[employment law quarterly] ELQ

workplace & family law | cleveland | columbus | zrlaw.com

Volume XXI, Issue iii

City of Toledo Joins Cincinnati, Passes Salary History Ban

By Scott H. DeHart*

The City of Toledo passed Ordinance No. 173-19, which generally prohibits Toledo employers with at least fifteen employees from seeking an applicant's prior salary information. Toledo joins a growing number of states and municipalities that have enacted similar bans, including the City of Cincinnati in March of 2019. Accordingly, Toledo employers should determine whether they are subject to the law and, if so, implement necessary changes to existing practices to ensure compliance with the ordinance when it becomes effective on June 26, 2020.

"Prohibition on Inquiring About or Use of Salary History"

Beginning on June 26, 2020, covered employers in Toledo cannot seek, use, or otherwise rely upon an applicant's salary history during the hiring process. Notable exceptions include discussions of salary and benefit expectations, internal transfer or promotion, "voluntary and unprompted disclosure" of salary history, and applicants governed by a collective bargaining agreement. The ordinance also requires an employer to provide an applicant the applicable pay scale for the position following an offer of employment, but only upon "reasonable request."

Remedies and Statute of Limitations

In the event the ordinance is violated, the applicant can seek "compensatory damages, reasonable attorney's fees, the costs of the action, and such legal and equitable relief as the court deems just and proper." The applicant must initiate any such action within two years.

TOLEDO JOINS GROWING NUMBER OF JURISDICTIONS OUTLAWING INQUIRY INTO APPLICANT'S SALARY HISTORY

Toledo has joined a growing number of jurisdictions outlawing inquiry into an applicant's salary history, passing an ordinance similar to that passed by the City of Cincinnati just months earlier. Given this trend, employers should expect other cities to pass similar laws. Toledo employers should begin preparations and implement necessary changes to existing practices to ensure compliance with the ordinance when it becomes effective in June 2020.

***Scott H. DeHart,** who works in the Columbus office, practices in all areas of labor and employment law. If you have questions about this ordinance or about inquiry into an applicant's salary history, please contact Scott at shd@zrlaw.com or (614) 224-4411.

Use it or Lose it: U.S. Supreme Court Holds That Title VII Defendants Must Raise Charge-Filing Defense in a Timely Manner

By Tiffany Henderson*

Before an employee can file a lawsuit under Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination based on an employee's race, color, religion, sex, or national origin, the employee must file a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") or the employee's state's equivalent of the EEOC. In Ohio, the state equivalent to the federal EEOC is the Ohio Civil Rights Commission. Generally, employees must file their Charge of Discrimination within 180 calendar days of the day the discrimination occurred or, if in a state like Ohio that has its own state agency, within 300 calendar days of the date that the discrimination occurred.

On June 3, 2019, the U.S. Supreme Court unanimously held that Title VII's "charge-filing requirement" is not "jurisdictional," *i.e.*, grounds for dismissal at *any* point during litigation. *Fort Bend County, Texas v. Davis,* 139 S. Ct. 1843 (June 3, 2019). Instead, employers must raise the objection in a timely manner or they forfeit the defense. So, if an employee sues its current or former employer under Title VII, and the employee incorrectly or insufficiently filed a Charge of Discrimination with the EEOC or equivalent state agency, then the employer *cannot wait* until the later stages of the litigation to object on these grounds.

In *Davis*, an employee filed an EEOC Charge of Discrimination against her employer alleging sexual harassment and retaliation. While the EEOC processed her charge, the employer fired the employee after she did not show up to work due to a conflict with a church commitment. The employee then attempted to amend her EEOC Charge to include an allegation for religious discrimination by making a handwritten notation on her EEOC intake questionnaire. However, she did not amend her formal EEOC Charge.

After the EEOC notified the employee of her right to sue, she filed a lawsuit in federal court and asserted claims including sexual harassment, retaliation, and religious discrimination under Title VII. After litigating the case for years, the employer moved – *for the first time* – to dismiss the religious-discrimination claim. The employer argued that the court lacked jurisdiction over the claim because the employee failed to properly assert it in her EEOC Charge. The district court agreed and dismissed the claim. On appeal, the Fifth Circuit reversed and reinstated the claim. The U.S. Supreme Court agreed to hear the case and decide whether Title VII's charge-filing requirement was a jurisdictional precondition that can be raised at any stage of a lawsuit or a "procedural prescription" that the employer must raise in a timely manner or risk forfeiting. The U.S. Supreme Court picked the latter.

In *Davis*, the U.S. Supreme Court noted that Title VII's language regarding the charge-filing requirement focuses on a party's procedural obligations, not a court's jurisdiction. Accordingly, the Court held that the charge-filing requirement is *not* "jurisdictional," and thus an employer forfeits the objection if it does not raise it in a timely manner. The Court contrasted the "harsh consequences" of jurisdictional objections, which can dissolve a claim at any point in the litigation (even in front of the U.S. Supreme Court), against a party's argument that the other party failed to comply with a claim-processing rule, which the objecting party forfeits if it "waits too long to raise the point." The U.S. Supreme Court never specified what amounts to waiting "too long to raise the point."

SCOTUS CONFIRMS EEOC CHARGE-FILING REQUIREMENT IS MANDATORY

The U.S. Supreme Court also confirmed that the EEOC charge-filing requirement is mandatory. Accordingly, upon an employer's timely objection, a Title VII plaintiff's failure to abide by the requirement will prove fatal to their lawsuit. Employers who are facing a Title VII lawsuit should consult with counsel to determine whether this procedural defense may exist.

***Tiffany Henderson** practices in all areas of labor and employment law. If you have questions regarding the U.S. Supreme Court's *Davis* decision or any other employment law issues, please contact Tiffany at tsh@zrlaw.com or (216) 696-4441.

Companies Must Make Reasonable Efforts to Maintain the Confidentiality of their Trade Secrets if They Want Courts to Protect Them

By Ami J. Patel*

For information to be considered a trade secret, it must be sufficiently secret to impart economic value because of (1) its relative secrecy and (2) the owner of the information must take reasonable efforts to maintain the secrecy of the information. Recent case law serves as a reminder that to obtain trade secret protection from the courts, the second, often overlooked component of the "trade secret" rule is pivotal. In litigating trade secret misappropriation under the federal Defend Trade Secrets Act ("DTSA") and applicable state law, it is not enough for companies to simply show the existence of a trade secret. Companies must show they took appropriate measures and had proper policies and procedures in place to protect their trade secret information.

A federal court recently reiterated this principle in *Abrasic 90 Inc. v. Weldcote Metals, Inc.,* 364 F. Supp. 3d 888 (N.D. Ill. 2019). In *Abrasic*, defendant Joseph O'Mera was president and a director of the plaintiff Camel Grinding Wheels, U.S.A. ("CGW"), which produced abrasive products. In his capacity as president, O'Mera developed and oversaw various aspects of CGW's operations, played the primary role in negotiating costs with CGW's suppliers, and set CGW's prices for its entire product line and approved all pricing discounts. In 2018, O'Mera left CGW to start a competing abrasives business for Weldcote Metals, Inc. ("Weldcote"). When he left, O'Mera took files containing information about CGW's pricing, customers, and suppliers. Additional employees who also took files containing information about CGW's pricing, customers, and suppliers, followed O'Mera to Weldcote. Further, O'Mera convinced one such employee to bring customer pricing documents from CGW's shared drive.

CGW filed suit against its former employees and Weldcote and moved to enjoin the defendants from entering the abrasives business, from doing business with CGW's suppliers or distributors, and from using the information at issue. The information at issue included compilations of CGW's pricing and sales data. Notably, the court held that this type of information *could be* a trade secret under the law. However, the court denied CGW's motion for a preliminary injunction under DTSA and the Illinois Trade Secrets Act, because CGW had taken "almost no measures to safeguard the information that it now maintains was invaluable to its competitors."

According to the court, CGW could have taken the following data security measures, but did not:

1. Requiring its employees to enter into non-disclosure and confidentiality agreements. CGW failed to require those with access to its supposed trade secrets to enter into non-disclosure and confidentiality agreements. The court described this as "among the most fundamental omissions by the company."

2. Establishing and implementing policies concerning the confidentiality of the company's business information. CGW's employee handbook did not have a policy regarding confidentiality beyond a "vague, generalized admonition about not discussing CGW business outside of work," which "did not define, delineate, or specify which information was considered confidential." The court determined this was "too broad and vague to confer meaningful protection over the information at issue."

3. Training company employees about their obligation to keep certain categories of information confidential. In the absence of a confidentiality policy, CGW further "did nothing to train or instruct employees about their obligation to keep certain categories of information confidential."

4. Ensuring all confidential information is returned to the company upon the cessation of employment of any employee with access to such information. Although CGW instructed departing employees to return CGW "property," these employees "were not asked whether they possessed any of the information at issue or instructed to return or delete such information." The court noted that merely requiring that departing employees return company property is not enough, and that company precautions "must go beyond normal business practices for the information to qualify for trade secret protection."

5. Ensuring that employees with responsibility for maintaining the security of sensitive company data and information are trained in data security and IT management. CGW's IT management person had "no training in data security (or virtually any other area of IT management) and was

Continues on page 4

Trade Secrets | Continued from page 3

ill-equipped to identify, much less champion, sound data security practices."

6. Ensuring that the company maintains and implements comprehensive data security policies and practices. CGW's IT management practices were "grossly inadequate to prevent unauthorized access and use of the company's purportedly valuable proprietary information." Further, CGW's IT person recommended to the company internally that it "take some basic steps to improve the security of the information at issue," such as segregating access to documents on a need-to-know basis and adopting an "acceptable device use policy." CGW, however, failed to implement "even these modest suggestions, further undermining its trade secret claim."

7. Restricting access to sensitive company information to employees on a need-to-know basis, such as assigning employees passwords to access the information. The entire contents of CGW's shared drive were accessible to employees who did not need access to this information. Further, the IT management person always granted any request for access that was made of her and she "did not make any meaningful inquiry into whether the person needed access to the information."

8. Differentiating access and protective measures with respect to sensitive company information from those imposed with respect to non-sensitive company information. The court disfavored the manner in which the information was stored on CGW's shared drive. CGW provided all employees with the same password to obtain access to the shared drive. Files were not encrypted, and there were no restrictions on employees' ability to access, save, copy, print, or email the information. Further, there was no evidence that employees needed the authorization of the IT management person to obtain access to the shared drive. Rather, any employee could have enabled their own workstation to access the shared drive with minimal knowledge or assistance. Moreover, the documents on the shared drive were not segregated from other files that were not trade secrets and the documents were not labeled in any manner as "confidential" or "proprietary." The court noted that it "takes virtually no effort and little sophistication to include a heading on an Excel spreadsheet identifying a document as 'proprietary' or 'confidential,' yet CGW failed even to do that much with respect to the information at issue."

The lesson from *Abrasic* is clear: to claim information is a statutory trade secret, companies need to employ reasonable security measures to protect that information. While companies need not implement each and every measure discussed above, it is imperative that they take heed of these measures.

***Ami J. Patel** practices in all areas of labor and employment law. If you have questions regarding protecting your company's trade secret information or any other employment law issues, please contact Ami at ajp@zrlaw.com or (216) 696-4441.

CONGRATULATIONS
Best Lawyers | 2020

George Crisci
Jon Dileno
Deanna DiPetta,
Jonathan Downes
Amy Keating
Christopher Reynolds
Jonathan Rich
Jeffrey Wedel
Kyleigh Weinfurtner
Andrew Zashin
Stephen Zashin

Letter of the Law: U.S. Department of Labor's Wage and Hour Division Continues Issuing Opinion Letters

By Michele L. Jakubs*

In 2018, the U.S. Department of Labor's Wage and Hour Division ("DOL") reinitiated its practice of issuing opinion letters. The DOL's opinion letters offer official guidance addressing how a particular law, such as the Family and Medical Leave Act ("FMLA") and Fair Labor Standards Act ("FLSA"), applies in specific circumstances. These letters also serve as important guidance for other employers faced with similar circumstances and compliance concerns. Although the letters are not binding precedent, they can help bolster arguments made by employers.

Since 2018, the DOL has released a steady stream of opinion letters (available through this link). Just this year, the DOL already has issued over a dozen opinion letters offering guidance on specific issues under the FMLA and the FLSA. A summary of some important opinion letters is provided below.

Opinion Letter FMLA 2019-1-A (available here)

This opinion letter addresses whether an employer may permit employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA qualifying, even when the leave clearly is FMLA qualifying. The DOL's answer is a resounding no.

The individual submitting this request for an opinion stated that employers often justify this practice pursuant to language in the FMLA regulations, 29 C.F.R. §825.700, which in relevant part states that "[a]n employer must observe any employment benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA." However, the DOL's response is clear that an employer may not delay the designation of FMLA-qualifying leave as FMLA leave. "Once an employee communicates a need to take leave for a FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee's FMLA leave entitlement." Further, pursuant to the FMLA regulations, "once the employer has enough information to make this determination, the employer must, absent extenuating circumstances, provide notice of the designation within five business days, and may not delay designating leave as FMLA-qualifying, even if the employee would prefer the delay." 29 C.F.R. §825.300(d)(1).

The DOL reconciles the language in 29 C.F.R. §825.700, i.e., the regulation cited in the underlying request for an opinion, with the opinion set forth in its letter, stating "[o]f course an employer must observe any employment benefit or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA, [b]ut providing such additional leave outside of the FMLA cannot expand the employee's 12-week (or 26 week) entitlement. [If] an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement."

This opinion may create additional confusion for employers in the Ninth Circuit, which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In 2014, the Ninth Circuit Court of Appeals concluded that an employee can decline FMLA leave and use paid leave instead, even though the underlying reason for leave would have been FMLA-qualifying. *Escriba v. Foster Poultry Farms*, 743 F.3d 123, 1244 (9th Cir. 2014). In issuing this opinion letter, the DOL noted its disagreement with the *Escriba* decision in a footnote.

Opinion Letter FLSA 2019-2 (available here)

This opinion letter addresses whether time spent participating in an employer's optional volunteer program constitutes "hours worked" requiring compensation under the FLSA. The answer is no, unless such time is forced.

The program at issue in the opinion letter is an employer-sponsored optional community service program for employees, where employees can choose to engage in certain volunteer activities. Under the program, the employer compensates employees for time they spend on volunteer activities during normal working hours or while they are required to be on the employer's premises, but activities which take place outside of normal working hours are not compensated. At the end of the year, the employer awards a monetary bonus to certain participating employees based on the total overall hours each employee volunteered.

Continues on page 6

Letter of the Law | Continued from page 5

Relying on a previous opinion letter concerning volunteer activities, the DOL notes that "[a]n employer may use an employee's time spent volunteering as a factor in calculating whether to pay the employee a bonus, without incurring an obligation to treat that time as hours worked, so long as (1) volunteering is optional, (2) not volunteering will have no adverse effect on the employee, and (3) the employee is not guaranteed a bonus for volunteering." FLSA 2006-4.

The DOL concluded that participation in the program at issue does not count as hours worked under the FLSA because: (1) the employer does not require participation in the program nor control or direct volunteer work; (2) employees do not appear to suffer adverse employment consequences if they do not participate in the program; and (3) the employer does not guarantee participating employees a bonus for volunteering.

The DOL also confirmed that an employer can use a mobile device application to track a participating employee's time spent volunteering, provided that this application is not used to direct or control the volunteering activities.

Opinion Letter FLSA 2019-9 (available here)

This opinion letter addresses whether an organization used permissible rounding practices when calculating its employees' hours worked. The organization at issue used payroll software to calculate its employees' hours worked and wages. Based on clock in and clock out times, the software would convert an employee's hours worked each day into a numerical figure that would be rounded based upon whether the third decimal fell below .005. For example, if the software initially calculated an employee's hours worked in a single day to be 6.865, that figure would be rounded up to 6.87 for purposes of calculating the employee's pay for that day. However, if the initial figure was 6.864, then the software would use 6.86 for purposes of calculating the employee's pay for the day.

The DOL found that this rounding practice was consistent with the FLSA's regulations. The DOL explained it has been its "policy to accept rounding to the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one-half hour as long as the rounding averages out so that the employees are compensated for all the time they actually work." The specific rounding practice at issue was neutral on its face and appeared to average out. Therefore, the DOL opined that, consistent with the FLSA's regulations, the rounding practice "will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b)

Conclusion

The key takeaways from the opinion letters summarized above are the following:

- Employers may not permit employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA-qualifying. When an employer determines that leave is for a FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee's FMLA leave entitlement.
- Employers will not incur an obligation to treat an employee's time spent volunteering as "hours worked" under the FLSA, so long as such time is not forced, i.e., (1) volunteering is optional, (2) not volunteering will have no adverse effect on the employee, and (3) the employee is not guaranteed a bonus for volunteering.
- In determining employees' hours worked, employers may use rounding practices, so long as those practices are neutral and average out so that the employer compensates its employees for all the time its employees actually worked.

The DOL's opinion letters provide valuable insight regarding the intricacies of the FMLA and the FLSA and how these laws apply under specific circumstances. The attorneys at Zashin & Rich regularly provide guidance to employers regarding the nuances of the FMLA and the FLSA and counsel employers on such policies and procedures. Employers should consult with counsel to assess whether their FMLA and FLSA policies and procedures remain compliant with these ever-evolving laws.

***Michele L. Jakubs,** an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions regarding the DOL's opinion letters, or the FMLA or the FLSA, please contact Michele at mlj@zrlaw.com or (216) 696-4441.

Z&R SHORTS

Please join Z&R in welcoming Tiffany Henderson and Ryan Spitzer to its Employment and Labor Groups

Tiffany Henderson practices out of Z&R's Cleveland office. Her practice encompasses all areas of private and public sector labor and employment law. Tiffany graduated from Bowling Green State University and received her Master of Public Administration and her Juris Doctor (*cum laude*) from Cleveland State University and Cleveland-Marshall College of Law, respectively. As a law student, Tiffany served as Student Bar Association President, Director of Pre-Law and Recording Secretary for the Black Law Students Association, and was a member of the mock trial advocacy team. Tiffany also received the Norman S. Minor Scholarship and Cleveland-Marshall Law Alumni Association Life Member Scholarship. Prior to joining Z&R, Tiffany served as an Assistant Attorney General at the Ohio Attorney General's Office. Before practicing law, Tiffany worked with PPG in Cleveland, Ohio as an Information Technology Systems Analyst.

Ryan Spitzer practices out of Z&R's Columbus office and represents public and private sector employers in all aspects of labor and employment law. Ryan graduated from the Ohio State University and earned his law degree *cum laude* from Capital University with a concentration in civil litigation. As a law student, Ryan participated in the Fall National Moot Court Team and was an extern for Chief Justice Maureen O'Connor at the Ohio Supreme Court. Prior to joining Z&R, Ryan worked for the Miami County Prosecuting Attorney's Office where he handled both civil and criminal matters and was appointed as a Special Assistant Prosecuting Attorney in multiple counties.

Congratulations to Stephen Zashin, Helena Oroz, and Jeffrey Wedel on their Recent Win before the Ohio Supreme Court

Z&R congratulates Stephen Zashin, Helena Oroz, and Jeff Wedel on their recent success before the Ohio Supreme Court in *Gembarski v. PartsSource, Inc.*, 2019-Ohio-3231 (Aug. 14, 2019). The case is a significant win for employers. The Ohio Supreme Court held that when a single named plaintiff files an action on behalf of a class of employees, but is not bound by an arbitration agreement to which other members of the putative class action may be bound, the employer need not raise an arbitration defense at the pleading stage. Instead, the employer may wait and raise such a defense at the class-certification stage of the proceedings.

Upcoming Speaking Engagements

Monday, November 4, 2019

Jonathan J. Downes presents *"Keys to Successful Negotiations"* and *"Negotiation Practice on Specific Issues"* at the State Employment Relation Board (SERB) Advanced Negotiations Seminar. The seminar will take place at the State Library in Columbus, Ohio.

Wednesday, December 4, 2019

George S. Crisci will be part of a panel presentation entitled *"Labor Law Hot Topics"* at the Ohio State Bar Association's National Labor Relation Board (NLRB) Updates seminar. The panel presentation will take place at the Ohio State Bar Association in Columbus, Ohio.