ZASHIN & RICH CO., L.P.A.

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THE FLSA'S NEW CLOTHES

*by Michele L. Jakubs**

Call it an extreme makeover, U.S. Department of Labor ("DOL") style, or your worst compliance nightmare since the new HIPPA regulations reigned supreme. Call it what you will, but the time has come to embrace the Fair Labor Standards Act's ("FLSA") new look.

The new FLSA regulations that went into effect on August 23, 2004 represent the law's first major overhaul in more than half a century. According to the DOL, they also represent the Department's attempt to restore the FLSA's overtime protections, eroded by years of change not reflected in the current regulations.

The new regulations change the rules concerning "white collar" exemptions—the exemptions from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees. Generally speaking, employees become "exempt" from overtime when they receive a guaranteed minimum weekly salary and perform certain required job duties.

Although almost everyone agrees that the FLSA needed an update, not everyone is a fan of its new look. Labor and business leaders are diametrically opposed on how helpful/hurtful the new regulations will be to American workers. Further, Congressional attempts to block the new regulations before their effective date failed. Congress reconvenes next month, however, so the fight over the new regulations may begin anew. Until lawmakers make some kind of move, however, employers will have to comply with the new regulations.

The revised regulations do not alter the basic requirements of the exemptions. Employees still must satisfy the salary and duties tests to qualify for exempt status. Instead, the new regulations redefine how to apply these basic requirements.

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EMPLOYERS PERMITTED TO CHALLENGE EMPLOYEES' FMLA LEAVE ELIGIBILITY

*by Stephen S. Zashin**

Current FMLA regulations allow employers to request medical certification forms only every thirty days. However, the Department of Labor ("DOL") recently created and explained an exception to the thirty-day rule in an opinion letter to the Equal Employment Advisory Council.

Under this exception, an employer that suspects an employee of taking advantage of FMLA leave can force the employee to provide new medical certifications.

Under the existing regulations, employees with chronic medical conditions often took protected time off for medical conditions unrelated to the reason for their absence. These employees knew that their employers could not easily challenge their FMLA leave eligibility.

The DOL has now specified that if employers receive information that makes them question the continuing validity of the employee's medical certification, they may request recertification more often than every thirty days. That is true, so long as the recertification is requested in connection with an absence. Employers can also request certification more frequently than thirty days as long as there is no evidence of a medical reason for the timing of the absences.

Finally, when requesting medical certification or recertification, employers may inform the health care provider that the employee in question has a pattern of Friday/Monday absences, or other noticeable patterns. This notification allows the health care provider to determine whether the employee's leave is justified by examining whether the absence pattern is consistent with the employee's serious health condition.

**Stephen S. Zashin is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in FMLA administration and litigation. For more information about the FMLA, its regulations or medical leaves of absence, please contact Stephen at (216) 696-4441 or ssz@zrlaw.com.*

DISABILITY: IS OHIO'S DEFINITION BROADER THAN THE ADA'S?

*by Lois A. Gruhin**

On June 3, 2004, an Ohio Court of Appeals held that the definition of "disability" is different under Ohio law than under the federal Americans with Disabilities Act ("ADA"). Previous cases involving Ohio's disability discrimination law have generally treated the two as identical.

The ADA defines a "disability" three alternative ways:

1. a physical or mental impairment that substantially limits one or more major life activities;
2. a record of such an impairment; or,
3. being regarded as having such an impairment.

Ohio law also defines a disability in those three basic ways, but with a now important difference. Ohio law defines "disability" as:

1. a physical or mental impairment that substantially limits one or more major life activities;
2. a record of physical or mental impairment; or,
3. being regarded as having a physical or mental impairment.

The difference? Under the ADA, a record of "such an impairment" means a record of a *substantially limiting* impairment. Likewise, being regarded as having "such an impairment" means being regarded as having a *substantially limiting* impairment. The word "such" refers to the descriptive language in part (1) of the definition. By contrast, Ohio law defines a record of impairment and being regarded as having an impairment without reference to the "substantially limits" language.

Despite this subtle difference, most Ohio courts have grafted the "substantially limits" requirement into parts (2) and (3) of the Ohio definition and treated it as if it were identical to the ADA definition. As a result, a plaintiff previously alleging disability discrimination in an Ohio court would always have to show that his or her impairment substantially limited a major life activity.

In *Johnson v. MetroHealth Medical Center*, the Court held that it is improper to graft the "substantially limits" language into parts (2) and (3) of the Ohio definition. In *Johnson*, the employer

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COBRA ALERT: NEW NOTICE REQUIREMENTS

*by Helena Oroz**

The health care continuance provisions of the federal law commonly known as COBRA (Consolidated Omnibus Budget Reconciliation Act) requires certain employers (generally those that employ 20 or more employees) to provide employees and their dependants with health care continuation coverage in the event coverage is lost due to a qualifying event. Such employers should be aware of recent changes to the law.

COBRA regulations already in place include a notice scheme that requires:

- group health plans to provide initial written notices describing COBRA rights to covered employees and their spouses when their coverage commences under a plan;
- employers to provide plan administrators with notice of a qualifying event within 30 days of the qualifying event;
- plan administrators to notify covered employees/qualified beneficiaries of their rights to continuation coverage within 14 days of notification of the occurrence of a qualifying event; and
- covered employees or their qualified beneficiaries to notify the plan administrator of certain qualifying events within 60 days of the qualifying event.

The Department of Labor ("DOL") recently released new regulations that clarify some of these notice requirements and add some additional requirements.

First, the initial notice is now called a general notice. The new regulations provide that a group health plan must provide the notice to both a covered employee and his/her spouse within 90 days of the date coverage begins under the plan. The general notice must include information about the plan, COBRA rights, and the qualified beneficiary's notice obligations as specified in the regulations. The plan may mail a single notice to both employee and spouse if its latest information indicates that both live at the same address; or include the information in a Summary Plan Description ("SPD") and provide same to employee and spouse.

Second, the new regulations explain aspects of the qualifying event notice that an employer must provide to a plan administrator. Some plans provide that COBRA coverage begins when plan coverage ends, instead of when a qualifying event occurs. In this case, an employer must provide the notice within 30 days of the date coverage ends. The notice must include information referencing the plan, the covered employee, the qualifying event, and the date of the qualifying event.

The new regulations also clarify several aspects of plan administrator notice obligations. Under COBRA, a plan administrator has 14 days to inform qualified beneficiaries of their right to elect coverage. The regulations confirm that where the employer and plan administrator are one and the same, a 44-day period applies (the employer's 30-day notice period + the administrator's 14-day notice period). The regulations mandate the inclusion of 14 specific topics covering COBRA rights, plan information, and notice procedures.

The new regulations require plans to establish reasonable procedures for employees and qualified beneficiaries to provide required notices to a plan administrator of qualifying events (divorce, legal separation, cessation of dependent

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Z&R Update

Events & Engagements

<u>October, 2004</u>

Cleveland and Columbus Offices of Zashin & Rich to Relocate
In October 2004, the Columbus office of Zashin & Rich will relocate. The new address will be Fifth Third Center, Suite 1900, 21 East State Street, Columbus, Ohio, 43215. Also in October 2004, the Cleveland office of Zashin & Rich will move to its newly designed offices. The new address for the Cleveland Z&R office will be 55 Public Square, 4th Floor, Cleveland, Ohio, 44113. Z&R has designed state-of-the-art work and client service environments at both its Cleveland and Columbus offices.

<u>October 18, 2004</u>

Zashin to Speak for the Ohio Society of CPAs
Stephen S. Zashin will speak for the Ohio Society of CPAs about employee handbooks and essential employer policies at the OSCPA's 2004 Fall Conference for Corporate CPAs in Beachwood, Ohio.

<u>November 18, 2004</u>

Zashin to Speak for Lorman Education Services
Stephen S. Zashin will speak at Lorman's "Employment Terminations: Communicating and Processing Separations from Employment" seminar in Cleveland, Ohio. Stephen will counsel employers on drafting and using separation and alternative dispute resolution agreements.

ARBITRATION OUTLOOK: HAS THE EEOC CHANGED ITS TUNE ABOUT MANDATORY ARBITRATION AGREEMENTS?

*by Robert Fertel**

Interesting things happen in California—just ask Arnold Schwarzenegger. Of note, the EEOC in Los Angeles filed a lawsuit against an employer that fired a legal secretary because he would not sign his employer's mandatory arbitration agreement. The EEOC and the employer recently settled their differences, and the employer will now use an arbitration agreement approved by the EEOC.

The resolution of this lawsuit is interesting because the EEOC, the federal body charged with enforcing federal equal opportunities laws, has sung the blues about mandatory arbitration for many years:

> The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. ... The Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment.

This language exists in the EEOC's 1997 Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment. The EEOC has not revised its policy since that time. Although its position ran contrary to U.S. Supreme Court and federal appeals court pronouncements concerning the legality of mandatory arbitration, the EEOC kept singing the same old song—until now?

The EEOC settlement requires the employer to use a pre-dispute arbitration agreement that complies "at a minimum with the standards set forth under applicable California and federal law." The EEOC-approved arbitration agreement includes the right to appeal an arbitrator's decision, although limited to grounds provided under applicable state or federal law. The settlement agreement itself requires the employer to inform its employees, via notices displayed at each of its offices, that the EEOC can independently file cases in the public interest despite an employee's agreement to arbitrate claims with an employer.

In time, the EEOC will likely release new guidance concerning its position on mandatory arbitration agreements. Whether or not that guidance will incorporate elements of this recent California settlement remains unknown. Nevertheless, this change by the EEOC reflects additional acceptance of employer-sponsored mandatory arbitration programs. As a result, employers should continue to consider mandatory arbitration programs as an alternative to traditional litigation.

**Robert M. Fertel, who successfully argued an employment law case before the United States Supreme Court, practices in all areas of public and private sector labor and employment litigation. For more information about mandatory arbitration, please contact Robert at (216) 696-4441 or rmf@zrlaw.com.*

ZASHIN NAMED AS LEADING LABOR AND EMPLOYMENT LAWYER BY LEGAL GUIDE SPECIALIST

Stephen Zashin is among only 208 U.S. labor and employment law specialists featured in the "Guide to the World's Leading Labour and Employment Lawyers," published by the Euromoney Legal Media Group, a publisher of area-specific legal practitioner guides. Stephen is among only four Ohio lawyers included in the Guide.

THE FLSA'S NEW CLOTHES

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For example, the new regulations increase the minimum salary requirement to $455 per week. That means that all employees earning less than $23,660 per year are entitled to overtime compensation regardless of their job duties. The new regulations also revise the duties tests and add a "highly compensated employee" test that exempts employees with annual salaries of at least $100,000 if they meet the corresponding duty test. The new regulations also clearly state that police, firefighters, emergency medical technicians and other "first responders" do not lose overtime eligibility.

**Michele L. Jakubs practices in areas of employment litigation and wage and hour compliance and administration. For more information concerning FLSA or changes to the FLSA regulations, please contact Michele at (216) 696-4441 or mlj@zrlaw.com.*

DISABILITY:

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fired the employee for violating its attendance policy. The employee alleged that her employer fired her because she had a history of treatment for cancer.

Although the employee conceded that her cancer did not limit any life activities, the court agreed with the employee that she satisfied one of the other alternative definitions of "disability" in O.R.C. §4112.01:

> Not only do two of the three alternatives in [the statute] fail to qualify the term "physical or mental impairment," [the statute] defines that term and clarifies its use in the definition of "disability." Under [the statute], cancer qualifies as a physical or mental impairment and, even though Johnson concedes that her condition did not limit a major life activity, she correctly asserts that she satisfied one of the other alternative definitions of "disability" in [the statute].

The court reasoned that the Ohio legislature would have used the exact ADA language if the Ohio legislature intended Ohio's definition to mirror the ADA definition.

The *Johnson* case substantially eases the burden of plaintiffs with disability claims in Ohio—at least those who attempt to state a claim under one of the alternative definitions of disability.

**Lois A. Gruhin, a member of the firm's Columbus office, is a former General Counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment law matters. For more information about this case or the ADA, please contact Lois at (614)861-7612 or lag@zrlaw.com.*

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COBRA ALERT

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status), Social Security disability determinations, and second qualifying events. "Reasonable procedures" must be described in the plan's SPD and must specify who receives notice, what methods qualified beneficiaries must use to properly give notice, and what information qualified beneficiaries must provide in a notice. Several new provisions discuss and explain time limits for such notices.

Finally, the new regulations require plan administrators to provide two (2) completely new notices:

Notice of Unavailability: If a plan administrator receives notice from a qualified beneficiary or a covered employee of a qualifying event and determines that the individual is not entitled to COBRA coverage, it must provide the person with a notice that explains why coverage is unavailable.

Notice of Termination: If continuation coverage will end earlier than the maximum period (e.g., for nonpayment), the plan administrator must provide qualified beneficiaries with an explanation of why coverage will end.

The DOL has determined to provide a period of at least six months after publication of the final regulations before they become applicable. That is, the regulations will apply to notice obligations arising as of the first plan year following November 26, 2004. For calendar year plans, the rules will apply to notice obligations arising on or after January 1, 2005. However, employers should consider how the new notice obligations may affect individuals already enjoying COBRA continuation coverage. For example, those individuals will need to know about any newly-instituted notice procedures an employer may have, just in case a second qualifying event occurs.

This alert does not cover every aspect of the new regulations. As a result, employers that have COBRA obligations should consult with legal counsel to ensure compliance under the new regulations.

**Helena Oroz practices in all areas of employment discrimination as well as benefits litigation and compliance issues involving ERISA (Employee Retirement Income Security Act), COBRA (Consolidated Omnibus Budget Reconciliation Act), and HIPAA (Health Insurance Portability and Accountability Act). For more information on how to achieve compliance with these new COBRA notice obligations or to receive sample notices, please contact Helena at* hjo@zrlaw.com *or(216) 696-4441.*