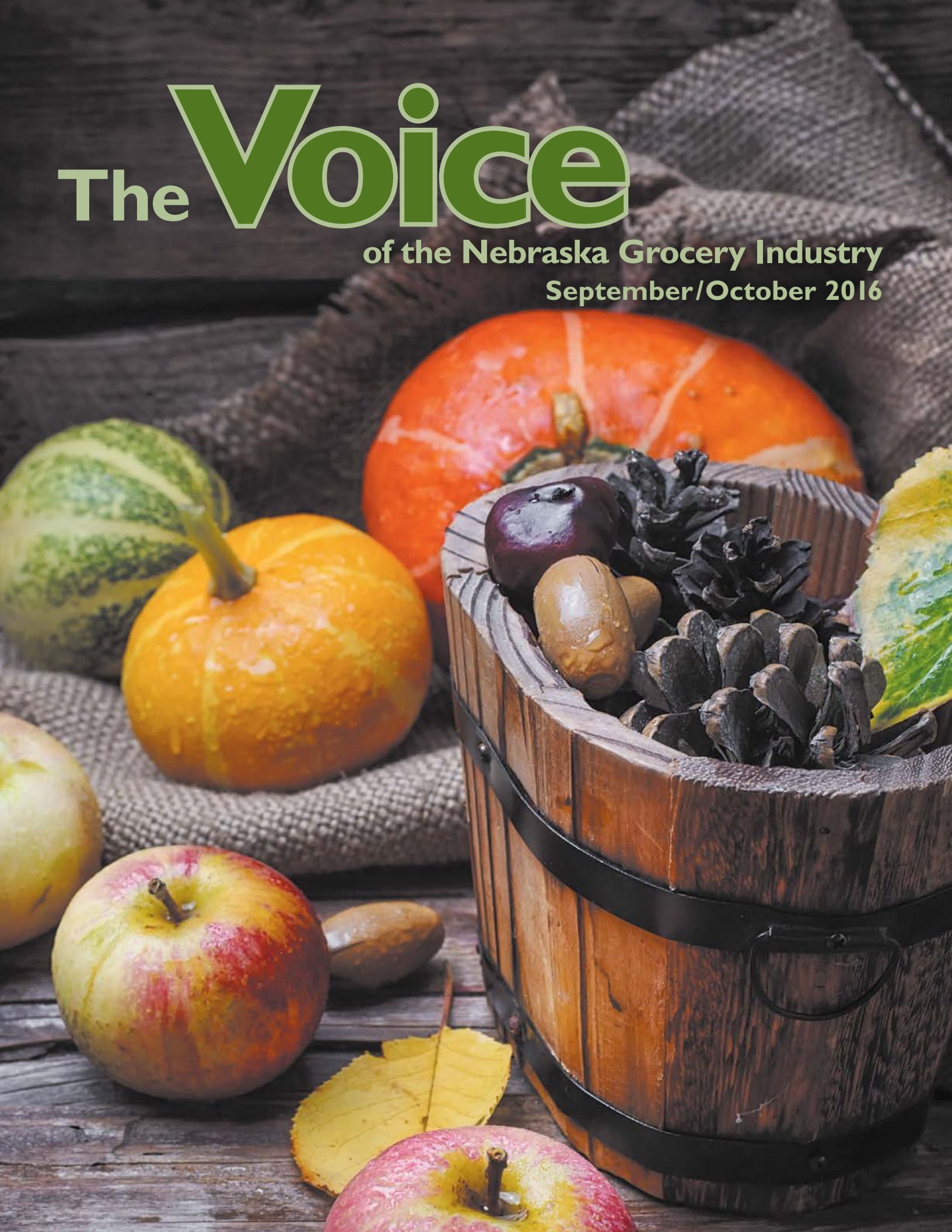

The Voice

of the Nebraska Grocery Industry

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features & departments

advertisers

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Phone: (402) 423-5533 or 800-433-6742 • E-mail: ksiefken@nebgrocery.com.

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Nebraska Food News… People… Places… Things…

This section of the magazine is dedicated to announcing the changes, additions, promotions, etc., regarding members of the grocery industry in Nebraska. We invite members to submit information that can be included in this section.

Prairie Sky Foods, Minatare's long-time grocery store, will close its doors on October 31. The city is trying to find a new owner.

CAPS Café in Nelson decided to take their business to another level and added a grocery store in September. Carroll and Patricia Sole are the owners. They will carry staple items such as eggs, milk, butter, bread, cheese, some meats and dry goods. The Soles decided that a grocery store added to their café was a good fit for them and for the community.

The Optimist Club of Sioux City, NE, partnered with Hy-Vee to do the Donuts for Cops event. And then after that event Hy-Vee did bratwursts and the proceeds from that and a free will offering enabled the Optimist Club to present a check for $500 to the police department for their ongoing youth programs.

SunMart Foods in Auburn was able to provide a check for $1000 to Trinity Evangelical Lutheran Church's Kids of HIS Kingdom Child Development Center through the Direct Your Dollars program. This was previously known as Support Our Schools program.

The **Ord Grocery Kart** celebrated the 20-Year Anniversary. They celebrated with a hamburger and hog dog grill out, a trailer full of fresh produce, and lots of great deals on grocery items. After purchasing the former Cetak's grocery store, Kiley White opened the Ord Grocery Kart on June 30, 1996, and it has been an integral part of the local economy ever since.

The **MNO Hometown Market** in Wood River opened for business in April in the former Mr. B's location. The store was purchased by Jamie and Veronica Morse who are rural Wood River residents. The Morse's purchased the store from its former owners Larry and Rosemary Brannagan after they retired.

Bruning Grocery store was announced a winner of 2016 Third District Excellence in Economic Development Award in July. The grocery's commitment to hard work, small-town values, and providing exceptional service and quality products has made a store a cornerstone of Bruning, a community of approximately 280 people. Its competitive prices draw many customers form surrounding towns, encouraging more Nebraskans to shop local. Owned by the Philippi family for more than 40 years, Bruning Grocery serves as a leading food supplier for local events and a major contributor to the vibrancy of Bruning's Main Street.

B & R Stores, the parent company of Russ's Market and Super Saver announced the hiring of Mark Griffin as senior vice president of operations and the promotion of Larry Elias to vice president of sales and merchandising. Griffin brings 35 years of experience in the grocery business including executive positions in finance, marketing and operations with retail and wholesale operations in Texas, New Mexico and Utah. Griffin has been in Nebraska the past five years as vice president of the Midwest region for Nash Finch. Larry grew up in the grocery business in Persia, IA and was a regional manager for Nash Finch prior to joining the leadership team at B&R Stores in 2002.

Korner Mart in Wakefield closed in July. Dan and Angela Miller started operating the business in 2007.

Malinda and Dave Kempf celebrated their 8th anniversary of having the 2nd Street Market in Dodge in July. They celebrated with a tent sale which included a wide variety of items and fresh fruit and vegetables.

Sharon and Perry Gydesen, owners, of the **Odell Market** for nine years retired from their teaching profession and also wanted to sell their store. With no offers on the table the Gydesen's were ready to close the doors and the citizens of Odell came up with a radical strategy—a community owned grocery store. So they have moved forward purchasing the store and

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FLSA Overtime Rule:

With all these efforts to block it, can employers relax?

By Robin Shea on September 30, 2016
Posted in Wage-Hour
Courtesy of UNICO HR Insights

Last week, two lawsuits were filed in federal court in Texas seeking to block the Final Rule on white-collar exemptions to the overtime provisions of the Fair Labor Standards Act, which was issued in May. Meanwhile, legislation that would delay the effective date of the rule until June 2017 just passed the U.S. House of Representatives, and there is other legislation pending in Congress that would "nullify the rule." The overtime rule is still set to take effect on December 1, but with all of this "blockage action" going on, can employers breathe easier now?


Jim Coleman


Ellen Kearns

I am delighted that Jim Coleman and Ellen Kearns, co-chairs of Constangy's Wage and Hour Practice Group, agreed to be interviewed about the efforts to block the rule and whether those efforts will buy employers a little more time to get ready for the rule to take effect.

(Quick answer on that last: NO, but read on!)

***ROBIN SHEA**: Jim and Ellen, last week two lawsuits were filed—on the same day, and in the same federal court in Texas—challenging the U.S. Department of Labor's final rule on white-collar exemptions to the overtime provisions of the Fair Labor Standards Act. One was filed by 21 states, and the other was filed by the U.S. Chamber of Commerce, a number of trade associations including the National Retail Federation and the National Association of Manufacturers, and a number of local Chamber of Commerce chapters.*

Do you have any thoughts on why the federal court in Sherman, Texas, was chosen for these lawsuits? I assume this was a coordinated effort. Do you agree?

JIM COLEMAN: It is a fair bet that counsel for both sets of plaintiffs independently concluded that the Eastern District of Texas was a favorable forum for presenting their legal challenges. Only a few months ago another federal court in Texas, this one in the Northern District (Lubbock), enjoined the Secretary of Labor from enforcing the "Persuader Rule," and that success may well have been a factor in the forum selection in the two lawsuits filed last week. While I am not involved in either lawsuit, I suspect there was coordination between the respective plaintiffs' counsel.

ELLEN KEARNS: The Eastern District of Texas has a reputation of moving cases quickly, earning the nickname "rocket docket." This means that plaintiffs could get a quick hearing on their request for injunctive relief, giving them time to appeal to the [U.S. Court of Appeals for the] Fifth Circuit if needed.

Second, as Jim has noted, federal judges in Texas have recently been willing to halt Obama Administration initiatives—the persuader rule, and a federal judge in the Southern District of Texas (Brownsville) recently granted an injunction freezing a program to expand deportation procedures for certain undocumented workers, and the injunction was affirmed on appeal.

But I don't think that it was a totally coordinated effort. The two lawsuits involve different plaintiffs, and were filed by different law firms. The states' lawsuit originated in the Nevada office of the Nevada attorney general, and then other states were asked to sign on. The Chamber of Commerce lawsuit was coordinated by the U. S. Chamber of Commerce and was filed by a private law firm and a number of industry legal groups. That having been said, some coordination no doubt took place because the two suits were filed on the same day, in the same courtroom, hours apart.

***ROBIN SHEA**: If this was a coordinated effort, either in whole or in part, then why didn't all of the plaintiffs join together in a single lawsuit?*

JIM COLEMAN: Each lawsuit presents different legal claims and theories, although there is significant overlap and a common goal. For example, the lawsuit filed on behalf of 21 states asserts, among other things, that the DOL's final rule violates the Tenth Amendment to the U.S. Constitution by unlawfully mandating how state governments must pay their employees. This is a "States' Rights" argument that is unique to the plaintiffs in the state lawsuit, but not to the private plaintiffs in the other.

ELLEN KEARNS: I agree, and I'd like to elaborate on that Tenth Amendment issue. The states' lawsuit argues that the new overtime rule will increase state governments' employment costs significantly based in part upon the number of Executive, Administrative, or Professional employees who will no longer be exempt from overtime. According to the lawsuit, "Because the Plaintiff states cannot reasonably rely upon a corresponding increase in revenue, they will have to reduce or eliminate some essential government services and functions. These changes will have a substantial impact on the lives and well-being of the Citizens of the plaintiff states." The states say that the rule improperly mandates the way that states "structure the pay of State employees and, thus, [dictates] how States allocate a substantial portion of their budgets," which could force the states to reduce or eliminate programs. They argue that these are "indisputable attributes of State sovereignty" and that there is no federal interest that justifies interference. As Jim has noted, this constitutional argument could not be made by the private sector plaintiffs in the Chamber of Commerce lawsuit.

Will Texas rescue employers from the new overtime rule?

***ROBIN SHEA**: Let's focus on that one—the Chamber of Commerce lawsuit. The plaintiffs claim, among other things, that the DOL's position is "arbitrary and capricious." The Obama Administration says that the threshold of $23,660 under the current rule has not kept pace with the economy. In fact, the poverty line this year for a family of four is $24,300. However, the plaintiffs say that by raising the salary threshold to $47,676 a year, the DOL is effectively (and without justification) taking away the "exempt" status of large numbers of workers whose job duties should make them exempt. Do you think this claim has legal merit?*

JIM COLEMAN: Well, I don't want to prejudge the argument, but I think the analysis will be whether the DOL satisfied the notice and comment rule-making requirements of the Administrative Procedure Act, which governs the process for promulgating federal executive branch regulations. While few could disagree that the current salary threshold, last adjusted in 2004, was in need of updating, the employer community as a whole was rocked with the more than doubling of the current requirement. The enormous size of the one-step increase is what has caused the employer community to push back.

ELLEN KEARNS: In addition, the DOL argues that the current threshold was set too low in 2004, and that it is increasing the threshold to account for the alleged mistake that was made in 2004.

Will the DOL's rationale for the rule trump the plaintiffs' claim that the DOL is effectively removing the exemption from large numbers of workers who should be exempt based on their job duties? Although it is a close question, I do not think the DOL's rationale will be found to be arbitrary and capricious. Therefore, even though workers may meet the applicable duties test for exempt status, I think the salary level, as determined by the DOL, will be found to be an integral and indispensable part of the definition of an exempt white-collar employee.

***ROBIN SHEA**: As you've both pointed out many times in the past, the final rule provides for automatic increases of the salary threshold, and the compensation threshold for "highly compensated employees." The plaintiffs in both lawsuits say that this indexing is improper because it allows the DOL to increase the thresholds in the future without going through the notice and comment requirements of the Administrative Procedure Act. What do you think about the legal merit of this claim?*

JIM COLEMAN: In my view, this is one of the more compelling arguments being presented in both lawsuits. The automatic adjustments, or indexing, scheduled at three-year intervals starting January 1, 2020, will probably result in increases in the salary and compensation thresholds without the benefit of notice and comment rule-making, without the establishment of an administrative record, and without the input of affected parties. This legal challenge may well prove to be a winner in both lawsuits. However, it is possible that a court could invalidate the automatic indexing provisions without invalidating the rest of the final rule.

ELLEN KEARNS: I agree that that may be a valid claim. Both lawsuits address the fact that there is no specific congressional authorization in 29 U.S.C. Section 213(a)(1) (the part of the FLSA addressing the white-collar exemptions) or the FLSA generally for the new indexing mechanism. As one of the lawsuits noted,

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FLSA Overtime Rule

"Indexing not only evades the statutory command to delimit the exception from 'time to time' as well as the notice and comment requirements of the APA, it also ignores the DOL's prior admissions [during the George W. Bush Administration] that 'nothing in the legislative or regulatory history… would support indexing or automatic increases.'"

***ROBIN SHEA**: The new overtime rule is scheduled to take effect December 1, but the plaintiffs in both of these lawsuits are seeking court orders to block the rule. And at the same time, in Congress, Sens. Tim Scott (R-SC) and Lamar Alexander (R-TN), and Reps. Tim Walberg (R-MI) and John Kline (R-MN) have introduced the Protecting Workplace Advancement and Opportunity Act—legislation which, according to Sen. Scott, would "nullify the rule." Legislation recently passed the House that would delay the effective date of the overtime rule until June 2017. And on top of this, we have the impact of the Presidential election. Should employers hold off on trying to comply with the final rule until they see what the court will do with these two lawsuits, or what happens in Congress, or who is elected President in November?*

JIM COLEMAN: While tempting to take a "wait and see" approach, we are only two months away from the December 1 effective date, and I think employers need to have contingency plans in place so that they can be in compliance if the judicial or legislative fixes do not come to pass. The legislative fix generally requires either the support of the White House, or super-majorities in the House and Senate to override an almost certain presidential veto. Most would agree that neither is very likely to happen. The judicial fix, likely in the form of a court-ordered injunction or declaratory judgment that the final rule is invalid and unenforceable, is much more difficult to predict, as is the timing of any such ruling. For most large employers, making the changes necessary to ensure compliance with the final rule will be no small task, and will require significant advance planning. Thus, with only two months to go, the "wait and see" approach will quickly become a high-stakes game of "chicken."

ELLEN KEARNS: Moreover, both lawsuits were assigned to Judge Amos Mazzant, who was nominated by President Obama in 2014 and is the only one of the three Sherman judges to have been nominated by a Democratic president. According to an anonymous former Labor Department official from the Bush administration, "If both suits are in front of an Obama appointee, then it is essentially game over, at least in the district court. They may fare better in the Fifth Circuit, but that takes time." As Jim noted, December 1 is only two months away. It is certainly a risk to wait for the outcome of these two lawsuits before planning for the final rule's implementation. Even if the DOL decides to forgo enforcement pending the outcome of the lawsuits, private plaintiffs may be able to sue after December 1 in reliance on the rule.

The states and the Chambers are likely to appeal immediately to the Fifth Circuit if Judge Mazzant denies their request for an injunction blocking the rule. And, as happened in the deportation case I talked about earlier, the Fifth Circuit may rule in their favor. But all of those "ifs" make it risky for employers to delay.

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Nebraska Food News… People… Places… Things…

getting it up and running. The goal is not to make a profit but the save their store.

Bag "N Save in York closed October 1st. The store had been a part of the community for several years. Grand Central Foods managed by Chris Rieger is still operating in York.

SpartanNash, which owns and operates more than 25 retail stores in Nebraska, including several Family Fare Supermarket, SunMart and Supermercado Nuestra Familia locations, held a healthy Athlete scan campaign for Special Olympics chapters in nine states. Between April 27 and May 8, store guests who visited the more than 160 SpartanNash-owned retail stores and fuel centers had the opportunity to donate $1, $5 or $10 at the checkout lane, with all funds raised going directly to their local Special Olympics. On June 20, Todd Hergenrader, the North Platte SunMart store director, presented a check for $18,000, which will benefit the more than 5,000 athletes and coaches who participate in Special Olympics Nebraska each year.

SNAP Authorized Stores Must Keep USDA Information Current

USDA Section Chiefs work very closely with the retail community in processing applications for retailer SNAP authority. To ensure that retailers keep their information at USDA current, we asked how the process works so our members are aware of requirements. In their response, USDA informed us that any changes to a firm (store) should be updated. The following list isn't all encompassing, but here is a sample listing:

1) Store Name
2) Change of store location address
3) Change of store mailing address
4) Change of store phone number
5) Change of store alternate phone number
6) Change in store/owner email address
7) Change in Corporation information (Officers, Corporate address, contact name for corporation, etc…)
8) Change in ownership
9) Change in store hours of operation
10) Any time the store is going to be closed for a specific time period (examples—major renovations that will close the store and no EBT transactions will be processed; Fire caused damage to the store and forced closure, and is currently being repaired; etc…)
11) Anytime the store is making a significant change to the store's business model (going from a Bakery Specialty to a Grocery Store; Going from a grocery store to a Restaurant, etc…)

There isn't a specific form. Typically the firm can just call the Retailer Service Center (RSC) at 877-823-4369 to report changes. Each day, a listing of calls from the RSC are forwarded to USDA Section Chiefs to handle, based on the work center assignment. If additional information is needed based on the phone call, they will reach out to the Retailer and process accordingly.

Any time there is going to be a change, Retailers should to report that as soon as possible… So there is ample time provided just in case additional information is needed.

Human Resources Q&A

Midyear Benefits Enrollment

Question: An employee has asked to be added to our medical insurance midyear because his coverage through his wife's plan is changing. His wife's severance package provided several months of free COBRA coverage, but the subsidy is expiring and they would have to pay the COBRA premiums themselves to continue on her plan. So our employee wants to enroll himself and his wife in our plan. What events allow a midyear enrollment and what is the time-frame for adding the employee once the request is made?

Answer: Under HIPAA special enrollment rights, an employee must be given the opportunity to enroll in the group health plan midyear under certain circumstances. Losing COBRA coverage under another plan can trigger special enrollment rights, but only if the maximum COBRA period has been exhausted. In this employee's case, there is no loss of coverage. Although the subsidy is expiring, the COBRA period has not been exhausted so your plan is not required to offer a midyear special enrollment.

Regarding the HIPAA rules in general, group health plans are required to provide special enrollment periods during which individuals who previously declined health coverage for themselves or their dependents may be allowed to enroll (without waiting for the next open enrollment period).

Special enrollment rights occur when:

- An individual loses coverage under the other group health plan or other health insurance coverage due to loss of eligibility (such as an employee and/or his or her dependents losing coverage under the spouse's plan due to employment status change, death, divorce or legal separation, or moving out of the plan's service area).
- An individual loses coverage under the other group health plan because the employer terminates the plan or stops all employer contributions to the plan. If the other coverage is COBRA, however, special enrollment does not have to be offered until the COBRA continuation period is exhausted.
- An individual becomes a new dependent through marriage, birth, adoption, or being placed for adoption.
- An individual loses coverage under a State Children's Health Insurance Program (CHIP) or Medicaid, or becomes eligible to receive premium assistance under those programs for group health plan coverage.

When one of the above events occurs, a special enrollment opportunity may be triggered. If the event is "loss of coverage" under another plan, the affected person(s) generally must have had the other health coverage when he or she previously declined coverage under your plan. Special enrollees must be given at least 30 days from the date of the event to enroll. For events related to Medicaid or CHIP, the minimum special enrollment period is 60 days. Coverage must take effect no later than the first of the month following the date the special enrollment request is made. If the event is birth or adoption of a child, coverage must take effect retroactively on the date of the birth, adoption (or placement for adoption).

Accommodation in the Workplace

Question: Our employee with a disability has asked to bring his service dog to work, but we have two employees in the office who are allergic to dogs. What can we do to accommodate everyone's needs?

Answer: According to the federal Equal Employment Opportunity Commission (EEOC), if the service animal has been trained to help with the employee's medical needs, then the employee has a right to ask that the service animal be allowed to accompany him or her to work as a reasonable accommodation. Like any other accommodation, the employee may be required to provide documentation of the need from a healthcare provider or other treating provider or organization. If the accommodation is granted, he or she may then be required to ensure the animal is not disruptive, is with him or her at all times, and is properly groomed and free of parasites or other health issues. Importantly, as with any other accommodation, an employer must engage in an interactive process with an employee who requests an accommodation for a disability to determine if the accommodation is reasonable and will not impose an undue hardship for the business. This includes individuals who need a service animal. In this case, the situation is more complicated because of the allergy issue with other employees.

There are a number of accommodations you can provide for employees with allergies, including, but not limited to:

- Moving the employee to a private/enclosed workplace.
- Changing the office air filtration to limit pet dander.
- Providing air filter fans at desks.
- Allowing flexible scheduling to avoid direct interaction.

Other accommodation ideas are available through the Office of Disability Employment Policy's *Job Accommodation Network*. Additionally, an employer may require that an employee with allergies provide certification of a disability (the allergy) in order for an accommodation to be granted. Essentially, the interactive process should be treated in a similar manner for the individual with allergies as the individual needing the service animal.

If there is an undue hardship in allowing the service animal, an employee may be required to accept alternate accommodations from the employer and/or the employer may deny the request. An undue hardship is an action that presents significant difficulty, disruption, or expense in relation to the size of the employer, its resources, and the nature of its operations or that would require violation of safety or health laws and regulations. In determining whether an accommodation would impose an undue hardship on an employer, the following factors may be considered:

- Nature and net cost of the needed accommodation.
- Overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources.
- Overall financial resources of the employer, overall size of the employer's business with respect to the number of employees, and the number, type, and location of the facilities.
- Employer's type of operation, including the composition, structure, and functions of the workforce.
- Impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

All options must be exhausted before determining an undue hardship, and such a determination should be made with legal counsel to minimize risk.

Finally, you should have policies and guidelines in place for service animals. This helps define the interactive process, as well as the expectations for the animal in the workplace, including how to deal with employees with fears or allergies. Like any other accommodation, all of these issues must be examined, and the result will vary based on the workplace, any applicable state laws, and the facts and circumstances specifically related to the accommodation.

Photocopying Military ID Cards

Question: For Form I-9 documentation purposes, may an employer photocopy an employee's military ID card?

Answer: Yes. According to the U.S. Citizenship and Immigration Services (USCIS), employers may make a photocopy of a military ID card for Form I-9 purposes. Under the Immigration and Nationality Act (INA) governing the Form I-9 process, the copying of documentation is permitted. More information is available on the USCIS's "*How to Complete Form I-9*" page. Keep in mind the military ID is only an acceptable List B identity document (*see 8 C.F.R. 274a.2(b)(1)(v)(B)*).

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Human Resources Q&A

Who has Authority to Request Removal From Insurance Plan

Question: One of our employee's dependent children has contacted us directly and asked to be taken off his father's insurance plan. Can the dependent request this or does our employee have the final say?

Answer: In most cases, the spouse or child of an eligible employee does not have an independent right of election with respect to group health plan coverage. That is, only the employee can make election choices, according to the plan's terms, for the employee and any eligible family members. However, there are a few exceptions. For instance, with respect to the Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage, each qualified beneficiary has an independent right of election. Another exception pertains to coverage for a child under the terms of a qualified medical child support order (QMCSO).

Under COBRA, the employee, child, or other party may notify the plan administrator (employer) that the child has experienced a COBRA qualifying event, such as attaining the plan's limiting age for eligibility. If that is the case here, the employer should confirm the information provided by the child and begin the COBRA event notice and election process.

Exempt and Nonexempt Work

Question: I have an exempt employee who would like to earn extra money working in another department in a nonexempt role. She works 40 hours per week in the exempt role, and would work 15–20 hours per week in a nonexempt role. Would she automatically receive the overtime rate for each hour of nonexempt work if she works 40 hours in her exempt role?

Answer: The primary issue is not how to calculate overtime, but rather whether you may have an employee classified as both exempt and nonexempt. Your employee may perform more than one job for you, but under the federal Fair Labor Standards Act (FLSA) regulations an employee must be classified as either exempt or nonexempt, but not both.

Your employee's exemption status requires an analysis of both positions to determine her primary duty (*see 29 C.F.R. 541.700*). The term "primary duty" means the principal, main, major, or most important duty that the employee performs. In your situation, the employee would remain classified as an exempt employee because her primary job duties are that of an exempt employee. Subsequently, you are not obligated by law to pay the employee any additional wages for her performance of the additional duties because she is earning a fixed weekly salary as an exempt employee, regardless of the number of hours per week she works.

However, you may pay the employee additional compensation for the additional work she performs without causing her to lose the exemption. The additional compensation may be in the form of additional salary, a flat sum, an hourly rate of pay, or another form of compensation as a reward for her additional time (*see 29 C.F.R. 541.604*).

Handbook Acknowledgment

Question: We recently made some changes to our handbook policies regarding benefits offered to employees and have a disclaimer stating, "The Company reserves the exclusive right to change or terminate any benefits or related policy at any time in accordance with applicable law." Are we required to have employees sign a new acknowledgment of the handbook because of these recent changes?

Answer: Yes, employees should be required to sign an acknowledgment noting that they are aware of any new policies or changes to existing policies.

Any new or changed policy should be provided to employees through the distribution of a new handbook accompanied by a brief memo directing the employees to the locations of the changes and requesting an updated acknowledgment signature. Without distributing and getting proof of receipt, the changed policies may be difficult to point to when correcting, disciplining, or terminating an employee. Most employers update their handbooks every one to two years. If there is a major change to an integral policy, that may be distributed separately and added to the handbook as an addendum until the next revision.

While not required, handbooks are a best practice in order to minimize risk. Clearly articulated and distributed handbooks can supplement a defense against many compliance issues such as, but not limited to, claims of sexual harassment, wrongful termination, and discrimination.

Handbooks are a general overview of policies and procedures. Key handbook policies include:

- Definitions of commonly used terms.
- Explanation of to whom the handbook and its policies apply.
- At-will employment policy.
- Disclaimer that handbook is not a contract and the right to change policies without notice.
- Anti-harassment policy.
- Equal employment opportunity/discrimination/accommodation policies.
- Leave of absence and family and medical leave policy (if applicable).
- Maternity leave policy.
- Drug free workplace policy.
- Standards of conduct.
- Timekeeping and overtime.
- Paid time off/vacation/sick leave policies.

Lastly, because a handbook is not legally mandatory, it may contain whatever information an employer wishes to impart to its employees. In addition, handbooks are traditionally separate from benefits summaries and other health and welfare plan materials, although the handbook may discuss employee status (full time, part time, etc.) and may refer employees to benefit plan materials. Further, handbooks do not need to outline company job positions or titles; this can be maintained separately in the job descriptions.

As a best practice, we recommend reviewing new or modified policies with counsel prior to implementation.

2016 Hackers & Snackers Golf Extravaganza at Quarry Oaks was Awesome… Blue Skies. No Wind. Amazing!
























Is There a "Reasonable Possibility" That Your Drug Testing Policy is Retaliatory?

By Jack L. Shultz & Brittney M. Moriarty, Law Clerk

O'NEILL, HEINRICH, DAMKROGER, BREGMEYER & SHULTZ, P.C., L.L.O.

On November 1, 2016, a new anti-retaliation regulation established by the Department of Labor's Occupational Safety and Health Administration ("OSHA") will go into effect. While the rule does not specifically address an employer's use of post-injury drug testing, OSHA has stated that in an effort to improve the tracking of workplace injuries and illnesses, post-injury drug testing policies will be under scrutiny.

The final rule, affecting drug testing policies, is an amendment to 29 C.F.R. § 1904.35(b)(1)(iv). The relevant changes read "(iv) You must not discourage or in any manner discriminate against an employee for reporting a work-related injury or illness." While the previous version of the rule required only that a business not discriminate against reporting employees, the revised version adds a prohibition of policies which may discourage reporting. OSHA contends that the perceived invasion of privacy associated with certain post-injury drug testing policies dissuades employees from reporting work-place injuries. The new rule does not act as a complete ban on drug testing policies; rather, it stops employers from using such policies as retaliation against employees who report an injury or illness.

OSHA helps to define which policies may be at risk for violating the new rule. A blanket post-injury drug testing policy will almost always be deemed to deter reporting and violate the rule. Examples of such a policy may be a drug testing requirement for any reported injury which requires outside treatment or a policy which requires a drug test for any on-the-job vehicle accident resulting in greater than $1,000.00 in damages. In these examples, the post-injury drug testing requirement is applied to a broad category of injuries with no emphasis put on the employee's actual contribution, or lack thereof. For example, under the first policy, an employee who receives outside treatment for a bee sting would be drug tested even though he in no way had control over or contributed to the situation. Under the second policy, an employee involved in an accident which significantly damages a vehicle would be subject to a drug test even if the cause of the accident was a malfunction of the vehicle. What these policies have in common is drug testing which results from events in which it is very unlikely, or impossible, that the employee's drug use contributed to or caused the injury or illness.

To avoid this unnecessary testing, which may deter reporting, OSHA will view post-injury drug testing policies under a "reasonable possibility" standard. Thus, a policy is in violation of the new rule if it requires a drug test even though the circumstances of the injury do not present a "reasonable possibility" that drug use of the reporting employee was a contributing factor to the reported injury. Such a standard does not require suspicion of drug use. Thus, while the "reasonable possibility" standard may affect current blanket post-injury drug testing policies, policies which are more specific and fact oriented in nature may pass scrutiny.

Additionally, OSHA provides that "if an employer conducts drug testing to comply with the requirements of state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing." For example, if an employer's post-injury drug testing policy has been established to comply with its state's Drug Free Workplace statute or mandated federal testing (DOT), the goal of the policy is clearly to adhere to state or federal law and not to act as deterrence to reporting an injury. Thus, drug testing policy established to comply with state and federal law are not of the kind which the new rule sets out to eliminate.

If OSHA finds that an employer's post-injury drug testing policy is in violation of the new rule they may issue a citation to the employer for retaliating against employees who report work-related injuries and illnesses. OSHA holds the right to issue a citation even if no employee has filed a complaint under section 11(c) of the OSH Act. If an employee is terminated as a result of a retaliatory drug testing policy, OSHA may require abatement including the reinstatement of the employee and payment of back pay.

In an effort to improve the tracking of workplace injuries and illnesses OSHA has taken a stance against policies which may function as a deterrent to reporting. Post-injury drug testing policies have come under this scrutiny. Under the new rule, OSHA requires that there be a "reasonable possibility" that drug use by an employee was a contributing factor to the reported injury before an employer requires the employee to undergo a drug test. Employers with drug testing policies established in compliance with state and federal laws and regulations will not be affected by the rule change. However, employers with blanket post-injury drug testing policies, or any policy established outside of compliance with state and federal laws, should revise their policies to adhere to the "reasonable possibility" standard.

Editor's Note: This article is not intended to provide legal advice but is intended to alert readers to new and developing issues and to provide some common sense answers to complex legal questions. Readers are urged to consult their own legal counsel or the authors of this article if the reader wishes to obtain a specific legal opinion regarding how these legal standards may apply to their particular circumstances. The authors of this article, Jack L. Shultz and Brittney M. Moriarty, Law Clerk, can be contacted at 402/434-3000, or at O'Neill, Heinrich, Damkroger, Bergmeyer & Shultz, P.C., L.L.O., P.O. Box 82028, Lincoln, NE 68501-2028, jshultz@ohdbslaw.com.

Bruning Grocery Receives "Excellence in Economic Development" Award

By Nancy McGill
Hebron Journal-Register

Bruning Grocery has carved itself a paragraph in the permanent Congressional Record. The family-owned business was one of eight to receive the "Excellence in Economic Development award from Congressman Adrian Smith, who solicited nominations in May and ended up with more than 50 businesses from 30 communities in the Third District.

Paul and Kurt Philippi of Bruning Grocery. Kurt is second generation and Paul, third, in the ownership and operations of the store. Kurt's father, Rex, bought the grocery in the 1970's from Paul's maternal grandparents.

"I join your family, friends and neighbors in acknowledging your accomplishments and applauding your efforts, and hope they will inspire increased economic development, which will strengthen communities across the Third District," Smith stated in a letter to the grocery last month. Paul Philippi, who is third generation to lead the store, said Smith stopped in last year. "We talked about the struggles in a small town, like the difficulties in customer flow," Philippi said.

A customer nominated the grocery. "We had no clue we had won," Philippi said about that Monday morning they all came to work, only to be congratulated and learn their accolade was shared the day before on Facebook.

The store was hailed on Smith's site for "exceptional service," ability to draw shoppers from surrounding communities, for its competitive prices and the "vibrancy" Bruning Grocery adds to the town's main street. In telling the story, Philippi said the store builds on the services it provides and strives to improve. Always. "We have a strong meat department—you want a steak, we'll cut it for you. Our hamburger is ground fresh multiple times a day," he said. "We just try and keep that as our niche because we do it really well."

At the same time, Philippi said they have to work within areas of the store to stay current. "We are trying to better in our freezers and match what the people want," he said. His grandfather Rex Philippi bought the store in 1973 and in 1984, Philippi's father, Kurt, continued the evolving legacy. "It seems like with each generation, new ideas crop up. When dad came in, there wasn't much for pop and chips, so he brought that in," Philippi said. He said he joined the business right out of college in 2008, but Philippi has been in retail grocery as far back as he can remember. "The grocery business is fun. We've got really good workers," he said. We know everybody and we work really hard. It's comfortable. You don't regret coming to work."

The store's employees stand out in Philippi's view. "Our employees are awesome. We have long standing employees, some for 15 or 20 years. These girls go above and beyond, more than I ask them," he said. It gives Philippi pride, but it's not his doing, he added. "It's theirs," he said.

Consistent expansion is another survival tactic of the rural grocery store. Big changes in the 1990s saw Bruning Grocery with new areas for its specialty in meat, and storage loading and unloading. The Philippis also added a couple aisles. "We needed the capacity. Every year, we have a little bit of growth," Philippi said. It's not easy thriving amidst Dollar stores and Walmarts, but Philippi takes a unique stance. He said he'll never match the pricing or hours of the corporate giants, but if he can't draw customers into the rural experience, then he needs to offer something different. "So far, we've been able to balance it and we hope to continue that," he said. He encourages shoppers who haven't visited the store to "check it out." "Be proactive and come in, try it out and ask questions," Philippi said.

NGIA Leadership

Mogens Knudsen, owner of Plum Creek Market in Lexington and Holdrege Market in Holdrege, was elected as Chairman of the Board of Directors. Mogens took over Chairman duties during the board of directors meeting in February.

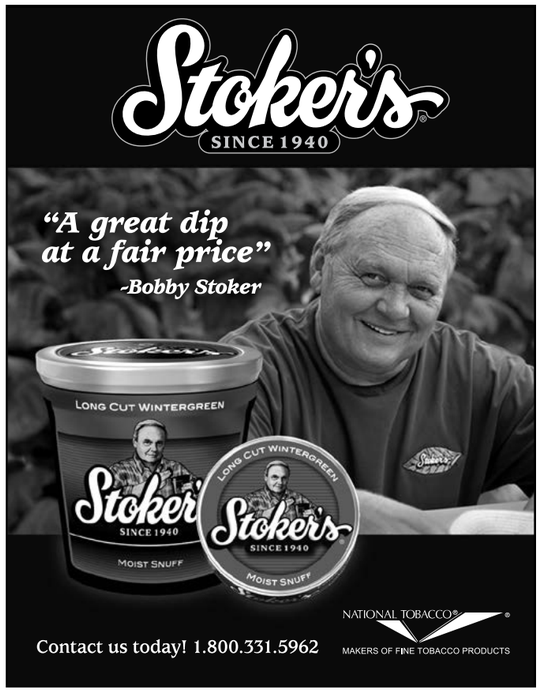
Lonnie Eggers moved to the position of Immediate Past Chairman of the Board and continues to serve on the Executive Committee.

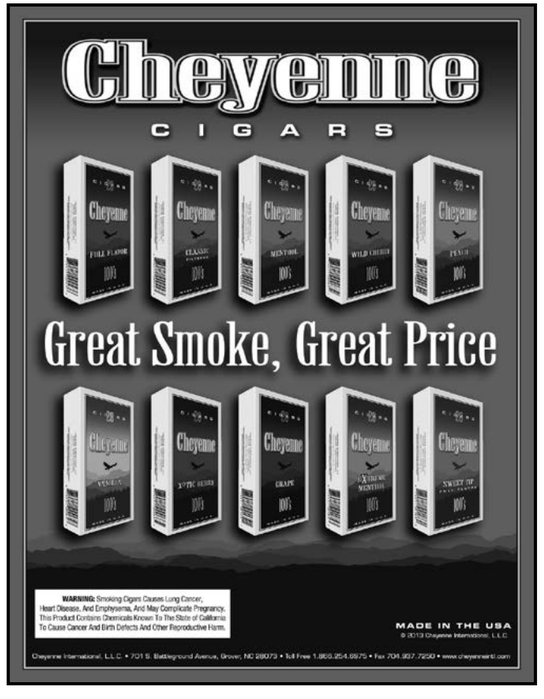
NGIA has been fortunate to have strong leaders step up to guide NGIA into the future. Lonnie Eggers served as chairman of the Board for two years, following his service as both Secretary and Treasurer. Mogens Knudsen was elected as the 2016/17 Chairman of the Board. Peter Clarke, owner of Crete Foodmart in Crete, IGA Marketplace in Lincoln, and Boogarts in Kearney, along with other locations outside of Nebraska, was elected to serve as Vice Chairman of Board of Directors for NGIA.

Dave Staples Appointed as President of SpartanNash

Dave Staples, who has served as COO of SpartanNash has been appointed by the Board of Directors to serve as President. He will report directly to Dennis Eidson, who continues his responsibilities as SpartanNash's chairman and CEO. Staples will lead the company's overall strategy implementation and execution, and direct all operating aspects of the retail, wholesale and military distribution business segments. This move will enable Eidson to continue to focus on long-term strategic growth opportunities. Staples has been serving as SpartanNash's COO since March 2015. He previously held the position of EVP and CFO since 2000. He served as CFO until Chris Meyers joined the company last April.

Grand Rapids, Mich.-based SpartanNash's core businesses include distributing grocery products to military commissaries and exchanges and independent and company-owned retail stores located in 47 states and the District of Columbia, Europe, Cuba, Puerto Rico, Bahrain and Egypt. SpartanNash operates 160 supermarkets, primarily under the banners of Family Fare Supermarkets, Family Fresh Markets, D&W Fresh Markets and Sun Mart.





Nebraska Grocery Industry Association
5935 South 56th, Suite B
Lincoln, Nebraska 68516-3301

Address Service Requested

Nebraska Grocery Industry Association

2017 Calendar of Events

Jan. 4	Nebraska Legislature Convenes
Jan. 19	NGIA Legislative Dinner, Cornhusker Hotel, Lincoln
Feb. 15-16	SpartanNash Spring Trade Show – Minneapolis
Feb. 12-15	National Grocers Association Trade Show – Las Vegas
Mar. 2-4	AWG/AFM Spring Food Show – Omaha
April 26	AWG Kansas City Summer Show
May1-2	AWG Springfield Summer Show (Chateau on the Lake, Branson)
May 2-5	Day In Washington Supermarket Industry Fly-In (FMI, NGA, FIAE)
June 5	Nebraska Legislature Tentative Adjournment
June 5-9	National Grocers Executive Leadership Development Program – Ithaca, NY
June 22	NGIA Spring Golf Outing at Iron Horse (10:00 shotgun start)
Aug. 22-23	AWG Springfield Summer Show
Aug. 23-24	SpartanNash Fall Trade Show in Minneapolis
Sept. 11-15	National Grocers Association: Fall Leadership, Chicago
Sept. 21-23	AWG/AFM Fall Food Show – Omaha
Sept. 28	Hackers & Snackers Golf Extravaganza (10:00 a.m. shotgun start)

(If you would like to have your event listed on the calendar, please contact the NGIA office)