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LEGISLATIVE ALERT

*by Stephen S. Zashin**

STATE: Tort Reform in Ohio

On January 6, 2005, Governor Taft signed Senate Bill 80 ("S.B. 80") into law. S.B. 80 goes into effect on April 6, 2005. The new law does not affect economic compensatory damages, or those damages awarded to compensate a plaintiff for actual monetary losses, like lost wages or the cost of medical treatment. Rather, S.B. 80 caps the non-economic and punitive damages a plaintiff may receive in most tort actions.

Non-economic losses include damages awarded for mental anguish. S.B. 80 limits such damages to $250,000.00 or three times the economic losses, whichever is greater, up to a maximum of $350,000.00 per person and $500,000.00 per occurrence. This limitation does not, however, apply to injuries of a catastrophic nature.

S.B. 80 also limits the amount of punitive damages that a court may award based upon the size of the employer. For employers with 100 or less employees, and certain manufacturing sector employers with 500 or less employees, the law caps the amount of punitive damages that can be awarded at the lowest of:

- twice the amount of compensatory damages awarded;
- 10% of the employer's net worth when the tort occurred; or
- $350,000.00.

For all other employers, the law caps punitive damages at twice the amount of compensatory damages awarded. In addition, a court may not award prejudgment interest on punitive damage awards.

FEDERAL: Filing Fees Increase in U.S. District Courts

On December 8, 2004, President Bush signed an appropriations act into law that, in part, raises the civil filing fee in federal courts from $150.00 to $250.00. The change becomes effective on February 7, 2005. The civil federal filing fee was last increased nine years ago from $120.00 to $150.00.

**Stephen S. Zashin is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in defending employment based litigation. For more information about Ohio Tort Reform or other changes in federal or state employment laws, please contact Stephen at (216) 696-4441 or ssz@zrlaw.com.*

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SAY WHAT YOU MEAN:

NLRB Continues Enforcement of "Clear and Unmistakable" Waiver Standard

*by Robert W. Hartman**

The National Labor Relations Board ("NLRB"), the federal body that administers the National Labor Relations Act ("the Act"), recently affirmed its position that employee waivers of statutorily granted rights must be clear and unmistakable. In *Englehard Corp.*, the NLRB held that a broad no-strike provision in a union contract failed to do just that.

The employer and the union in Englehard were seemingly on the same page when they entered into their collective bargaining agreement. In the agreement, the parties included a statement of intention "to prevent any suspension of work due to labor disputes during the term of this Agreement." The employer agreed not to lock out employees during the term of the agreement. The employer also agreed not to discriminate against any employee for resorting to the grievance procedure. In return, the union agreed that it would not "call, participate in, or sanction any strike, boycott, picketing, work-stoppage or slow-down whatsoever."

Before the agreement expired, the union and the employer began negotiating a new contract. At the end of the third negotiating session, the employer declined to schedule further negotiations. To pressure the employer into returning to the bargaining table, the union decided to picket – but not at the employer's plant. Instead, the union picketed the employer's shareholder meeting, held about seventy miles away.

Approximately fifty employees attended the demonstration. The employees did not actively participate in the picketing, which the employer videotaped, but engaged in silent protest. The employer ultimately suspended thirty-eight employees for three days each for violating the no-strike provision. The union filed grievances on behalf of the thirty-eight suspended employees. When the employer refused to process the grievances, the union filed an unfair labor practice charge.

The employer argued that the employees, through their union, waived their right to engage in any kind of picketing or strike. The union clearly agreed that it would not "call, participate in, or sanction any strike, boycott, picketing, work-stoppage or slow-down whatsoever." Any picketing, the employer reasoned, means what it says–including picketing its shareholder meeting.

The NLRB disagreed. Initially, the Board noted that any waiver of employee rights in a collective bargaining agreement must be "clear and unmistakable." In this case, the Board held that the language of the parties' agreement did not meet this standard. First, the parties mutually agreed to the no strike/no lockout provision to "prevent any suspension of work due to labor disputes." This statement of intent effectively limited the application of the no strike/no lockout provision. The provision expressly prohibited any conduct that would reasonably lead to the suspension of work.

The Board then found that the union's conduct could not reasonably have led to the suspension of work. First, the picketing occurred seventy miles away from the employer's work site. Second, the employer had scheduled only three of the employees who attended the picketing to work at the plant that day, and those employees received advance permission to miss work. The Board found, therefore, that the picket did not cause a suspension of work.

Because the picket did not cause a suspension of work, the no strike/no lockout provision did not clearly and unmistakably waive the employees' right to picket under these particular circumstances. The Board thus held that the employer violated the Act when it suspended the employees who participated in the picketing.

This case reinforces some basic principles with respect to collective bargaining agreements. First, the language in a collective bargaining agreement must clearly state the intent of the parties. Ambiguous language often leads to unintended results. Second, when the NLRB or other arbiter interprets a collective bargaining agreement, it considers the document as a whole, not particular language in isolation, to reach the parties' intent. Broad statements of policy in an agreement can accordingly affect the interpretation of other

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Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of employment and labor law.

WHAT'S UP WITH FORM I-9?

Myth Busters for Those Confused About Employment Verification

*by Michele L. Jakubs**

It may seem like every time you turn around these days, there is new legislation out there affecting your business–or at least your HR manager. Unfortunately, sometimes the word on the street about a new rule or modified paperwork generates confusion for employers. The buzz around Form I-9 is one such example.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the Act") requires employers to verify both the employment eligibility and identify of all new hires. The Immigration and Naturalization Service ("INS") designated the Form I-9 for this purpose.

The Act's implementing regulations provide for three lists of documents to accomplish verification. Acceptable "List A" documents establish both identify and employment eligibility. Acceptable "List B" documents establish identity only. Acceptable "List C" documents establish employment eligibility only. The current Form I-9 in use lists these documents in handy columns. The word on the street though is that there are new I-9 rules and maybe even a new Form I-9 floating out there somewhere. To clarify these and other burning questions, consider the following myths and myth busters:

Myth #1: I heard there is a new version of Form I-9 that I should be using, so why didn't the INS tell anybody?

First, the INS is no more. As of March 1, 2003, the INS transitioned into several parts of the Department of Homeland Security, including the U.S. Citizenship and Immigration Service ("USCIS").

Second, CIS has not issued a new version of Form I-9. The current version is dated 11/21/91. CIS is currently revising the Form and may make a revised version available sometime in 2005. To date, CIS has not set a release date.

Myth #2: I also heard that there are a bunch of new rules going into effect that will change the type of documents I can accept for verification purposes.

Passing new regulations is often a long, complicated process that involves several stages of rules (proposed, interim, and final) and intervening periods of public comment. Interim and final rules have the force of law, but proposed rules do not. You may have heard about proposed changes to the employment verification rules that came out in February of 1998. Those rules are not currently in effect.

The current rules describing acceptable documents for verification have not changed since September of 1997. These interim rules made some changes to the lists of acceptable documents in effect at that time.

Myth #3: Great, that clears things up. It's good to know that the Form I-9 hasn't changed and is totally accurate.

You should be aware that the list of "List A" documents on Form I-9 is not accurate. Apparently, no one has had time to revise Form I-9 since 1991, so the changes made eight years ago are not reflected on the "current form." Therefore, you should not accept the following "List A" documents:

- Certificate of U.S. Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Form I-151
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

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SAY WHAT YOU MEAN:

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provisions. Finally, any waiver of an employee's statutory rights must be clear and unmistakable. If there is any ambiguity as to whether a union waived a statutory right, the NLRB will not likely find a waiver. Any waiver of statutory rights should, therefore, explicitly state the right waived in the most specific terms possible.

Photo of Robert Hartman

**Robert W. Hartman practices in all areas of employment and labor law. For more information on negotiating or administering collective bargaining agreements or other labor law inquiries, please contact Rob at rwh@zrlaw.com or (216) 696-4441.*

WHAT'S UP WITH FORM I-9?:

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Although not included as a "List A" document, you may additionally accept Form I-766.

Myth #4: Fantastic, somebody just yesterday handed me a Form N-560, which I accepted as proof of their identity and employment eligibility. I'm in serious trouble.

Unlikely. The point of the interim rule was to maintain the status quo as much as possible while still making changes required by law. The INS understood that employers would not have much notice of the changes or a revised Form I-9 reflecting the changes. For these reasons the INS, and now the CIS, has forgone enforcement against employers who "continue to act in reliance upon and in compliance with existing employment verification forms, guidance, and procedures." You are not in serious trouble–but you should comply with the current law next time.

**Michele L. Jakubs practices in all areas of employment litigation. For more information on wage and hour compliance other employment-related record keeping, please contact Michele at mlj@zrlaw.com or (216) 696-4441.*

Z&R Update

Z&R Welcomes Two New Associates and Settles into a New Office Space

Zashin & Rich is always busy, but even busier than usual as of late with two new faces and a new work space to boot.

First, Z&R recently welcomed new additions to both its Employment and Labor and Domestic Relations practice groups.

Robert Hartman has joined the firm to practice in the areas of labor relations, employment discrimination, and all other employment-related issues. Rob works extensively in the areas of labor-management relations and the National Labor Relations Act ("NLRA").

Rob joined Zashin & Rich in 2002 as a law clerk. He earned his law degree, cum laude, in May 2004 from the Case Western Reserve University School of Law and became a certified member of the Ohio Bar in November 2004. Rob is also certified to appear before the U.S. District Courts for both the Northern and Southern Districts of Ohio. Rob is a member of the Ohio State Bar Association.

Likewise, Z&R's Domestic Relations group recently welcomed Ryan Long. Ryan practices in all areas of domestic relations law, including divorce and dissolution, spousal support, child support and property division.

Ryan earned his law degree in May 2004 from the Case Western Reserve University School of Law and became a certified member of the Ohio Bar in November 2004. Ryan is a member of the Ohio State, Cuyahoga County, and Medina County Bar Associations.

In other news...first Z&R's Columbus office moved to its new space on the 19th Floor of the Fifth Third Center building on East State Street....then the Cleveland office took on taking over the 4th Floor at 55 Public Square.

Now that we have settled into our new spaces for the past several weeks, it finally feels like "home." With all the glass, loft-like ceilings, and high-tech capabilities, we don't look a lot like our old selves, but we are even better able to serve the needs of our clients. We invite all of our clients and friends to stop by and see us in Cleveland or Columbus.

WORKING UNDER THE INFLUENCE:

The "Drug-Free Workplace" Gets Help Getting There

*by Lois A. Gruhin**

Ask anyone to think of a slice of American life that drug or alcohol abuse has adversely affected, and you will likely hear something about the dangers of people driving, flying, or boating under the influence. What about working under the influence?

According to the Ohio Bureau of Workers' Compensation ("BWC"), 38% to 50% of nationwide workers' compensation claims are related to alcohol or drug abuse in the work place, and 47% of serious workplace accidents and 40% of fatal work place accidents have drug and/or alcohol involvement.

To combat these problems, many employers now have Drug-Free Workplace Policies in place. The BWC even provides discounts to qualifying state-fund employers that implement some version of a Drug-Free Workplace Policy. Having the right policy can only do so much, however, and many employers still must deal with drug- or alcohol-related accidents.

A change in Ohio law now gives employers a leg up in defending against such claims with the "rebuttable presumption" law that took effect this past October. Under the old law, employers had to prove, usually through medical testimony, that an injured employee should be disqualified from receiving workers' compensation. Employers are still free to drug test after an accident and use medical testimony to defend claims, but the new law allows employers to presume that an employee's injury resulted from working under the influence. The new law shifts the burden of proof to the employee. Now it is up to the injured employee to rebut, or disprove that presumption.

An employer can presume that the employee was injured as a result of substance abuse as a result of (1) a positive "qualifying chemical test" OR (2) the employee's refusal to submit to the drug test. The employer must, however, post a written notice explaining that the results of, or refusal to submit to a chemical test can affect eligibility for workers' compensation benefits. This notice must be at least the same size as the employer's BWC certificate and must be posted in the same location.

A "qualifying medical test" must be conducted by a certified laboratory that meets or exceeds the U.S. Department of Health and Human Services standards. It also means that the employer administered the test because it had "reasonable cause" to suspect that the employee was under the influence. "Reasonable cause" can be:

- direct observation of use/possession/distribution of drugs or alcohol, or physical symptoms of being under the influence;
- a pattern of abnormal conduct, erratic behavior, or deteriorating work performance not attributable to other factors;
- identification of the employee as the focus of a criminal investigation involving controlled substances;
- a report of use of drugs or alcohol by a reliable source; or
- repeated/flagrant violations of safety/work rules.

If an employer can submit evidence that it complied with these requirements, the burden falls on the employee to prove that the employee's use of drugs or alcohol did not cause the injury. The new law may not look like a proactive measure in the drug-free workplace movement, but it might make employees think twice about working under the influence.

**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 creating or revising a drug-free workplace policy, please contact Lois at lag@zrlaw.com or (614) 224-4411.*

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MILITARY LEAVE UPDATE:

USERRA Extends Continuation Coverage for Employees Called to Serve

*by Helena Oroz**

USERRA (the Uniformed Services Employment and Reemployment Act of 1994) is the federal law that grants employees on military leave reemployment rights upon return. President Bush signed new language into law on December 10, 2004 that amends USERRA.

USERRA originally required employers to offer health care continuation to eligible employees called up to military active duty (and their dependents) for up to 18 months. The new law extends coverage rights for up to 24 months at the employee's cost. This change affects individuals electing coverage beginning on and after December 10, 2004.

An employer may require a person electing continuation coverage under this USERRA provision to pay up to 102% of the full premium under the plan. However, if the person performs service in the uniformed services for less than 31 days, an employer cannot require the person to pay more than the employee share, if any, for the coverage.

In addition, employers must provide a notice of USERRA rights and obligations to employees, either through a general posting or otherwise, on an annual basis. Employers must provide or post the notice starting March 10, 2005. The U.S. Department of Labor will likely issue in the interim a model notice that employers may use to fulfill this obligation.

**Helena Oroz practices in all areas of employment law, as well as benefits litigation and compliance issues. For more information about your USERRA obligations or other continuation coverage questions, please contact Helena at hjo@zrlaw.com or (216) 696-4441.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of employment and labor law.