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Travel Time… To Pay or Not to Pay: It's Not an Easy Question

*by Michele L. Jakubs**

The proper legal standard concerning paying non-exempt employees for time spent traveling during or before the workday presents numerous challenges for employers. Federal law provides some general guidelines for determining whether an employee's travel time is compensable.

Ordinarily, employees are not entitled to compensation for time spent commuting to and from work. Most courts regard the length of time spent commuting as a product of the employee's choice to incur the additional time and cost of commuting. As a result, an employee generally does not arrive "at work" until he or she reaches the job site.

Travel during the work day presents a more complex issue. As a general rule, an employer must compensate an employee for travel time spent as part of the *employer's* principal activity. Thus, the key determination in such cases is whether the employees engage in travel for the employer or for personal reasons. This determination, in turn, rests on the nature of the employer's principal activity and its relationship to the time spent in transit by the employee. Significantly, the employee's use of the employer's transportation does not require the employer to compensate the employee for travel time. Since use of the employer's transportation might be for the *employee's* convenience, courts will still review the specific facts of the situation to determine whether the travel time relates to the employer's principal activity.

Some exceptions do exist to these general rules. For instance, Department of Labor ("DOL") regulations provide that an employer must compensate employees for home-to-work travel in certain emergency call-back situations. For instance, an employer might have to compensate an employee for time

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Inside this issue:

Ohio Supreme Court Tweaks Age Discrimination Standard

*by Robert M. Fertel**

The Ohio Supreme Court, adopting a test enunciated by the U.S. Supreme Court, held that a former employee must demonstrate that a substantially younger employee subsequently filled his position to prove a prima facie case of age discrimination.

In *Coryell v. Bank One Trust Company N.A.*, a 49-year-old employee sued his former employer for wrongful termination under Ohio's age discrimination statute. After terminating the employee, the employer hired a 42-year-old replacement. Since the employer hired a "substantially younger" person to replace the terminated employee, the employee claimed that the employer illegally discriminated against him based on age. The trial court dismissed the complaint, holding that an employee could not establish a prima facie case of age discrimination unless replaced by a person outside the protected class (i.e., a person under 40 years of age). On appeal, the appellate court affirmed.

The Ohio Supreme Court reversed. The Court noted that prior precedent required an employee alleging age discrimination to establish the following elements: (1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) was replaced by a person outside the protected class. The last element of the prima facie case, the Court recognized, conflicted with U.S. Supreme Court precedent under the federal Age Discrimination in Employment Act ("ADEA").

The Ohio Supreme Court looked to the U.S. Supreme Court's decision in *O'Connor v. Consol. Coin Caterers Corp.* In that case, the U.S. Supreme Court held that an employee could establish a prima facie case of age discrimination even if replaced by an employee over the age of 40. The relevant inquiry, according to the U.S. Supreme Court, focused on whether the aggrieved employee "lost out because of his age." Consequently, the fact that an employer replaced a protected employee with substantially younger person proved a much more reliable indicator of age discrimination.

Although not bound to apply federal court interpretations of federal statutes to analogous Ohio statutes, the Court recognized that federal case law serves as a useful guide for interpreting Ohio statutes. After reviewing the current standard under Ohio law, the Court held that the fourth element of the current prima facie case was logically disconnected from the statute's goal of prohibiting age discrimination. Under the prior standard, a 40-year-old employee replaced by a 39-year-old employee could plead a cognizable age discrimination claim. A 56-year-old employee replaced by a 40-year-old, however, could not maintain an age discrimination claim. This result, the Court reasoned, did not vindicate the underlying purposes of Ohio's age discrimination act.

To remedy the potential for such results, the Court amended the final section of the prima facie case for age discrimination. Under the *Coryell* standard, the fourth prong of the prima facie case now requires the employee to demonstrate that the replacement was substantially younger. The Court declined to establish a bright line rule defining substantially younger. Rather, the Court instructed trial courts to examine all the circumstances, keeping in mind the statute's broader purpose of eliminating age discrimination.

This decision brings Ohio's age discrimination standards in line with federal court interpretation of the ADEA. The Ohio Supreme Court's decision, however, does differ from pertinent Sixth Circuit precedent. The Sixth Circuit requires a six-year difference between the aggrieved employee and his replacement for a cognizable claim of age discrimination. Thus, it is possible for an employee unprotected by the ADEA in the Sixth Circuit to succeed on a claim in state court. In this respect, it is important to recognize potential differences between state and federal employment discrimination law.

**Robert M. Fertel, who successfully argued an employment law case before the United States Supreme Court, practices in all areas of employment discrimination litigation. For more information about Ohio's age discrimination statute or the ADEA, please contact Robert at (216) 696-4441 or rmf@zrlaw.com.*

Lose the Check: Continued Employment Sufficient Consideration for Non-Competition Agreement

*by Lois A. Gruhin**

The Ohio Supreme Court resolved a conflict among state appellate courts, holding that continued at-will employment is sufficient consideration to support a non-competition agreement.

In *Lake Land Employment Group of Akron, LLC v. Columber*, an employer sued a former employee pursuant to the terms of a non-compete agreement signed by the employee. While employed, the former employee signed a non-competition agreement that prohibited him from engaging in a similar business within a 50-mile radius of Akron for a period of three years. After termination, the employee formed a corporation engaged in a similar business.

The former employee claimed that the non-competition agreement failed for lack of adequate consideration. The trial court agreed and held that the former employee did not receive consideration for signing the agreement. Specifically, the former employee did not receive an increase in benefits or salary and also did not experience a change in his employment situation. Rather, the employee remained at-will after signing the agreement. On these facts, the trial court held that the non-competition agreement lacked consideration, and the appellate court affirmed.

The Ohio Supreme Court reversed and remanded. Reviewing historic hostility to non-competition agreements, the Court noted that modern economic realities did not require such a harsh conclusion. Indeed, the Court reasoned that non-compete agreements in the modern economy facilitated productivity by permitting the parties to share confidential information, while protecting an employer's business.

Although modern courts will permit certain restrictive covenants, the Court recognized that the validity of a non-compete agreement turns on whether the agreement imposes reasonable temporal and geographic restrictions. Such agreements do not violate public policy, according to the Court, because they seek only to protect the employer's reasonable interests in business operations without unreasonably restricting the employee's right to ply a trade.

Reviewing the precedent of sister state courts, the Court discerned much dissention as to whether continued at-will employment sufficed as consideration for a non-competition agreement. Many courts hold that continued employment does not suffice due to a lack of bargaining power between the employer and the employee, and further note that the employee gets no more from the employer than he/she already had.

Courts upholding non-competition agreements supported only by at-will employment focus on factors such as the length of the employee's continued employment, the possibility that the employer would otherwise discharge the employee, or that the employee received additional consideration or confidential information after signing the agreement.

After reviewing the decisions of other state courts, the Ohio Supreme Court held that "consideration exists to support a noncompetition agreement

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Z&R Update

Zashin to Instruct Regarding Interplay of Employment Laws

Stephen S. Zashin will speak for the Council on Education in Management in Cuyahoga Falls, Ohio on April 30, 2004 regarding the interplay of the FMLA, ADA and workers' compensation laws.

Z&R to Present at the 4th Annual Ohio Employment & Labor Law Conference

Stephen S. Zashin will present materials for the Cleveland Bar Association at the 4th Annual Ohio Employment & Labor Law Conference on May 20, 2004 in Cleveland, Ohio

Zashin Speaks in Cleveland

Stephen S. Zashin will speak in Cleveland at the Council on Education in Management's 2004 Personnel Law Update on June 22, 2004 in Cleveland, Ohio.

Zashin to Counsel Employers on Using Arbitration in the Workplace

Stephen S. Zashin will speak for Dispute Resolution Partners concerning legal, effective and enforceable alternative dispute resolution programs in Cleveland, Ohio on June 24, 2004 and in Columbus, Ohio on July 19, 2004. For more information concerning the ADR in the Workplace program, please contact Dispute Resolution Partners at (248)240-0271.

BENEFITS FOR ALL?

Same-sex marriage debate in Massachusetts cranks up questions for employers nationwide

*by Helena Oroz**

Ever since Vermont's Civil Union law went into effect in July 2000, benefit issues for same sex partners have gained more steam. In November 2003, the Supreme Judicial Court of Massachusetts ("SJC") startled America in *Goodridge v. Department of Public Health*. Seven same-sex couples sued the Massachusetts Department of Public Health and the Commissioner after each couple attempted to obtain and was denied a marriage license.

Massachusetts Mayhem. The SJC held that limiting civil marriage to opposite-sex couples violates the Massachusetts Constitution. The court stayed its decision for 180 days (until May 17) to allow the legislature to take appropriate action. The legislature proposed legislation that reserved marriage for opposite-sex couples but provided for civil unions for same-sex couples. In February 2004, the SJC clarified in an "Opinion of the Justices to the Senate" that such legislation "maintains an unconstitutional, inferior, and discriminatory status for same-sex couples" and is therefore not an acceptable solution.

As May 17 draws near, Massachusetts elected officials have scrambled. Massachusetts Governor Mitt Romney filed emergency legislation on April 15, 2004 that would enable him to seek a stay of the *Goodridge* decision. Romney has also urged legislatures in other states to adopt Defense of Marriage Acts ("DOMAs") modeled after the 1996 federal DOMA, which defines marriage as a union between a man and a woman. Thirty-eight states have DOMAs, including Ohio.

Other states. Other states are extending greater benefits to same-sex couples:

- Oregon: On April 21, 2004, an Oregon state court declared the right of same-sex couples to the same benefits as married couples, and gave state lawmakers ninety days (from the beginning of the next session, slated to begin in June) to accomplish the task. The court also found that differing treatment with respect to marital benefits for same-sex couples constitutes gender discrimination under the state constitution.

- California: California's "domestic partnership" law goes into effect on January 1, 2005. The law gives state-registered domestic partners all rights granted to married couples under state law, except the right to file joint tax returns. The law does *not* authorize same-sex marriage.

- New Jersey: A domestic partnership law recognizing registered same-sex couples took effect in January 2004.

Ohio gets DOMAed. Ohio's DOMA is really a recent amendment to the state's marriage statute. The revised statute, effective May 7, 2004, states that "marriage may only be entered into by one man and one women" and declares that any marriage between persons of the same sex violates the strong public policy of Ohio. The statute further declares that Ohio will not recognize any marriage entered into by persons of the same sex in any other jurisdiction.

Do changing times mean benefits for all? Employers may now wonder what to do about providing benefits if, for example, an employee travels to another jurisdiction to marry a same-sex partner and returns seeking benefits for his or her same-sex spouse. First, Ohio does not currently recognize any same-sex marriage entered into in any other jurisdiction. Second, benefit plans that provide benefits to an employee's spouse typically define a "spouse" as someone *legally* married to the employee. Therefore, Ohio employers and employers in other states with similar DOMAs likely need not recognize such marriages for benefits purposes under such facts. However, this analysis may change if an Ohio employer employs employees in a state that authorizes same-sex marriages. Other employers (e.g., in California) must comply with domestic partnership and civil union laws. Employers in Massachusetts and Oregon are currently left in limbo until further legislative action clarifies how those states will address recent court decisions.

Regardless of the states of operation, all employers should check their plan documents and the definition of "spouse" to resolve potential future disputes. Employers should also review their internal nondiscrimination policies to ensure than any definition of "spouse" does not contradict such policies. Finally, consult legal counsel to resolve questions concerning same-sex marriages and the complex matrix of state and federal employment laws.

**Helena J. Oroz practices in all areas of employment discrimination and employee benefits litigation, including the Employee Retirement Income Security Act. For more information about same-sex marriages and employee benefit plans or ERISA, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

Travel Time…

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spent traveling back to work in an emergency where substantial travel time is involved. Exceptions also exist where the employer requires an employee to report to a meeting place to pick up equipment or other employees before proceeding to a work site.

Out-of-town and overnight travel present additional complications for determining proper employee compensation. In the case of an employee assigned to work out of town for one day, the mere fact that the travel occurs during a single day does not absolve the employer of compensating the employee for his or her travel time. According to the DOL, such travel does not constitute ordinary home-to-work travel, but rather is travel performed for the employer's benefit and at the employer's behest. Consequently, the DOL requires compensation for the time the employee spent traveling out of town as well time spent working out of town. The DOL does not, however, compel an employer to compensate the employee for time spent traveling to the airport or train station.

Similarly, overnight travel presents particularly difficult compensation issues. Generally, travel time that occurs during the employee's regular working hours is compensable. Indeed, travel time is compensable if performed during the working hours of a non-work day, such as Saturday or Sunday. Overnight travel as a passenger that occurs outside regular working hours generally does not merit compensation. Importantly, the employer must compensate the employee for such time if the employee actually performs work.

As demonstrated above, the proper compensation for time spent traveling eludes simple answers. Application of the DOL's regulations depends upon the specific facts of the situation and the nature of the employer's business.

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

EEOC Reports Charge Filings Remain High and Union Membership Continues 20-Year Decline

*by Stephen S. Zashin**

After hitting a 17 year high in 2002, the Equal Employment Opportunity Commission ("EEOC") recently reported that employees filed 81,293 charges of discrimination nationwide in 2003. Discrimination complaints remain at the second highest level since 1996. The EEOC reported that most charges concerned race discrimination (35.1%) followed by sex discrimination charges (30.0%).

While discrimination charges remain high, the latest numbers from the Bureau of Labor Statistics ("BLS") indicate that overall union membership in the United States declined from 13.3% in 2002 to 12.9% in 2003. These numbers contribute to the ongoing decline of union membership over the past twenty years. In 1983, the first year that such data was tabulated, 20.1% of all employees belonged to a union.

The statistics also indicate that public sector employees remain more likely to unionize then their private sector counterparts. In the past 20 years, BLS findings indicate that public sector union membership has remained relatively constant while private sector union membership has declined by about one-half in the same period. In 2003, four in every ten government worker belonged to a union. By contrast, only one in ten private sector

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employees belonged to a union. In 2003, 37.2 percent of all government workers and 8.2 percent of private sector employees belonged to a union.

This decline in membership has reached all corners of the United States. 33 states reported falling union membership. Only 15 states and the District of Columbia saw an increase in union numbers. In 2003, approximately one-half of all union members lived in six states (California, New York, Illinois, Michigan, Ohio, and Pennsylvania).

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Continued Employment Sufficient Consideration for Non-Competition Agreement

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when, in exchange for the assent of an at-will employee to a proffered non-competition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause." The Court reiterated, however, that non-competition agreements are enforceable only if the agreement imposes reasonable restraints. The Court further noted that reasons other than lack of consideration could invalidate a non-competition agreement.

This decision clarifies a previously murky area of law in Ohio. After this decision, an employer, who offered at-will employment in exchange for a non-compete agreement, need not worry that the agreement will fail for a lack of consideration. Employers should recognize, however, that non-competition agreements must still impose only reasonable time and geographic restrictions on employees. This case also suggests that other employment agreements (e.g., arbitration, confidentiality, etc.) containing solely at-will employment as consideration are valid and binding.

**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 concerning litigating or drafting non-compete agreements, please contact Lois at (614)861-7612 or lag@zrlaw.com.*