[employment law quarterly] ELQ

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

Volume XXII, Issue i

New Protections: Ohio Grants Employers Civil Immunity from COVID-19-Related Claims

By David R. Vance*

On September 14, 2020, Ohio Governor Mike DeWine signed into law H.B. 606, which provides businesses, healthcare providers, schools, and governmental entities with civil immunity from COVID-19-related lawsuits. Specifically, the new law protects against claims of an "injury, death, or loss to person or property" caused by either "exposure to, or the transmission or contraction of [COVID-19]." The law applies retroactively from March 9, 2020, through September 30, 2021.

In support of H.B. 606, the Ohio General Assembly explained:

- In Ohio, it has been the responsibility of individuals going into public places to avoid exposure to individuals who are sick. The same is true today: those individuals who decide to go out into public places are responsible for taking those steps they feel are necessary to avoid exposure to COVID-19, such as social distancing and wearing masks.
- Nothing in the Ohio Revised Code establishes duties upon businesses and premises owners to ensure that members of the general public will not be exposed to airborne germs and viruses.

The legislature further explained that "orders and recommendations from the Executive Branch, from counties and local municipalities, from boards of health and other agencies, and from any federal government agency, do not create any new legal duties" for purposes of establishing COVID-19-related claims.

THE NEW LAW PROTECTS AGAINST CLAIMS OF AN "INJURY, DEATH, OR LOSS TO PERSON OR PROPERTY" CAUSED BY EITHER "EXPOSURE TO, OR THE TRANSMISSION OR CONTRACTION OF [COVID-19]."

Importantly, employers should note that the new law does not provide absolute immunity. Specifically, it does not protect employers that cause an exposure, transmission, or contraction of COVID-19 through reckless, intentional, willful, or wanton misconduct. Ohio employers should do their best to adhere to all local, state, and federal laws and directives related to COVID-19, as failure to do so could serve as evidence of such misconduct.

*__David R. Vance__, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions about House Bill 606 or the impact of COVID-19 on your workplace, please contact David at drv@zrlaw.com or (216) 696-4441.

Adapting to the Times: Tracking Employees' Remote Work Hours in Accordance with the FLSA

By Lauren M. Drabic*

As employers manage increasing telework and remote work arrangements, the U.S. Department of Labor's ("DOL") Wage and Hour Division issued a Field Assistance Bulletin (available here) discussing employers' obligation to track the compensable working hours of employees who work remotely. Under the Fair Labor Standards Act ("FLSA"), employers must pay employees for all hours worked, including overtime, so long as "the employer knows or has reason to believe that the work is being performed." This requirement applies equally to work performed away from an employer's worksite, even if the employer did not request or want the work done.

In general, the FLSA places the burden on employers to prevent employees from working when it is not desired. However, the FLSA does not require employers to pay for work that they did not know about and had no reason to know about. The DOL's Field Assistance Bulletin notes that employers are considered to have "reason to believe that the work is being performed," or constructive knowledge of the work, "if the employer should have acquired knowledge of such hours through reasonable diligence." With respect to employees working remotely, the DOL explains that "the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications."

In order to avoid potential FLSA issues arising from remote work, the DOL recommends that employers establish "a reasonable process for an employee to report uncompensated work time." In doing so, employers should ensure that they do not directly or indirectly dissuade employees from accurately reporting time worked. If an employee subsequently fails to report unscheduled hours under the reporting procedure, employers generally are not required to undertake an investigation to discover unreported hours. For example, even though the employer may have access to information including employees' use of work-issued electronic devices, the employer generally would not be required to audit that information to determine if employees worked hours beyond what they indicated through the reporting procedure. However, the DOL cautioned that this is not absolute, and circumstances may exist where the employer should consult those records. Still, having a reasonable time reporting procedure in place can serve as an effective measure to ensure accurate time reporting for remote employees and a key line of defense to FLSA claims by employees who fail to abide by the procedure.

As the world adapts to the COVID-19 pandemic, remote work has been an important method for keeping employees working and safe. However, it also poses an increased risk to employers in the form of liability under FLSA and state wage-and-hour laws. As the pandemic continues and remote work becomes more common in general, employers need to remain vigilant when it comes to properly tracking employees' time and compensating them for all hours worked.

*__Lauren M. Drabic__ regularly advises clients on labor and employment matters, including FLSA compliance. If you have questions about remote work related issues or labor and employment matters more generally, please contact Lauren at lmd@zrlaw.com or (216) 696-4441.

EMPLOYERS NEED TO REMAIN VIGILANT WHEN IT COMES TO PROPERLY TRACKING EMPLOYEES' TIME AND COMPENSATING THEM FOR ALL HOURS WORKED.

Crime and Punishment: Ohio Supreme Court Allows Civil Actions Based on Allegations of Criminal Acts in the Absence of an Underlying Conviction

By Jzinae N. Jackson*

On July 29, 2020, the Ohio Supreme Court held that plaintiffs may pursue civil claims for alleged criminal acts, even in the absence of an underlying criminal conviction. *Buddenberg v. Weisdack*, 2020-Ohio-3832. The decision likely will subject Ohio employers to increased litigation, as it allows employees to bring civil claims based upon a variety of alleged criminal acts.

THE DECISION LIKELY WILL SUBJECT OHIO EMPLOYERS TO INCREASED LITIGATION

The plaintiff in *Buddenberg* filed a lawsuit alleging that her employer wrongfully demoted her and retaliated against her for raising complaints about unequal pay and ethical misconduct. Among her claims, she alleged violations of Ohio's criminal statutes prohibiting retaliation against public servants and interference with civil rights. As those criminal statutes do not expressly authorize a civil claim, the plaintiff asserted her claims pursuant to Ohio Revised Code 2307.60. That statute provides, in part: "Anyone injured in person or property by a *criminal act* has, and may recover full damages in, a civil action unless specifically excepted by law…." Ohio Revised Code 2307.60(A)(1) (emphasis added). The defendants sought to dismiss the "criminal" claims based upon the lack of any underlying criminal conviction. Due to a lack of controlling legal precedent, the court sought clarification from the Ohio Supreme Court as to whether a criminal conviction is a condition precedent to a civil claim under Ohio Revised Code 2307.60.

Answering in the negative, the Ohio Supreme Court held the plain language of Ohio Revised Code 2307.60 does not require an underlying criminal conviction. The Ohio Supreme Court noted that the word "conviction" was absent from the statue which, instead, refers to a "criminal act." The Ohio Supreme Court explained that "crimes can be committed without a conviction. They often are. The fact that a person's actions subject him or her to prosecution in no way establishes that he or she will in fact *be* prosecuted." Accordingly, the Ohio Supreme Court declined to "read the phrase 'a criminal act' to mean 'a criminal act that resulted in a conviction.'" The Ohio Supreme Court also pointed to language elsewhere in the statute that "permits the use of a conviction as evidence, but does not require it."

While clarifying that a conviction is not a condition precedent for a civil claim under Ohio Revised Code 2307.60, the Ohio Supreme Court's *Buddenberg* decision left other important questions unanswered. For example, as noted by the judge in the underlying federal case: "A criminal conviction requires proof beyond a reasonable doubt; civil liability can be established by a preponderance of the evidence. If the legislature created civil liability for those injured by a 'criminal act,' did it mean to let a plaintiff do an end-run around the higher burden of proof required to establish a crime? Suppose a defendant is actually prosecuted and acquitted? May the victim go to civil court and seek to prove the same 'criminal act' by a preponderance of the evidence?" *Buddenberg v. Weisdack*, No. 1:18-cv-00522, 2018 U.S. Dist. LEXIS 108333, *16 (N.D. Ohio Jun. 28, 2018). These questions remain unanswered and surely will result in additional litigation.

As the underlying allegations in *Buddenberg* demonstrate, the decision impacts Ohio employers by expanding the scope of potential claims available to employees. Despite the lack of a conviction, employees can now assert claims premised upon allegations of a variety of criminal acts. In the wake of the *Buddenberg* decision, courts will need to further clarify the parameters of these claims, including the applicable burden of proof.

*Jzinae N. Jackson practices in all areas of labor and employment law. If you have questions about the *Buddenberg* decision, please contact Jzinae at jnj@zrlaw.com or (216)696-4441.

Reentering the Workplace: How to Apply Existing Law to New Circumstances

By David P. Frantz*

Employers face new challenges as employees reenter the workplace in the midst of the ongoing COVID-19 pandemic. Both the Department of Labor's Wage and Hour Division ("WHD") and the Equal Employment Opportunity Commission ("EEOC") have provided guidance to help employers navigate these new challenges. In its guidance (available here and here), the WHD expands upon their list of compliance assistance materials, with resources designed to help employers and workers understand how the requirements and protections of the Fair Labor Standard Act ("FLSA"), the Family Medical Leave Act ("FMLA"), and the Families First Coronavirus Response Act ("FFCRA") intersect. The EEOC's recent guidance (available here) addresses issues regarding work accommodations for high risk individuals, such as older or pregnant workers, harassment of Asian workers, and whether employers can mandate viral or antibody tests for employees.

The WHD created plain-language questions and answers to help employers understand other critical issues regarding both the FLSA and the FMLA. These questions and answers provide an excellent resource for employers and serve as reminders of employer obligations during this unique and challenging time.

The WHD guidance addresses the newly enacted temporary leave provisions for "paid sick leave" and "expanded family and medical leave" under the FFCRA, which run through December 31, 2020 and apply to private employers with fewer than 500 employees and certain public employers. The FFCRA's leave provisions are meant to ensure workers do not have to choose between their paychecks and their health or their families' health. While leave under the FFCRA is paid, employers may receive tax credits for the cost of providing workers with FFCRA leave. To help employers fulfill the notice requirements under the FFCRA, the WHD issued the following two posters, one for federal employees and one for all other covered employees. Additionally, the WHD created the following resources to help employers and employees better understand the FFCRA: Notice Requirement Q&A Catalog; Fact Sheet for Employers; Fact Sheet for Employees; Benefits Eligibility Guide; and General Leave Provisions Q&A Catalog.

In its guidance, the EEOC recently addressed the rights of employees who are 65 and older in the context of the Centers for Disease Control and Prevention's recommendation that employers provide these employees maximum flexibilities due to their higher risk of a severe case of COVID-19. Specifically, the EEOC explains that the Age Discrimination in Employment Act ("ADEA") prohibits employers from "involuntarily excluding an individual from the workplace based on his or her being 65 or older," even if such action is well-intentioned to keep employees safe. The EEOC explains that the ADEA does not legally require employers to provide any accommodations for employees. Rather, the ADEA prohibits employers from discriminating against individuals age 40 and older. Additionally, the ADEA permits employers to provide flexibility to workers age 65 and older, even if younger workers are treated less favorably.

Similarly, the EEOC guidance states that involuntarily excluding pregnant workers, even for benevolent reasons, would violate Title VII of the Civil Rights Act. The EEOC explains that the Pregnancy Discrimination Act requires employers to provide reasonable accommodations for workers affected by pregnancy or childbirth if the employer provides accommodations for individuals "who are similar in their ability or inability to work." Generally, the American with Disabilities Act ("ADA") requires employers to provide "reasonable accommodations" to individuals in need because of disability, as long as such accommodations do not pose an undue hardship on the employer. Employers should consider requests for reasonable accommodations due to a pregnancy-related medical condition under the usual ADA rules.

As employers develop policies to accommodate certain at-risk workers, they should avoid mandatory policies, and instead offer accommodations on a case-by-case basis. To avoid singling out at-risk workers, employers should communicate with all employees to help determine the appropriate accommodations for workers who express concerns. It is important that all employees are familiar with the accommodation policies to ensure that workers understand the procedures for requesting accommodation and that managers and HR personnel administer requests consistently and properly.

The EEOC guidance also addresses workplace harassment focused on employees of Asian descent. It states, "[m]anagers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the

Continues on page 5

Reentering the Workplace | Continued from page 4

coronavirus or its origins." It is important that managers quickly recognize and address any such harassment.

The EEOC also provides guidance on employers' ability to test employees for COVID-19 before allowing them to return to the workplace. In April of this year, the EEOC stated that employers are permitted to administer viral tests to determine if an individual is actively infected before returning to the workplace. Subsequently, the EEOC distinguished between viral tests, which are permitted under the ADA, from antibody or serology tests. It explains, "[a]n antibody test constitutes a medical examination under the ADA," and currently, "does not meet the ADA's 'job related and consistent with business necessity' standard for medical examinations or inquiries for current employees." Thus, under the ADA, it is unlawful for employers to require antibody testing before allowing employees to reenter the workplace.

Employers should contact counsel with any questions pertaining to the WHD's or the EEOC's COVID-19 guidance. Responsible Restart Ohio, an initiative by Ohio's Department of Health, also provides general guidelines for employers to ensure the health and safety of all Ohioans as they reenter the workforce. Employers are strongly encouraged to continually monitor and adhere to these guidelines.

*__David P. Frantz__ regularly advises clients on labor and employment matters, including COVID-19's impact on the workplace. If you have questions about COVID-19 related issues or labor and employment matters more generally, please contact David at dpf@zrlaw.com or (216) 696-4441.

Changes to Ohio's Workers' Compensation Law

By Scott Coghlan*

Effective September 15, 2020, Ohio's legislature made a number of changes to the state's workers' compensation law. Some of the more significant changes are summarized below:

1. **One-Year Statute of Limitations for VSSR Claims.** The legislature added a section to the Ohio Revised Code that reduces the statute of limitations for claims alleging a violation of a specific safety rule ("VSSR") from two years to one year for VSSR claims arising on or after September 15, 2020. See R.C. 4121.471. Accordingly, going forward, the statute of limitations for VSSR claims will be the same as the one-year statute of limitations for claims alleging a workplace injury.
2. **End Date of Continuing Jurisdiction.** The law now provides that the Industrial Commission's jurisdiction and the authority of the administrator of the Bureau of Workers' Compensation ("BWC") over a claim continues for five years from the date that the last medical services were provided, not from the date of payment for such services.
3. **Codification of the Voluntary Abandonment Doctrine for TTD.** The law now provides, "[i]f an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible" for temporary total disability compensation. The law also expressly states that it supersedes all prior judicial decisions applying this concept, which is known as the voluntary abandonment doctrine.
4. **Prohibition on Withdrawals from Certain Settlement Applications.** Employers are prohibited from denying or withdrawing consent to a settlement application if: (a) the claim is no longer within the date of impact for the employer's experience; and (b) the claimant is no longer employed by the employer.
5. **Increased Reimbursement Funeral Expenses.** The cap on reimbursement for reasonable funeral expenses by the BWC increased from $5,500 to $7,500.

Employers should contact counsel with questions regarding the impact of these changes.

*__Scott Coghlan__ focuses his practice in all areas of workers' compensation law. If you have questions about any workers' compensation related issues, please contact Scott at sc@zrlaw.com or (216) 696-4441.

Z&R SHORTS

Upcoming Speaking Engagements

October 15, 2020

George S. Crisci presents "Public Sector" at the Ohio State Bar Association's 57th Annual Midwest Labor and Employment Law Seminar. The seminar will be conducted as a live interactive webinar.

Registration Information:
ohiobar.org/2020-cle-course-catalog/57th-annual-midwest-labor-and-employment-law-seminar---live-interactive-webinar/

October 22, 2020

Jonathan J. Downes and **Scott DeHart** present "Managing the Discipline Process" and "Legal Considerations for Conducting Internal Investigations" for the Ohio Association of Chiefs of Police.

OACP Conference Information: oacp.org/training-schedule/

November 18, 2020

Jonathan J. Downes presents "Bargaining During the Perfect Storm: Achieving Needed Changes to Union Contracts (Concession Bargaining)" as a webinar for the National Public Employer Labor Relations Association.

Webinar Information: npelra.org/webinars.php

CONGRATULATIONS

Please join us in congratulating our attorneys selected to the 2021 Best Lawyers List.

Best Lawyers | 2021

Christopher Reynolds, Kyleigh Weinfurtner,
5 YEARS: Jon Dileno, Deanna DiPetta,
Amy Keating, David Posner, Jonathan Rich,
Stephen Zashin, **10 YEARS:** George Crisci,
Jonathan Downes, **15 YEARS:** Jeffrey Wedel,
Andrew Zashin