the general contractor does not have to pay a subcontractor if the owner has not paid the general contractor. In the past, these pay-if-paid clauses have interfered with a subcontractor's or materialman's ability to file mechanic's liens, liens against public funds, and/or claims against payment bonds. Specifically, all of these various types of claims must be made within defined time periods. Further, to be able to make such claims, a subcontractor or materialman must say that payment is "now due" him from the general contractor. When a contract between a general contractor and the subcontractor or materialman contains a pay-if-paid clause, it may mean that the payment by the general contractor is not due—even though the scheduled time for payment has passed—because the owner has not paid the general contractor.

Before the passage of the Act, in such circumstances a subcontractor or materialman could not claim that payment was due, and therefore, could not file a lien or bond claim. Further, if the owner's delay in payment went past the time required by law to file a lien or bond claim, then the subcontractor or materialman would lose the right to file such claims.

The Act protects subcontractors and materialmen in these situations by saying that a pay-if-paid clause *does not* prevent a subcontractor or materialman from filing a lien or bond claim where the date for payment has been delayed by an owner's failure to pay the general contractor. Simply stated, the Act allows a subcontractor and/or materialman to timely and lawfully file a lien or bond claim where previously he or she could not.

*—by Russell R. Aukerman and William F. Kolis Jr., attorneys in the Avon law firm of Wickens, Herzer, Panza, Cook & Batista. Updated by attorney Michael Niederbaumer of the same firm.*

## What Employers Should Know about Ohio's Minimum Wage

On November 7, 2006, Ohio voters passed Issue 2 to include a minimum wage in Ohio's constitution. As of January 1, 2009, most Ohio employers must pay at least \$7.30 per hour.

The minimum wage will increase each year by the amount of inflation, as determined by the Ohio Department of Commerce. The rate set by the original amendment in 2006 was \$6.85, which has since increased. Importantly, the since the minimum wage was raised through constitutional amendment, the Ohio General Assembly cannot reduce it.

The minimum wage amendment covers the employees of the state and every county, city, township, school district and governmental authority, as well as most, but not all, private employees. Examples of those who are not entitled to the new minimum wage include employees under the age of 16 and employees of a small business (less than \$250,000 in annual gross revenues). These employees, however, are entitled to receive the federal minimum wage.

Other exceptions include the following:

- 1) Employers can pay "tipped" employees (*i.e.*, employees who receive tips as part of their pay) as little as one half of the minimum wage, so long as tips make up the other half.
- 2) Family-owned businesses do not have to pay the new Ohio minimum wage to their own family members.
- 3) Employees who work "in or about the property of the employer or an individual's residence on a casual basis" are not covered by the new minimum wage law.

In addition, the state can permit employers to pay wage rates below the new minimum to individuals who have a disability that affects their employment opportunities.

Employers must make sure that they keep a record of each employee's name, address, occupation, pay rate, hours worked *for each day worked*, and each amount paid to an employee.

Employers must keep these records for three years after each employee's last day of work.

Employers must provide these records within 60 days of a request and without charge to the employee or a person acting on behalf of the employee (for example, the employee's lawyer or union representative).

Minimum wage lawsuits can be filed within three years of the violation or (if it was a continuing violation) when the violation ceased. The lawsuit can be a simplified class action, where one employee can sue on his or her own behalf and that of all "similarly situated" employees. The suit can be filed in a county where any one of the employees resides.

If an employer violates Ohio's minimum wage law, the employer must, within 30 days of a finding of the violation:

- pay the employee's back wages;
- pay damages equal to an additional two times the back wages; and
- pay the employee's costs and reasonable attorneys' fees.

Finally, the minimum wage law prohibits employer retaliation against people who provide assistance to employees asserting their rights. Employers who retaliate must pay an amount “sufficient to compensate the employee and deter future violations,” or at least \$150 for each day that the violation continued.

Legislation implementing Issue 2 provides privacy protections for employees requesting wage information, and regulates how minimum wage lawsuits can proceed. That legislation also exempts employees who are exempted from both the Ohio and the federal minimum wage.

*—by Neil E. Klingshirn of Fortney & Klingshirn, Akron.*

## **Wage-and-Hour Update:**

### **When Must an Employee Be Paid for Travel Time?**

Suppose one of your employees travels from job site to job site in a company truck, then takes the truck home in the evening. How much of his drive time is compensable? When, if ever, should an employee be paid for the commute between work and home?

Suppose another employee leaves home in the morning in her personal automobile and returns late in the evening after a one-day job in another state. Is all of her travel time compensable? What if the assignment lasts for more than one day?

The Fair Labor Standards Act, the federal law governing minimum wage and overtime requirements for all *non-exempt* employees, addresses travel time. Those regulations say:

- 1) An employee's commute from home to work, even in the employer's vehicle, is usually not compensable.
- 2) Travel that falls "all in a day's work," such as travel from job site to job site during the workday, must be compensated.
- 3) Travel from home to work in an emergency may be compensable, particularly if the employee reports to a site that is not his or her usual workplace.
- 4) If an employee travels out of town, travel time is compensable if:
  - The employee completes the trip in one day, regardless of whether the travel occurs in a company vehicle, personal automobile or public transportation.
  - The trip lasts more than a day, but the travel time occurs during the employee's regular work hours, even if the travel occurs on Saturday or Sunday.
  - Travel to another city in a personal automobile (except when required by the employer) or public conveyance that takes place outside of the employee's regular work hours is generally not compensable, however, if the trip lasts longer than a day.

Your attorney or accountant can answer questions about how these general rules apply to you. A mistake in this area can be costly. Employees who have not been properly paid can recover all of the unpaid wages owed to them for up to three years plus liquidated damages in an equal amount and attorneys' fees.

*—by Gregory T. Lodge, a labor and employment law attorney with Shumaker, Loop & Kendrick, LLP, in Toledo.*

## Avoiding Antitrust Problems

For most businesses, facing antitrust claims is like being struck by lightning. The odds of it happening are very small, but the consequences are dire.

Many antitrust claims arise only when a business has acquired, or is in a position to acquire, “market power”—the ability to control price or output in a relevant market. Most firms can only dream of having that sort of economic clout.

However, the most serious antitrust offenses do not require a business to have such market power, so no firm can afford to assume that it is beyond the reach of the antitrust laws.

These most serious antitrust violations involve certain agreements among competitors: *price fixing* (agreements on the prices competitors will charge); *customer allocation* (agreements to stay away from each other’s clientele); *market division* (agreements to limit the geographic areas in which firms compete); and *bid rigging* (agreements about what or whether to bid or who will win bids).

The consequences of committing one of these violations are severe. They carry potential jail sentences of up to ten years in prison and criminal fines of up to \$100 million for corporations and up to \$1 million for individuals. Moreover, any person or business that is injured as a result of the violation can recover three times the amount of damage suffered plus attorney fees. Also, experience shows that these cases are among the most expensive to defend.

The federal government takes the investigation and prosecution of antitrust violations very seriously. The Justice Department’s Antitrust Division has seven field offices, one located in Cleveland, that are devoted exclusively to identifying, investigating and prosecuting antitrust violations. Like most states, Ohio’s Attorney General’s Office also has an entire section devoted to pursuing antitrust violators.

In Ohio, many antitrust investigations and prosecutions have involved relatively small businesses without “market power.” Electrical contractors, scrap metal dealers, funeral homes, supermarkets, real estate brokers, dairies and steel container manufacturers have been the subject of investigations, many of which have resulted in prosecutions and convictions.

### Price-Fixing Case Study

*United States v. Foley*, 598 F.2d 598 (4th Cir. 1979) demonstrates the dangers associated with seemingly idle discussions among competitors about prohibited topics. The head of a real estate agency arranged a dinner meeting of his competitors at the Congressional Country Club in Bethesda, Maryland. After dinner, he told the group that he did not care what they did, but his agency was going to raise real estate commission fees. The evidence about what, if anything, the others said after that was disputed. However, the evidence showed that, after the dinner, the other Realtors raised their rates as well, and that they all knew that a rate increase would not “stick” unless they all went along with it.

Under these circumstances, a jury convicted the defendants of a conspiracy to fix prices, which was affirmed on appeal. Of course, there was much more to the case, but the important thing to observe is that there need not be a specific expression of agreement in order for the crime of price fixing to occur. How much better off these defendants would have been if they had never even discussed the subject of their prices, and, in fact, had declined their competitor’s invitation to an unsupervised dinner in the first place.

Like a lightning strike, antitrust violations are relatively easily avoided by following a few common sense rules.

- 1) **Never make any agreements with your competitors about prohibited subjects (your prices, customers, territory or bids).** The law prohibits any kind of agreement on these topics—written, oral, handshakes or even unspoken, informal “understandings.”
- 2) **Never discuss these prohibited subjects with your competitors.** Juries can infer the existence of agreements from what might seem like innocent circumstances. For example, if you discuss your pricing with a competitor and later both of your prices become similar, someone might infer that you did more than just discuss them, but rather agreed on what they would be.
- 3) **Instruct all of your employees never to make such agreements or have such discussions.** Agreements a sales person makes with your competitors’ sales force about the prohibited subjects will bind the company, and the company will bear the consequences.
- 4) **Adopt a written policy that mandates compliance with the antitrust laws and explains how to do so.** This will help impress upon your personnel the importance of compliance and provide a reference guide.

Application of the antitrust laws can be very complex, but businesses often can achieve their legitimate goals while staying well within the bounds of these laws. Detailed analysis and careful planning sometimes are necessary, but, when it comes to the most serious potential antitrust problems, the rules are fairly clear and easily obeyed.

Following these steps will help you and your business stay out of the storm and avoid the lightning.

*—by John J. Eklund, a partner in the Cleveland and Columbus law firm of Calfee, Halter & Griswold LLP.*

## **Taxpayers Can Choose Method for Estimating Commercial Activity Tax Payments**

As part of the comprehensive tax reform enacted in 2005, a new commercial activity tax is being imposed upon the gross receipts from commercial activity in Ohio. Taxpayers with annual taxable gross receipts of less than \$1,000,000 file annual returns, while taxpayers with annual gross receipts in excess of \$1,000,000 file quarterly returns.

For taxpayers filing quarterly returns, the returns and payments are due 40 days after the end of the calendar quarter. Many small and medium-sized taxpayers, however, find it hard to obtain accurate gross receipt figures within this window. The possibility of interest and penalties for reporting inaccuracies only adds to the tensions.

Fortunately, taxpayers can choose one of two methods for estimating their quarterly tax liabilities: the *rule estimation procedure* and the *statutory estimation procedure*. Although they work differently, both methods allow a taxpayer to estimate taxable gross receipts during a quarter and to reconcile that estimate at a later date.

Using the rule estimation procedure, the taxpayer can estimate taxable gross receipts based on the actual receipts from the previous quarter. The estimate must be at least 95 percent of the actual taxable gross receipts for the previous quarter, but in no event less than 70 percent of the actual receipts for the current quarter. The taxpayer must then file a reconciliation return before the due date for the next quarter and pay any additional tax due. A taxpayer using the rule estimation procedure and meeting its requirements will not incur penalties or interest when filing a reconciliation return.

The statutory estimation procedure permits a taxpayer to estimate taxable gross receipts for a quarter at 95 percent to 105 percent of the actual number without penalty or interest. The taxpayer files a single reconciliation return at the end of the year, reporting the actual taxable gross receipts for each quarter and comparing them to the estimated receipts. If the estimate falls within the range of 95 percent to 105 percent of the actual receipts for that quarter, no interest or penalty is due (although any shortfall in tax paid must be paid and any excess is taken as a credit for the fourth quarter). If the estimate falls below that range, however, a penalty of 10 percent plus interest will apply. A taxpayer who overpays the tax for one quarter may not use the excess to remedy an underpayment for another quarter; each quarter stands on its own.

A taxpayer may not mix methods during a calendar year. If the rule estimation method is used for a quarter, the taxpayer may not use the statutory estimation method for a subsequent quarter in that year. However, a taxpayer may estimate taxable gross receipts for one or more quarters, using either method, and report actual taxable gross receipts for other quarters during the same calendar year.

Most taxpayers likely will find the rule estimation procedure easier. However, businesses with wildly fluctuation receipts, or with anticipated seasonal swings, may find the statutory estimate procedure offers better protection. Taxpayers should take the time to determine which method is better for their particular situation.

*—by Mark A. Engel, an attorney with the West Chester office of Bricker & Eckler LLP.*

## Complying with Ohio's Smoking Ban

Ohio's voters passed the statewide Smoke Free Workplace Act in November 2006, and the Ohio Department of Health began enforcement efforts in May 2007. As the mandatory "No Smoking" signs continue to appear all across Ohio, employers must make sure they are complying with the law.

Some have referred to the law as an *indoor smoking ban* because it restricts smoking only in enclosed areas. However, outdoor areas like decks and patios fall under the ban if they are covered overhead and on more than two sides. For example, a partially enclosed deck or patio that has a roof, awning, or even umbrellas may be a mandatory non-smoking area.

As the name suggests, the Smoke Free Workplace Act is directed primarily at places of employment. Yet anyone who performs services for an organization—with or without compensation—is considered an "employee" under this law, so independent contractors and volunteers are likely covered. If those individuals use an enclosed area for work or any other purpose, the smoking ban applies there at all times of day and night. This broad definition of "employee" makes the law applicable to most organizations, and it also applies to enclosed areas into which the public is invited. Business owners still have the option of designating their entire facilities as non-smoking areas, both indoors and out.

Exceptions are narrow and specific to places like nursing homes, hotel rooms, and retail tobacco stores. An exception for private clubs has generated controversy, but as a practical matter few organizations are eligible for that exception. In addition to other conditions, the club must be a not-for-profit entity, must be the only occupant of a freestanding structure, and must employ only members of the club.

Employers are responsible for enforcing the law in areas that are directly or indirectly under their control. In addition to removing ashtrays and posting specified signs that include the toll-free reporting hotline, business proprietors cannot allow employees or customers to smoke in prohibited areas. The first violation of the smoking ban is punishable by a warning letter, and subsequent violations may result in fines between \$100 and \$2,500. Retaliation—which includes terminating or refusing to hire someone who exercises a right under the new law—is also prohibited. Individuals who refuse to stop smoking upon request by a proprietor are subject to fines as well, even in outdoor areas that a business voluntarily declares to be non-smoking.

Because the financial consequences of noncompliance can be serious, businesses are well-advised to comply with the Smoke Free Workplace Act. Enforcement activity has been brisk and will likely continue to be while businesses across Ohio adapt to the new law.

—by Justin D. Flamm, a partner in the Cincinnati office of Taft, Stettinius & Hollister LLP.