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EMPLOYMENT LAW QUARTERLY

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ENFORCING SAFETY PROCEDURES:
how one employer tamed the intentional tort

*By: Steven P. Dlott**

A tort is simply a civil wrong or injury for which the law allows a remedy. An *intentional* tort is a "wrong perpetrated by one who intends to do that which the law has declared wrong." (Black's Law Dictionary, 5th Ed.) In the employment context, an intentional tort claim arises when an employee basically alleges that the employer *intended* to injure the employee on the job.

These actions typically occur when an injury occurs after an employer "knowingly" allows an employee to work on a machine that is missing a safety guard or when an employer forces an employee to use a piece of equipment after the employee has previously requested repairs. These are the extreme cases. There are many companies, however, operating under the belief that they are doing everything possible to protect their employees from injury and themselves from liability–who still get nipped by an intentional tort action.

One company recently beat the rap in *Eilerman v. Cargill Inc.* The employer had strict safety policies in place. Specifically, the employer instituted an elaborate six-step "lockout/tagout" procedure that required employees to do the following before performing maintenance work: 1) inform affected employees of the equipment's shut down; 2) turn off the equipment; 3) disable the equipment's circuit breakers; 4) place a lock and tag on switches that could restart the equipment; 5) eliminate any energy stored in the equipment; and finally 6) test the equipment's controls to ensure that no power flowed to the equipment.

To ensure compliance with its lockout/tagout procedure, the employer trained all new hires on the procedure three separate times within the first ninety days of their employment. The employer also disciplined any employee who did not comply with its lockout/tagout procedure.

One of the employer's employees worked as an elevator and meal load operator. The employee performed his duties from a control room, where he programmed a computer to load rail cars with meal from designated tanks. One day the computer signaled a problem with a tank's gate. The employee grabbed a wrench to attempt to open the tank manually.

The employee knew the employer's lockout/-tagout procedures from attending four training sessions, viewing a video, and receiving a booklet about the procedure. The employee nonetheless ignored the procedure. He climbed on top of the tank and attempted to open the stuck tank's gate with the wrench to manually rotate the motor operating the gate. The motor's guard, which prevented access to the motor, had been removed long ago. The motor suddenly started to rotate while the employee worked on it, causing his wrench to spin around and hit him in the head.

The employee subsequently sued the employer alleging an intentional tort. The employee blamed his injury on the employer's removal of the safety guard. The court rejected the employee's argument and reaffirmed a longstanding legal principle: an employer is not liable for an intentional tort where an employee's injury results from a knowing failure to follow a safety procedure that could have prevented the accident. By instituting such specific safety

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(PARTIAL) BONUS TIME:

Prorating Production Bonuses Under the FMLA

*By: Stephen S. Zashin**

Most employers are well-informed about Family and Medical Leave Act ("FMLA") basics, including returning an employee to his or her former position or its equivalent after a period of qualified leave. Things get a little more complicated, however, when employers have to determine whether a restored employee is entitled to other benefits after a leave of absence. For example, where do bonuses fit in? Is an employee who takes twelve weeks of leave entitled to the same bonus as his or her co-worker who takes no leave? Can an employer prorate the bonus amount of the employee who takes leave, or would taking such an action interfere with that employee's FMLA rights? As with so many other questions in this area of the law, the answer is–it *depends.*

The U.S. Court of Appeals for the Third Circuit (which covers Pennsylvania, New Jersey, Delaware, and the Virgin Islands) recently reviewed such questions in *Sommer v. The Vanguard Group.* The employer in *Sommer* implemented a bonus plan to reward its employees' "contributions to [the company's] growth and success in a tangible way." The amount that the company distributed annually under the plan depended on a number of factors, including the company's operating performance. To qualify for the bonus, an employee had to be employed on the last calendar day of the year, on the date of the distribution, and all days in between. The amount an employee received under the plan depended on job level, length of service, and "hours of service."

The plan defined "hours of service" as actual hours for which the employee was paid or entitled to payment for performance of duties, vacation, holidays, sick time, or certain leaves of absence (e.g., bereavement, jury duty, military)–but not disability leave. An employee had to meet an annual goal of 1,950 hours worked to receive his or her entire bonus. If an employee did not meet the annual goal, the company prorated the payment by the amount of hours that the employee was deficient.

In this case, the employee took a short-term disability leave under the FMLA for eight weeks, from December 2000 through February 2001. Because of his absence, the company prorated his bonus payment for 2001. The employee sued, alleging that the employer interfered with his FMLA rights by prorating his bonus payment for the time he spent on FMLA leave. The district court granted summary judgment to the employer, holding that the bonus was a "production bonus" for which prorating is allowed.

On appeal, the court described the case as the first "in which an appellate court had to distinguish between the two classifications of company bonus programs for purposes of an FMLA interference action." The "two classifications" of bonus programs that the court distinguished were "production" bonuses and "absence of occurrence" bonuses. The difference determines whether prorating is permissible:

- a *production bonus* requires some positive effort on the employee's part (e.g., a monthly production bonus).
- an *absence of occurrence bonus* rewards an employee for compliance with rules (e.g., bonuses for perfect attendance and safety); it does not require the employee's performance but instead contemplates something not happening, like an absence.

Under the FMLA, an employer cannot reduce an "absence of occurrence" bonus to an employee who takes FMLA leave if the employee was otherwise qualified for it, but for the taking of the leave. However, the employer may prorate a "production" bonus to an FMLA leave taker by the amount of any lost production, in hours or otherwise, that the FMLA leave causes.

The court held that the employer's bonus plan was more akin to a bonus program that rewards employee production:

> Here, [the employer's] focus throughout its policy appears to be on incentivizing employees to contribute to [the employer's] performance and production by meeting a predetermined hours goal–1,950 hours a year…. [The employer] then communicates this production goal to the employees throughout the policy–especially by indicating that qualifying employees' bonus amounts are based on hours worked and will be prorated for every hour that they are under the annual goal.

Accordingly, the court held that the employer's hours-based bonus plan was a bonus program designed to reward employee production, which may be prorated to account for the hours not worked by employees who take FMLA leave.

As this case illustrates, it is a good idea for employers to have a clear purpose with respect to their bonus programs. In other words, what are you rewarding? Is the plan to reward employees in sync with your obligations under the FMLA and other laws? Answering these questions will go a long way toward resolving potentially complex FMLA issues.

***Stephen Zashin** *is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in both defending FMLA-based litigation and assisting employers with FMLA compliance. For more information about the FMLA, please contact Stephen at (216) 696-4441 or ssz@zrlaw.com.*

ALERT: Issue 2 Passes Raising Ohio's Minimum Wage, Increasing Employer Obligations

*By: Lois A. Gruhin**

On November 7, 2006, Ohio voters passed Issue 2 approving the adoption of an amendment to Ohio's Constitution that will have significant ramifications for Ohio employers. Beyond simply raising Ohio's minimum wage, the amendment imposes recordkeeping and disclosure requirements on employers and exposes them to liability for violations. The amendment's key provisions include the following:

MINIMUM WAGE INCREASE

- Effective January 1, 2007, Ohio's minimum hourly wage is $6.85.
- The minimum wage will increase annually, based on the rate of inflation, every September 30 starting in 2007, with the increased wage taking effect January 1 of the following year (e.g., the first increase to occur Sept. 30, 2007, effective Jan. 1, 2008).
- Exceptions to the increased minimum wage include: employees under the age of 16 and employees of businesses with annual gross receipts of $250,000 or less for the preceding calendar year (who must receive the federal minimum wage); and employees of solely family-owned and operated businesses who are family members of an owner. Other provisions apply for tipped employees and mentally or physically disabled individuals.

RECORDKEEPING AND DISCLOSURE REQUIREMENTS

- At the time of hire, an employer must provide an employee with the employer's name, address, telephone number, and other contact information and update this information when necessary.
- During an employee's employment and for 3 years following his or her last day of employment, an employer must maintain a record of an employee's name, address, occupation, pay rate, daily hours worked, and earnings. **An employer must provide this information to an employee or the employee's representative upon request and without charge.**

ENFORCEMENT

- An employer may not discharge, discriminate or retaliate against any employee who exercises his or her rights under these provisions, or against any person who provides the employee with assistance or information regarding the exercise of his or her rights.
- An employee or other interested party may file a complaint with the state for violations of these requirements. The state may initiate its own investigation of an employer's compliance with these provisions.
- An employee or the Attorney General may bring an independent legal action against an employer for violations of these provisions within the later of the following time periods: (a) within 3 years of the violation or of cessation of the violation, if ongoing; or (b) within 1 year of notification to the employee of the state's disposition of a complaint for the same violation.

DAMAGES FOR VIOLATION

- If an employer is found by a court or the state to have violated these provisions, the employer must pay the employee back wages, damages, and the employee's costs and attorney's fees. The employer must pay the employee within 30 days of a finding of a violation.
- Damages are calculated at twice the amount of the employee's back wages. In the case of a violation of the anti-retaliation provision, the court or the state sets the amount of damages "sufficient to compensate the employee and deter future violations," but at a minimum of $150.00 for each day that the violation continued.

These changes create many uncertainties, such as who may act "on behalf of an employee" for record inspection purposes; who constitutes an "interested party" for purposes of filing a complaint; whether employers must disclose all employee records to a requesting employee or just the requesting employee's records; and if an employer must disclose all employee records to a requesting employee, what rights a coworker may have, if any, to prevent disclosure of his or her own records to the requesting employee. Pending further clarification of these issues by legislation or a court decision, employers are urged to consult with legal counsel before responding to a disclosure request.

***Lois 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 discrimination matters. For more information about Ohio's new minimum wage, please contact Lois at (614) 224-4411 or lag@zrlaw.com.*

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WHAT EXACTLY IS A SUPERVISOR? NLRB Finally Gives Guidance

As to the Definition of Supervisor for Purposes of the National Labor Relations Act

*By: Robert W. Hartman**

After confounding labor unions, employers and, ultimately, the U.S. Supreme Court for more than 60 years, the National Labor Relations Board ("NLRB") finally issued clear guidance as to what constitutes a "supervisor" under the National Labor Relations Act ("the Act"). In a troika of cases, the NLRB devised a new test to determine whether a person meets the definition of supervisor in 29 U.S.C. § 152(11).

The Act specifically grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See* 29 U.S.C. § 157. These rights, however, exist only for "employees" as defined by Section 2(3) of the Act.

In response to a 1947 U.S. Supreme Court opinion, Congress enacted Section 2(11) of the Act, which specifically excludes "supervisors" from the definition of "employee." Congress defined a supervisor as an individual who possesses the authority to take certain actions on behalf of the employer so long as the exercise of that authority is not clerical in nature and requires the use of independent judgment. The actions which indicate supervisory authority include the power "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action."

The NLRB and the courts recognized that the phrases used by Congress to define a supervisor were vague and ambiguous. As a general principle, however, the NLRB construed the term "supervisor" narrowly because any employee deemed a supervisor under the Act lost his or her rights to engage in protected activity. In 2001, the U.S. Supreme Court held in *NLRB v. Kentucky River* that definition of supervisor was too narrow and inconsistent with the Act.

In September, the NLRB adopted definitions for the terms "assign," "responsibly to direct" and "independent judgment." The NLRB construed the term "assign" "to refer to the act of designating an employee to a place (such as location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Significantly, "assign" refers to the putative supervisor's designation of significant duties to an employee, not ad hoc instructions to perform a discrete task.

Next, the NLRB turned its attention to the problematic phrase "responsibly to direct." Since the NLRB had not attempted to define this term with particularity in the past, a number of other federal courts had, on their own, attempted to reach a consensus definition of "responsibly to direct." The NLRB adopted this consensus definition. Thus, the term "responsibly to direct" means that the person must direct or perform oversight of other employees and also must be accountable for the performance of the task by the employees over whom the supervisor directs or oversees. In other words, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action if necessary. Further, the putative supervisor must face adverse consequences if he or she does not take the above-listed steps.

Finally, the NLRB confronted the Supreme Court's rebuke of its definition of the term "independent judgment." Prior to the Supreme Court's 2001 *Kentucky River* decision, the NLRB interpreted the term "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." The NLRB disavowed this definition, holding that so long as an employee exercises independent judgment with respect to one of the 12 enumerated supervisory functions, it is irrelevant that the independent judgment is also a professional or technical judgment.

Left to define independent judgment, the NLRB held that the putative supervisor's actions must be free of control by others, must involve a judgment by the individual and must involve a degree of discretion that rises above the routine or clerical. Thus, judgment will not be independent if dictated by detailed instructions set forth in a company policy, the verbal instructions of a higher authority or the terms of a collective bargaining agreement.

The NLRB's expanded definition of supervisor will have immediate effects on election petitions. As stated above, supervisors do not have Section 7 rights to choose a representative for the purposes of collective bargaining or to engage in any other activity protected by the Act. Accordingly, these employees should be excluded from any proposed bargaining unit for the purposes of an election. Moreover, an employee is permitted to instruct a supervisor to refrain from engaging in activities on behalf of a labor union.

With the NLRB's guidance, employers are now in a better position to determine who is a supervisor for purposes of the Act and ensure that those employees are not included in proposed bargaining units. Employers should carefully consider the various job classifications within any election proposal to determine whether the positions are excluded.

***Robert W. Hartman** *practices in all areas of employment and labor law. For more advice on traditional labor law issues, or other labor and employment law inquiries, please contact Rob at (216) 696-4441 or rwh@zrlaw.com.*

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

HOURLY REQUIREMENTS FOR SALARIED EMPLOYEES

and other work rules you didn't know you could have

*By: Michele L. Jakubs**

Employers who pay their overtime-exempt employees on a salary basis (generally speaking, the same pay every pay period regardless of quality or quantity of work) sometimes run into an old problem…the one where they have to pay those employees the same pay every pay period–regardless of quality or quantity of work.

While nothing has changed in that regard, employers may not know that they can actually require their exempt employees to work a certain number of hours each week–and require them to make up work time lost due to partial-day absences.

Earlier this year, the Department of Labor ("DOL") issued an Opinion letter in response to an employer inquiry concerning two new job requirements under its consideration. First, the employer wanted to require exempt employees to work a set number of hours per week. Second, the employer wanted to require exempt employees to make up work time lost due to personal absences of less than a day. The employer did not intend to dock employee salaries for failure to meet either requirement but rather would discipline employees for consistent failure to observe the requirements. The employer inquired as to whether it could implement these requirements without losing the exempt status of its employees.

The DOL opined that so long as the employer did not dock an employee's salary for a violation of either rule, the employer was free to implement the rules without losing an employee's exempt status. "The number of hours worked by an employee who is exempt under…the FLSA is a matter to be determined between the employer and the employee." Likewise, the DOL explained that an employer may require an exempt employee to make up work time lost due to personal absences of less than a day without loss of the exemption.

The Opinion Letter cautioned, however, that failure to comport with either of the two rules would not constitute a violation of a "workplace conduct rule" for which an employer may impose a disciplinary suspension for one or more full days.

Guidelines like these may be a good idea for your company, especially if you are afflicted with "work when they wanna" exempt employees or if productivity is simply too low. While employers cannot dock an employee's pay or impose disciplinary suspensions for noncompliance with such rules, otherwise disciplining an employee for consistent failure to observe such rules may have the required effect and will not affect the employee's exempt status.

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ENFORCING SAFETY PROCEDURES...

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measures, the court held that the employer could not have had the required intent under the law to either harm the employee or expect that the employee might be harmed under these circumstances.

Take two important lessons from this case. First, taking extensive measures to train and enforce compliance with safety procedures may seem cumbersome and time-consuming, but the effort will pay off–with lower workers' compensation premiums and a lock on intentional tort claims. Unfortunately, many well-intentioned companies have model safety measures "on the books" –but that is where they remain. Front line supervisors must also ensure strict compliance with safety procedures and hold employees accountable for failing to follow them.

The second lesson this case illustrates is that strict safety measures–that are strictly enforced–can also help defend against claims involving employer oversights or unintentional safety violations. Removal of safety guards, like the one in the *Cargill* case, is common in many factories and often used as evidence to establish an intentional tort. Companies with iron-clad safety procedures, however, can avoid liability even for seemingly obvious safety violations.

***Steve Dlott** *defends employers in all aspects of workers' compensation law and employee injury claims. For more information about safety policies and procedures or any aspect of workers' compensation law, please contact Steve at (216) 696-4441 or spd@zrlaw.com.*

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

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Please call (216) 696-4441 for more information about any of these seminars.

NOVEMBER 2006

Zashin & Rich continues its brain•food•breakfast law series with Volume III, a 2-part Seminar on Absenteeism presented by attorneys **Stephen Zashin** and **Steve Dlott** of Z&R's Cleveland office and **Dr. Kevin Trangle**. Part One, "Preventing Common Workplace Injuries," takes place on November 16, 2006 from 8:30-10:00 a.m. at the Monarch Building, 5885 Landerbrook, Mayfield Heights, Ohio, 44124.

DECEMBER 2006

Lois Gruhin of Z&R's Columbus office will moderate the Council on Education in Management ("COEM") Ohio Employment Law Update 2006 in Columbus, Ohio on December 4-5, 2006. Registration begins at 8:00 a.m. on Day 1. The seminar will take place at the Concourse Hotel, 4300 International Gateway, Columbus, Ohio, 43219. **Lois** will also present two topics, "Update on New and Emerging Employment Law Challenges in 2006" and "Steering Clear of Common Costly Mistakes Made When Conducting Workplace Investigations." Other speakers include:

- **Stephen Zashin** of Z&R's Cleveland office, who will speak on two topics, "Preventing Improper Denial of the FMLA's Intermittent and Reduced Schedule Leave, and other Requirements" and "Curtailing Legal Challenges that Arise from Protected Absenteeism When Untangling the FMLA, ADA, PDA, and Workers' Comp Laws."
- **Michele Jakubs** of Z&R's Cleveland office, who will speak on the topic "Avoiding Misclassifications and Improper Salary Deductions for Exempt Employees Under the Revised FLSA White-Collar Exemption Regulations."

Stephen Zashin of Z&R's Cleveland office will present "The Leave of Absence Puzzle" to the Greater Cleveland Chapter of the American Payroll Association on December 14, 2006 at 1:00 p.m. The seminar will take place at the Sheridan Hotel, 5300 Rockside Road, Independence, Ohio, 44131.

JANUARY 2007

At Part Two of Zashin & Rich's brain•food •breakfast law series, Volume III, attorneys **Stephen Zashin** and **Steve Dlott** of Z&R's Cleveland office and **Dr. Kevin Trangle** will discuss "Managing the Existing Injury" on January 18, 2006 from 8:30-10:00 a.m. at the Monarch Building, 5885 Landerbrook, Mayfield Heights, Ohio, 44124.

Stephen Zashin and **Steve Dlott** of Z&R's Cleveland office will also speak at Lorman Education Services' "Best Practices In ADA, FMLA And Workers' Compensation" seminar on January 31, 2007 at the Sheraton Hotel, 5300 Rockside Road, Independence, Ohio, 44131. Registration begins at 8:30 a.m. **Stephen** will present two topics, "Baby FMLA: the Basics" and "Mastering the Leave of Absence Puzzle." **Steve** will also present two topics, "Winning Strategies at the Industrial Commission" and "Using the Court System to Defeat Claims."

FEBRUARY 2007

Lois Gruhin of Z&R's Columbus office will moderate and speak at the "COEM Discrimination, Harassment, and Retaliation Update 2007: Critical Prevention and Response Strategies to Reduce Liability Risks" seminar in Cuyahoga Falls, Ohio on February 20, 2007. Other speakers include **Stephen Zashin, Michele Jakubs, Christina Janice,** and **Robert Hartman** of Z&R's Cleveland office. Look for details in January 2007.

Stephen Zashin and **Steve Dlott** of Z&R's Cleveland office will provide an Employment Law Update on February 28, 2007, sponsored by the Middleburg Heights Chamber of Commerce and the Cleveland Southwest Safety Council. The seminar will take place at the Middleburg Heights Chamber of Commerce, 16000 Bagley Rd., Middleburg Heights, Ohio, 44130 from 8:30 a.m. to 10:00 a.m. Look for more information about this seminar in coming months.

MARCH 2007

Stephen Zashin will present "The Leave of Absence Puzzle" at the National Business Institute's Labor and Employment Law Update 2007 on March 2, 2007. The seminar will take place at the Holiday Inn Independence, 6001 Rockside Road, Independence, Ohio, 44131. Registration begins at 8:30 a.m. Look for more information about this seminar in coming months.

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