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

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FLIP-FLOP: NLRB Limits the Rights of Non-Union Employees During Investigatory Interviews

*by Lois A. Gruhin**

On June 9, 2004, the National Labor Relations Board ("NLRB") decided that non-union employees do not have the right to have a co-worker present during an "investigatory interview that the employee reasonably believes might result in discipline." The NLRB overruled its earlier decision *Epilepsy Foundation of Northeastern Ohio* which gave non–union employees the right to have a co-worker present. The 2004 decision continues an NLRB flip-flop on this issue.

In 1975, the NLRB decided, in *NLRB v. Weingarten*, that union employees have a right to have someone present during an investigatory interview. While this case established the rights of union employees, it did not address non-union employees. The NLRB first decided non-union employee rights in 1982. In *Materials Research Corp.*, the NLRB decided that such rights extended to non-union employees. The NLRB held that all employees had the right to have another person present during pre-disciplinary interviews pursuant to section 7 of the National Labor Relations Act ("NLRA"). This section gives employees the right to "engage in concerted activity for mutual aid and protection."

Two subsequent cases eliminated *Weingarten* rights for non-union employees. In *Sears, Roebuck & Co.*, decided in 1985, the NLRB held that non-union employees did not have the right to have a co-worker present because it interfered with the employer's ability to work with employees on an individual basis. In 1988, the NLRB reaffirmed that decision in *E.I. Dupont & Company.* In *Dupont*, the NLRB concluded that: (1) a co-worker had no obligation to represent the entire workforce; (2) a co-worker would not have the necessary skills to represent the employee; and, (3) the employer may decide to skip the interview altogether and go straight to a discipline, giving the employee no opportunity to tell his or her side of the story. Therefore, the NLRB reasoned, that non-union employers did not need to permit the presence of a co-worker.

In 2000, the NLRB flipped again. In *Epilepsy Foundation*, the NLRB restored a non-union employee's right to have a co-worker present upon request.

Nevertheless, in *IBM Corporation*, the NLRB reversed itself again holding that the right to have a co-worker present does not extend to non-union employees. Building on the

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Inside this issue:

DISCRIMINATION AND DIVORCE? MICHIGAN COURT PROVIDES A PRIMER ON MARITAL STATUS DISCRIMINATION

*by Helena J. Oroz**

A recent Michigan case determined that evidence of discrimination based on an employee's marital status creates a jury question. In *Veenstra v. Washtenaw Country Club,* an employee sued his former employer for discriminating against him based upon his marital status. The employee and his former employer signed six consecutive one-year contracts until the employee separated from his wife in 1996 and began cohabiting with another woman. The employee's private life became a topic of discussion among club members of the employer. Some members found his behavior offensive, as evidenced by a survey of club members and their open expressions of disapproval. The employer's Operations Manager heard three board members express their disapproval of the employee's divorce, as well as a desire to terminate him. At the conclusion of the 1996 golf season, the employer did not renew the employee's contract.

On reviewing the employee's claim, the court noted that nothing in the legislative history of Michigan's discrimination statute limited the term "marital status" to protect married couples only. Furthermore, the court determined that the language banning discrimination based on "marital status" naturally means both married and unmarried. The court further held that discrimination based on marital status is just as real when committed against a person about to be married or divorced, as when committed against someone who has begun the paperwork by filing a complaint for divorce or obtaining a marriage license.

The appeals court concluded that the board members' express disapproval of the employee's divorce allowed an inference that the plaintiff's marital status could have caused the employment decision. Therefore, the employee submitted sufficient evidence of marital status discrimination to bring his case before a jury.

This case clarifies that employers must make termination decisions based upon legitimate non-discriminatory reasons. Further, employers may not make employment decisions based upon an employee's marital status.

**Helena J. Oroz practices in all areas of employment discrimination and employee benefits litigation. For more information about marital discrimination claims, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

WHAT EMPLOYERS NEED TO KNOW ABOUT REVISIONS TO FLSA REGULATIONS

*By Michele L. Jakubs**

The U.S. Department of Labor ("DOL") recently released the final version of its revisions to the regulations for the Fair Labor Standards Act ("FLSA"). The new regulations alter the salary requirements and duties tests for determining who is exempt from the FLSA's overtime requirements. The regulations will go into effect on August 23, 2004. However, it remains unclear whether the Senate and House of Representatives will block the revisions before the August deadline. Therefore, the fate of the revisions to the FLSA regulations remains unknown.

What does this mean for employers? If Congress does not block the new regulations, all employers must comply with the new regulations by August 23, 2004.

Like the old regulations, the new regulations set forth a salary and duties test that exempt employees must meet. To acquire exempt status, an employer must pay an employee on a salary basis, (i.e., a predetermined amount each week in which the employee works regardless of the quality or quantity of work performed). The new regulations allow deductions from an employee's salary in certain limited situations. The new regulations increase the minimum salary threshold to qualify for an exemption from $250.00 per week (under the old short test) to $455.00 per week. Therefore, any employee earning less than $23,660.00 is entitled to overtime compensation regardless of his/her job duties.

The new regulations set forth new duties tests for the executive, administrative, professional, computer and outside sales employee exemptions. However, as under the old regulations, employers must analyze an employee's actual job duties, not the employee's job title, to determine the employee's status under the FLSA. The executive employee's primary duty must entail the management of the enterprise or a recognized department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two (2) employees. In addition the employee must have the authority to hire or fire other employees or make recommendations regarding such employment actions. The regulations provide examples of executive duties and positions in an effort to clarify who qualifies for this exemption.

The administrative employee's primary duty must entail the performance of office or non-manual work directly related to management of business oper-

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Summer Help and Child Labor Laws… Is Your Company in Compliance?

*by Robert M. Fertel**

There are approximately 3 million workers in the United States between the ages of 14 and 17. Many employers find it beneficial to employ teenagers over their summer break, causing the teenage workforce to grow by over 1 million workers over the summer. Along with the extra help comes a laundry list of state and federal child labor regulations. Some child labor laws are relaxed during the summer months, but most are the same all year round.

The Fair Labor Standards Act ("FLSA") and Ohio state law define a child as anyone under the age of 18. The act separates children into three categories: 16 and 17 year-olds, 14 and 15 year olds, and those younger than 14. Anyone under 14 is generally prohibited from entering the work force except in limited circumstances such as newspaper delivery, babysitting, or working in a business owned by a parent.

In order to encourage teenagers' pursuit of their education, the FLSA and Ohio state law restrict the number of hours a child may work, and the times at which children may begin and end their workday. During the school year, children ages 14 and 15 may not work more than 3 hours in a day or 18 hours in a week. During summer break, 14 and 15 year olds may work up to 8 hours in a day and 40 hours per week. For most of the year, 14 and 15 year olds cannot work before 7 a.m. or after 7 p.m. From June 1 to Labor Day, 14 and 15 year olds can work until 9 p.m.

The FLSA does not impose any time requirements on 16 and 17 year olds. However, Ohio state law prohibits these teenagers from working between the hours of 11 p.m. and 7 a.m. before a school day, if they must attend school. No weekly maximum number of hours exist for a child of 16 or 17. Keep in mind that Ohio also requires a 30 minute break for every 5 consecutive hours worked by anyone under the age of 18.

In addition to defining working hours for minors, state and federal law restrict anyone under the age of 18 from doing certain types of work. No one under the age of 18 may perform a hazardous occupation. What is a hazardous occupation? The State of Ohio and the FLSA have the same list of hazardous occupations including, but not limited to, meat packing, operation of power driven slicers, manufacturing of brick and tile, manufacturing of chemicals or explosives, coal mining.

If the child is under 16 further restrictions exist. Occupations prohibited for 14 and 15 year olds include, but are not limited to, manufacturing and warehouse occupations, work in freezers or meat coolers, work in boilers or engine rooms, loading or unloading goods from trucks, and other such duties.

There are exceptions to these general rules. For example, children working for their parents in any occupation other than manufacturing or mining are not subject to child labor provisions. Child labor laws also do not apply at all to children working on a family farm. Family farm or not, 16 year olds can also work in any agricultural job for any number of hours. On non-family farms, children under 16 can work in non-hazardous jobs during non-school hours. Children under 14 can do the same with written permission from a parent.

Exceptions may also apply if the child is a *bona fide* volunteer, or if he/she is a "trainee" gaining professional experience and education. Additionally, exceptions exist which allow children to work

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Z&R Update

Events & Engagements

June 24th & July 19th, 2004
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.

July 21, 2004
Gruhin to present for the Council on Education in Management
Lois A. Gruhin will counsel employers on preventative and proactive measures at the Concourse Hotel in Columbus, Ohio. Lois will speak on "Detecting Legal Landmines: Ensuring that your Investigation Complies with the Law."

October 23, 2004
Cleveland Office of Zashin & Rich to Relocate
On October 23, 2004, the Cleveland Office of Zashin & Rich will move to its newly designed offices. Z&R hired Ugrinov Associates from Chicago, Illinois to design a state of the art work and client service environment. The newly designed and additional space will assist the firm in managing its growth and the growth of its clients. The new address for Z&R will be 55 Public Square, 4th floor, Cleveland, Ohio 44113.

October 25, 2004
Zashin to Speak for the Ohio Society of CPAs
Stephen S. Zashin will speak for the Ohio Society of CPAs concerning hot topics in employment law.

FMLA ALERT:
Employer Interference For Failure To Provide FMLA Notice

*by Stephen S. Zashin**

Employers have a duty to advise employees of their Family Medical Leave Act ("FMLA") rights. Further, a failure to do so may constitute unlawful interference with such rights under the FMLA.

In *Conoshenti v. Public Serv. Elec. & Gas Co.*, an employee sued his former employer for wrongful termination under the FMLA. While employed, the employee signed a Last Chance Agreement that included a provision requiring the employee to report to work every day. Shortly thereafter, a car struck the employee, causing him to sustain a serious injury. The employee's doctor cleared him to return to work two weeks later, but the employee chose to undergo shoulder surgery and missed 92 days. The employee's recovery consisted of two phases: the initial recovery from the accident, and the subsequent recovery from the shoulder surgery. The employer terminated the employee and never advised him of his FMLA rights.

The employee argued that his employer's failure to advise him of his right to twelve weeks of FMLA leave, after he properly gave notice of his serious health condition and requested leave, constituted unlawful inference with the FMLA. Therefore, the employee claimed that if he had known he only had twelve weeks of leave, the employee would have looked into the practicality of postponing the surgery. The Third Circuit Court of Appeals concluded that the employee had a valid argument.

The Third Circuit noted that the stated purpose of the FMLA is to balance workplace and family demands, and to entitle employees to take reasonable leave for medical reasons. The court decided that FMLA's intent is lost when employers fail to provide their employees with the opportunity to make informed decisions regarding their leave options and limitations. Without this opportunity, employees do not receive the statutory benefit of taking necessary leave with the assurance that employment, under proscribed conditions, will exist upon their return. As a result, the court concluded that the employee could establish a potential claim under the FMLA.

Although the Third Circuit accepted the employee's failure to advise argument, it rejected his argument that his firing after he returned from his leave violated the FMLA. Because the employee's leave lasted more than the FMLA's 12 protected weeks, the employer's termination of the employee after 12 weeks could not violate the FMLA.

The Third Circuit's decision strongly suggests that any violation of the FMLA, or its regulations, constitutes unlawful interference under the FMLA. As a result, this case illustrates the importance of identifying FMLA issues and informing employees of their rights under the FMLA. Without proper employment counsel or training, employers face potentially significant liability under the FMLA.

*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 at (216) 696-4441 or ssz@zrlaw.com.

FLIP-FLOP…

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Dupont rationale, the NLRB gave 4 reasons for its 2004 decision: (1) co-workers, unlike union representatives, do not represent the interest of the entire workforce or bargaining unit; (2) co-workers do not have the support of an entire bargaining unit to balance the power between employers and employees; (3) co-workers lack the skills and knowledge a union representative provides; and, (4) co-worker presence might compromise confidentiality and inhibit candor.

While the NLRB recognized that it could interpret the Act either way, this most recent decision is "most consistent with the language and policies of the Act." As a result of this decision, employers do not have to allow a non-union employee to have a co-worker present in an investigatory interview. However, because the NLRB has shown a propensity to flip-flop on this issue, stay tuned for more on this issue in the years to come.

**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 employer workplace rights, please contact Lois at (614)861-7612 or lag@zrlaw.com.*

FLSA REGULATIONS…

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ations. The employee must exercise discretion and independent judgment regarding matters of significance to the business. The new regulations provide examples of jobs that typically meet this exemption.

The professional employee's primary duty must entail the performance of work requiring knowledge of an advanced type in a field of science or learning usually acquired by a long course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized artistic or creative field. In general, this exemption is limited to employees with academic degrees. However, an employee who has advanced knowledge as a result of work experience and intellectual instruction may also qualify under this exemption. The new regulations also provide examples of those jobs that typically meet the professional employee exemption.

The new regulations also provide an exemption from overtime for highly compensated employees. To qualify for this exemption, the employee must earn at least $100,000.00 annually. In addition, the employee's total annual compensation must include a salary of at least $455.00 per week. The employee must also perform at least one of the duties or have at least one of the responsibilities of an executive, administrative or professional employee.

To keep clients and friends of the firm apprised of these new regulations, Zashin & Rich will provide continuing updates to and information about the status of these new regulations.

**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.*

Zashin & Rich Co., L.P.A.
www.zrlaw.com

Cleveland:
55 Public Square, Suite 1490
Cleveland, Ohio 44113-1901
Phone: (216) 696-4441
Fax: (216) 696-1618

Columbus:
2242 S. Hamilton Road, Suite 101
Columbus, Ohio 43232
Phone: (614) 861-7612
Fax: (614) 861-7616

Zashin & Rich Co., L.P.A.
55 Public Square, Suite 1490
Cleveland, Ohio 44113-1901

Summer Help and Child Labor Laws

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in hazardous occupations if they work as an apprentice or a student learner. Finally, an employer may apply for an exemption to the minimum wage requirements if they are in the retail, service, or agricultural industries. The requirements to qualify for these exceptions and exemptions are spelled out, in detail, in the FLSA.

What are the penalties for violating child labor laws? The Wage and Hour Division of the Department of Labor ("DOL") is responsible for enforcement of the federal standards. The DOL can impose civil or **criminal penalties**. The DOL can impose civil penalties of up to $11,000 for each violation. If the DOL imposes criminal penalties, the employer may go to jail for up to 6 months instead of, or in addition to, the monetary penalties. The FLSA also permits the DOL to seek an injunction. The DOL can either file an injunction to force an employer to comply or, in the case of "oppressive child labor," the DOL can stop the shipping and delivery of the goods produced by that employer.

As a result of the increase in the number of minors in the workforce during the summer months and the severity of the penalties for violations, any company employing minors must ensure that it has analyzed and complied with the requirements of state and federal child labor laws.

**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 employment and labor law. For more information about summer help or child labor laws, please contact Bob at (216) 696-4441 or rmf@zrlaw.com.*