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Volume XX, Issue i

Out with the Old, in with the New: A Look Forward and Back to Start the New Year

By Stephen S. Zashin*

Heading into 2018, Zashin & Rich has created a checklist for employers:

Policy Review:

- ☐ Review discrimination, harassment and retaliation policies;
- ☐ Review policies concerning Family and Medical Leave and disability accommodation issues;
- ☐ Review policies concerning pay for time worked (including reviews of pre and post shift work and meal and rest breaks);
- ☐ Review social media policies to ensure that they comply with recent guidance from the National Labor Relations Board (even if the company is a non-union employer);
- ☐ Review wage deduction policies to ensure that only proper deductions are made from employee pay; and,
- ☐ Update confidentiality, non-solicitation and non-compete agreements to take advantage of the Defend Trade Secrets Act.

Applications:

- ☐ Revise employment applications to comport with "ban the box" rules governing questions about convictions; and,
- ☐ Review employment application procedures to ensure that all third party background checks comply with the Fair Credit Reporting Act.

Training:

- ☐ Train employees, managers and supervisors about discrimination, harassment and retaliation; and,
- ☐ Train managers and supervisors about FMLA and ADA leaves of absences and accommodations.

Audit:

- ☐ Ensure that employees are properly classified as exempt or non-exempt under the Fair Labor Standards Act;
- ☐ Review pay practices to ensure that minorities are not statistically disadvantaged in compensation;
- ☐ Review workforce composition information to ensure that minorities are not statistically disadvantaged in management;
- ☐ Analyze health care enrollment to ensure that only eligible participants are on the company's medical plan; and,
- ☐ Review independent contractor classifications to ensure that those working under such arrangements are actually independent contractors.

Be sure to follow Zashin & Rich's Employment Law Quarterly to stay updated on labor and employment law developments in 2018.

*Stephen S. Zashin, an OSBA Certified Specialist in Labor and Employment Law, is the founder of the firm's Labor and Employment Groups and has extensive experience with all aspects of labor and employment law. If you have questions regarding the above checklist or any other labor or employment issues, please contact Stephen at ssz@zrlaw.com or (216) 696-4441.

How the Tables Have Turned: NLRB Shifts Course Under Trump Administration

By Patrick J. Hoban*

During the Obama administration, the National Labor Relations Board ("NLRB") was a thorn in the side of many employers – overturning long-standing precedent and broadly construing the National Labor Relations Act ("NLRA") to protect employee activities and prohibit employer enforcement of commonplace employment policies. Now, under the Trump administration, the NLRB has shifted in a more employer-friendly direction. The Republican-appointed NLRB majority recently issued two decisions that dramatically altered the framework for analyzing work rules and joint employer status. Also, the NLRB's General Counsel issued a memorandum to NLRB regional directors highlighting priorities going forward, including a focus on legal issues raised "in cases of the last eight years that overruled precedent."

A New Standard for Evaluating Work Rules

In recent years, many employers were frustrated and confounded by a seemingly endless string of NLRB decisions rendering work rules unlawful, including those commonly set forth in employee handbooks. In analyzing these rules, the NLRB used a standard (referred to as the *Lutheran Heritage* standard) that asked, in part, whether an employee would "reasonably construe" the work rule to prohibit NLRA-protected activity. The NLRB's application of this standard led to inconsistent and arbitrary results. For example, the NLRB found rules prohibiting "loud, abusive, or foul language" and an "inability or unwillingness to work harmoniously" to be unlawful, yet approved of rules prohibiting "abusive or threatening language" and "conduct that does not support the . . . [employer's] goals and objectives." The NLRB's application of the *Lutheran Heritage* standard "produced rampant confusion for employers" and allowed the NLRB to find neutral and innocuous work rules unlawful, without giving due consideration to legitimate business justifications underlying the rules.

Fortunately for employers, in December 2017, the NLRB overturned the *Lutheran Heritage* standard and adopted a new framework for analyzing work rules. *See The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). Under this new standard, the NLRB evaluates: (1) the nature and extent of the work rule's potential impact on employees' protected rights under the NLRA; and (2) the legitimate justifications associated with the work rule. In *Boeing*, the NLRB applied this new framework to a "no-camera rule" implemented by Boeing that restricted employee use of cell phones and other camera-enabled devices on company property. Initially, an Administrative Law Judge ("ALJ") found Boeing's no-camera rule unlawful under the *Lutheran Heritage* standard. Reversing the ALJ, the NLRB emphasized the "fundamental problems with the . . . application of *Lutheran Heritage* when evaluating the maintenance of work rules, policies and employee handbook provisions." These problems included the NLRB's failure to take into consideration legitimate justifications associated with the work rules, the false premise that employees are better served by no work rules as opposed to ones that may have some overlap with NLRA coverage, and the failure of the standard to allow the NLRB to differentiate among industries and work settings.

Applying its new standard to Boeing's no-camera rule, the NLRB held that any potential impact on Boeing's employees' exercise of protected rights under the NLRA was outweighed by the substantial and important justifications underlying the rule. These justifications included Boeing's need to maintain its security protocols, protect against the disclosure of sensitive and proprietary information (including employee personal information), and (as an aircraft manufacturer and military defense contractor) limit the risk of becoming the target of a terrorist attack.

A Return to a Prior Standard for Evaluating Joint Employer Status

In another December 2017 decision, the NLRB announced it was returning to its prior standard for evaluating whether two entities should be deemed a joint employer, and therefore, subjected to joint and several liability under the NLRA. *See Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017). In 2015, the NLRB held that two entities are joint employers based on the mere existence of reserved joint control (i.e., a contractual right to exercise control), or based on "indirect" or "limited and routine" control. The NLRB could have deemed two entities joint employers even if they never actually exercised joint control over essential terms and conditions of an employee's employment. Under this broad standard, a parent company or even a client could face liability on legal obligations under the NLRA, even without exercising any control over a subsidiary's or vendor's employees.

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In *Hy-Brand,* the NLRB rejected this standard in favor of the pre-existing joint employer test, under which "the essential element in . . . [the] analysis is whether a putative joint employer's control over employment matters is direct and immediate." In conducting this analysis, the NLRB will now focus, as it did in the past, on "whether an alleged joint employer 'meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.'" Accordingly, the mere existence of reserved control, which has not been exercised, or indirect or limited and routine control is no longer sufficient to give rise to joint employer status and joint and several liability under the NLRA.

The NLRB's General Counsel's Memorandum

Also in December 2017, the NLRB's newly-appointed General Counsel issued a memorandum to the leadership of the NLRB's regional offices, which set forth guidelines and priorities going forward. These priorities include special attention to "[s]ignificant legal issues includ[ing] cases over the last eight years that overruled precedent and involved one or more dissents." The General Counsel enumerated a number of areas of focus, including employee access to employer email to engage in union-related and other protected activity under the NLRA, off-duty employee access to employer property, work rules, and joint employer status. The NLRB has already issued decisions regarding work rules and the joint employer standard. Additional decisions from the NLRB are likely forthcoming that further revise Obama-era policies.

As demonstrated by the *Boeing* and *Hy-Brand* cases, which were decided shortly after the General Counsel issued the memorandum, a dramatic shift appears to be underway at the NLRB. Zashin & Rich will continue to report on developments from the NLRB.

***Patrick J. Hoban**, an OSBA Certified Specialist in Labor and Employment Law, regularly practices before the NLRB and counsels employers regarding work rules and protected activity. If you have questions about recent developments at the NLRB, please contact Pat at pjh@zrlaw.com or (216) 696-4441.

CONGRATULATIONS

Ohio Super Lawyers Top 100 List | 2018
Andrew Zashin

Super Lawyers List | 2018
Brad Bennett, Deanna DiPetta, Michele Jakubs, Stephen Zashin, **10 years:** Jon Dileno, Jeffrey Wedel, **15 years:** George Crisci, Jonathan Downes, Andrew Zashin

Rising Stars List | 2018
Christa Heckman, Amy Keating, Ami Patel, Drew Piersall, David Vance

Best Lawyers | 2018
George Crisci, Jon Dileno, Deanna DiPetta, Jonathan Downes, Amy Keating, Christopher Reynolds, Jonathan Rich, Jeffrey Wedel, Andrew Zashin, Stephen Zashin

A DRAMATIC SHIFT APPEARS TO BE UNDERWAY AT THE NLRB. ADDITIONAL DECISIONS ARE LIKELY FORTHCOMING THAT FURTHER REVISE OBAMA-ERA POLICIES

Father Trucker: The Sixth Circuit Addresses a Truck Driver's Discrimination Claim Premised Upon His Status as a Single Parent

By Jessi L. Ziska*

Most employers are familiar with prohibitions on discrimination based on an employee's race, color, religion, sex, national origin, age, and disability. As demonstrated in a recent decision by the U.S. Court of Appeals for the Sixth Circuit, however, employers also should beware of employment decisions based on other factors, including marital and familial status. *See Reedy v. Rich Transp., LLC*, No. 17-1085, 2017 U.S. App. LEXIS 22031 (6th Cir. Nov. 1, 2017). Although the Sixth Circuit ultimately found in favor of the employer, the *Reedy* decision serves as a warning to employers about actions and statements about an employee's family that could give rise to a lawsuit.

In *Reedy*, the plaintiff, who was married but separated from his wife, had custody of their five children. During one of his shifts as a truck driver, the plaintiff left his truck at a truck stop and went home early due to a snowstorm. When his supervisor ordered him to retrieve the truck the following day, the plaintiff refused because he could not find a babysitter. His supervisor responded: "I don't give a f*** about your kids. Get your f***ing ass in that truck because that's where we need to have you." Subsequently, another one of the plaintiff's supervisors told him that, if he had known the plaintiff was a single parent, he would not have hired him. A few days later, the employer terminated the plaintiff, citing issues with his performance including his refusal to retrieve the truck as ordered.

The plaintiff then filed a lawsuit alleging his employer discriminated against him based on his status as a single parent in violation of Michigan's antidiscrimination law, which specifically prohibits discrimination based on "marital status." After the district court dismissed his discrimination claim, the plaintiff appealed to the Sixth Circuit. On appeal, the Sixth Circuit assumed the plaintiff qualified for protected status, noting that the Michigan Supreme Court has never addressed whether the State's antidiscrimination law "covers single or separated parents (or the perception of single with children while still married)."

In support of his discrimination claim, the plaintiff relied solely on his supervisors' statements. Affirming the dismissal of his claim, the Sixth Circuit held that "[t]otal reliance on statements about [the plaintiff's] status as a single parent is not sufficient evidence of motivation to terminate his employment." The court noted that the supervisors' statements, although close in time to the plaintiff's termination, were not directly linked to the decision to terminate his employment. Furthermore, the plaintiff failed to present any additional evidence to call into question the legitimacy of the employer's stated reasons for his termination, including his failure to retrieve the truck as directed.

The Sixth Circuit also found that the plaintiff failed to present evidence that the employer treated him differently on the basis of his marital status. Specifically, the plaintiff was unable to point to anyone outside his protected class who enjoyed better treatment from the employer.

While the Sixth Circuit affirmed the dismissal of the plaintiff's discrimination claim, one of the judges felt his claim should have survived. In a dissenting opinion, Judge White stated that the supervisors' troubling statements "certainly . . . [gave] rise to an inference of unlawful discrimination."

Unlike Michigan's antidiscrimination law, Title VII of the Civil Rights Act of 1964 and Ohio's antidiscrimination law do not specifically prohibit discrimination based upon "marital status" in the employment context. Nevertheless, employers in Ohio and elsewhere still should be cautious of making employment decisions based upon employee or applicant marital or familial status as local ordinances may prohibit such conduct. Also, even in the absence of a law specifically prohibiting these types of discrimination, employees may be able to bring suit against their employers for sex-based discrimination arising out of comments or actions tied to their marital or familial status. For example, an employer could give rise to a discrimination claim by asking only female job applicants whether they are married or have young children.

In sum, employees' familial obligations can present challenges for employees and their employers alike. Although the Sixth Circuit in *Reedy* found the comments insufficient to prove discrimination, employers should be cautious of actions and comments based on or relating to their employees' marital or familial status.

***Jessi L. Ziska** recently joined Zashin & Rich in their Cleveland office and practices in all areas of labor and employment law. If you have questions regarding the *Reedy* decision, please contact Jessi at jlz@zrlaw.com or (216) 696-4441.

EMS Captains and Lieutenants Are Supervisors, Not "Public Employees," Under Ohio Collective Bargaining Law

By George S. Crisci*

In a recent directive, the State Employment Relations Board ("SERB") provided further clarification on the types of job responsibilities that will exempt employees from collective bargaining under Ohio law. Specifically, SERB held that EMS captains and lieutenants qualified under the "supervisor" exemption of Ohio's collective bargaining law. *See In re Athens County EMS Association*, Case No. 2017-REP-04-0053 (Nov. 17, 2017). This latest directive follows closely on the heels of another SERB decision (which Zashin & Rich reported on here) holding that captains in a fire department fell within the "confidential" and "management" employee exemptions.

Ohio Revised Code Section 4117.01 sets forth a number of exclusions from the definition of "public employee" under Ohio's collective bargaining law. If a public employee falls within one of these exclusions, then the employee is not entitled to collective bargaining rights. One such exclusion applies to "supervisors," which are defined, in part, as individuals who have the authority to "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." R.C. 4117.01(F).

In April 2017, a union filed a request to represent, for collective bargaining purposes, all EMTs, paramedics, lieutenants, and captains in the Athens County EMS Department. After the County Commissioners objected to this request, SERB directed the matter to its Office of General Counsel for an inquiry. SERB asked the General Counsel to determine whether the EMS captains and lieutenants were exempt from the definition of "public employees" under Ohio Revised Code Chapter 4117. On November 7, 2017, SERB's General Counsel issued findings of fact and conclusions of law, finding the captains and lieutenants qualified under the "supervisor" exemption. Subsequently, SERB adopted the General Counsel's conclusions, granted the Athens County Commissioners' objection, and denied the union's request to represent the EMS captains and lieutenants.

The Athens County EMS Department was comprised of the chief, assistant chief, five captains, two lieutenants, and 38 EMT/paramedics. Among various other duties, the captains and lieutenants were involved in hiring employees, including participating in candidate interviews and making hiring recommendations. Likewise, both the captains and lieutenants disciplined employees, including issuing verbal and written reprimands without prior approval, and developed and conducted annual performance evaluations.

In analyzing these responsibilities under R.C. 4117.01, SERB noted the captains and lieutenants did perform "duties that are routine and ministerial in nature: however, there are duties that require judgment to initiate action and utilize discretion without further review." Pointing specifically to the captains' and lieutenants' responsibilities with respect to employee performance evaluations and employee discipline through written and verbal reprimands, SERB found that the captains and lieutenants met the "supervisor" criteria as set forth in R.C. 4117.01(F). Therefore, they were exempted from the definition of "public employee" and were not entitled to collective bargaining rights under Ohio law.

As the operations of safety forces continue to develop, management must consider the structural application of their organizations. Petitions to amend existing bargaining units can be filed at SERB. Careful application of the standards and the procedural steps must be taken. These cases are fact specific, and public employers looking to amend a bargaining unit should contact counsel to evaluate the merits of doing so.

*__George S. Crisci__, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience representing employers before SERB. If you have questions regarding this SERB decision or other collective bargaining issues, contact George at gsc@zrlaw.com or (216) 696-4441.

Z&R SHORTS

Please join Z&R in welcoming two new attorneys to its Employment and Labor Groups.

Jessi L. Ziska earned her law degree, as well as certificates in both Litigation and Alternative Dispute Resolution and Health Law, from The University of Akron School of Law. Jessi was a member of the Moot Court Honor Society ("MCHS") and Trial Team. As a member of the MCHS, Jessi competed in the 2016 American Bar Association National Appellate Advocacy Competition in Boston, Massachusetts. Jessi was later elected to serve as the President of the MCHS. After her performance in Akron Law's Summer Trial Academy, Jessi was selected to join Akron Law's nationally-known Trial Team, which gave her the opportunity to compete in the 2016 Ohio Attorney General's Public Service Mock Trial Competition in Columbus. As part of Akron Law's Health Law program, Jessi completed an externship in the health law practice group of a well-established, Northeast Ohio firm. During her externship, she reviewed and revised employment agreements between physicians and hospitals, formed various corporate and non-profit entities, and ensured corporate compliance with federal and state laws.

Christopher D. Caspary's practice focuses on employment litigation and corporate employment counseling. Chris previously practiced in the areas of civil litigation and insurance defense, and appeared in courts throughout Ohio and in federal court. Chris's experience also includes taking and defending depositions, drafting pretrial motions and pleadings, and advising clients on complex legal issues. Following law school, Chris clerked for the Honorable Nancy A. Fuerst in the Cuyahoga County Court of Common Pleas, where he drafted opinions and rulings, conducted certain hearings and conferences, and provided legal recommendations to the Judge. While in law school, Chris specialized in labor and employment law, worked in the Employment Law Clinic, and externed with the Federal Trade Commission. Chris is the Vice-Chair and incoming Chair of the Cleveland Metropolitan Bar Association's Litigation Section. Chris is a member of the Cleveland Metropolitan Bar Association's Bar Admissions Committee and is a member of the William K. Thomas Inn of Court. Chris was also a delegate to the 8th Judicial District Conference in May 2015 and October 2016.

Upcoming Speaking Engagements

March 2, 2018

Jonathan J. Downes and **Drew C. Piersall** present *"Beyond Sexual Harassment and Other Claims of Discrimination – Legal and Practical Realities"* at the Ohio Municipal Attorneys Association's 2018 Spring Municipal Civil and Criminal Law Seminar at the Westin in Columbus, Ohio.

March 2, 2018

Stephen S. Zashin presents *"Hearing Employment Law Cases"* at The Supreme Court of Ohio Judicial College Webinar.

March 14, 2018

Patrick M. Watts presents *"Conducting Harassment Investigations"* at the Greater Ashtabula Chamber of Commerce in Ashtabula, Ohio.

March 19, 2018

Jonathan J. Downes presents *"Legal Minefields to Avoid"* at the Ohio Association of Chiefs of Police - New Chiefs' Workshop at the Crowne Plaza in Dublin, Ohio.