ZASHIN&RICH CO.,L.P.A.
cleveland | columbus

EMPLOYMENT LAW QUARTERLY

Volume VIII, Issue I
Winter 2006

In this issue:

GOOD CENTS:

Using a Workers' Comp Attorney Even if You Have a TPA

*By: Steve P. Dlott**

Virtually every employer in Ohio utilizes a third party administrator, or "TPA" to manage their workers' compensation claims. The benefits of using a TPA are obvious to these employers: a small fee allows them to delegate the day-to-day management of any work-related claims to someone else. A TPA acts as a liaison of sorts between all the interested parties, deals with the paperwork, and generally sorts out the logistics of processing a claim.

Most TPAs do an excellent job with day-to-day claims management, but not all claims proceed quietly. When it comes to fighting claims at Industrial Commission ("IC") hearings, for example, TPAs and the employers they defend are at a distinct disadvantage because TPA representatives are not attorneys.

What can an attorney do for an employer at a hearing that a TPA representative cannot? An attorney can question and cross-examine witnesses. A TPA cannot do the same. A lone TPA at a hearing is an employee's dream come true—because a TPA cannot challenge a single word that comes from the injured employee, no matter how false. While the employer's witnesses can respond to any false testimony from an employee, there is no substitute for aggressive cross-examination. An attorney impeaching an employee's credibility is likely more compelling and persuasive to a hearing officer than a witness on the employer's side simply claiming that the employee lied. In this way, an employer misses out on framing the facts in its favor.

A lawyer-less employer misses out on arguing the law in its favor, too. Again, an attorney can bring to the hearing officer's attention the statutes, rules, or case law that, combined with the facts, support the employer's position. TPAs cannot make arguments at these hearings. Imagine how detrimental that is, especially after a hearing officer just spent a good portion of the hearing listening to all the reasons for allowing a claim from the injured workers' attorney, and your representative must remain mute.

TPAs are sometimes lax in advising their clients of the benefits of attorney representation—and conversely, the possible detriments of failing to secure attorney representation for a hearing. TPAs that market themselves as providers of comprehensive workers' compensation services sometimes assume that advising an employer to retain legal counsel will undermine that goal. Others fear incurring an employer's wrath if they recommend spending money on services the employer assumed (or was led to believe) were part of the TPAs job.

Some TPAs avoid the problem of these hearing restrictions by contracting with attorneys to represent the employer at hearings. While this is certainly an improvement, such an arrangement comes with its own set of potential disadvantages. For example, contract attorneys may receive case files just a few days before the hearing. Large caseloads and such little lead time may curtail adequate preparation—and thus diminish any advantage gained from their ability to argue and cross-examine witnesses for the TPA.

It is true that hiring legal counsel can be expensive. It is also true that most Industrial Commission hearings do not require the presence of an attorney. In light of these considerations, regard the following as two instances in which having an attorney by your side could prove indispensable:

• *Cases that turn on the claimant's credibility*. The most effective way for an employer to

(continued on page 4)

ARE SALES ENGINEERS OVERTIME-EXEMPT?

The Answer is not Just Academic

*By: Michele L. Jakubs**

Time to put your thinking caps on: under the new Fair Labor Standards Act ("FLSA") regulations, would you pay an engineer who engages in sales activities as part of the job overtime pay? Anyone? Anyone? Bueller?

If you are unfamiliar with the reference to the 1986 pop-culture classic *Ferris Bueller's Day Off*, not a problem. If you have recently faced an FLSA question like the one posed above, you may nonetheless feel a certain kinship with the high school students in that movie when questioned by their economics teacher ("In 1930, the Republican-controlled House of Representatives, in an effort to alleviate the effects of the ... Anyone? Anyone? ... the Great Depression, passed the ...Anyone? Anyone? The tariff bill? The Hawley-Smoot Tariff Act?...). Whether confused, drowsy or distracted, they didn't have any answers either.

The Department of Labor ("DOL") may have an answer for you. Last year, the DOL Wage and Hour Division published an opinion letter concerning the exempt status of "sales engineers" in light of the FLSA's "learned professional exemption."

Opinion letter? For the FLSA uninitiated, an opinion letter is an official interpretation of the DOL's Wage and Hour Division (so long as it is signed by the Administrator or other proper DOL official). They are issued in response to questions that employers or other interested individuals pose about real-world situations. Opinion letters provide employers with a potential good-faith reliance defense for FLSA violations. Note, however, that courts of law do not have to follow the DOL's guidance and may reach a result in direct contradiction to a DOL opinion letter.

The DOL issued such an interpretation in response to an employer question about whether the learned professional exemption applied to its sales engineers. The employer engages in the production and distribution of motors for automotive components, audio and visual products, and other equipment. It employs "sales engineers" who engage in a combination of sales and applications engineering activities. The sales engineer position requires at minimum a four-year degree in either mechanical or electrical engineering.

Learned Professional? Just about everyone knows the general rule that employers must pay overtime for any hours worked over forty in one week. What people sometimes do not know is why certain employees in certain jobs are exempt from overtime: because they meet certain tests relating to their salary and duties to fit within an exemption.

To qualify for the learned professional exemption, first the employer must compensate the employee on a salary basis at a rate of at least $455.00 per week. Second, an employee must meet the *primary duty test.* An employee's primary duty must require advanced knowledge, meaning that his or her work is "predominately intellectual in character and includes consistent exercise of discretion and judgment," as opposed to routine physical or mental work. An employee will not necessarily meet this test just because he or she earned a bachelor's degree in a specialized field. The outcome really depends on whether the particular job requires the employee to *apply* that advanced knowledge. In addition, the advanced knowledge that the employee's job requires must be in a field of science or learning, which must be customarily acquired by a prolonged course of specialized intellectual instruction.

And the answer is... The DOL concluded that the employer's sales engineers are exempt from the FLSA's overtime pay mandates. First, the position's job duties are predominately intellectual in character and include things like collecting data for development purposes, verifying industry and market standards or developments, and developing files of engineering specifications. The sales engineers also exercise discretion and judgment. They must work independently with customers to determine engineering specifications for specific product applications and to resolve engineering-related problems.

Second, the position requires advanced knowledge in a field of science or learning–in this case, engineering. Finally, the sales engineer position requires advanced knowledge obtained through specialized academic training that is a standard prerequisite for entrance into the engineering profession. The employer requires the engineers to possess at least a bachelor's degree in electrical or mechanical engineering, which requires a prolonged course of specialized intellectual instruction.

But don't they sell stuff too? Although the position involves some sales responsibilities, the importance of the exempt engineering duties outweighs the importance of the sales activities. Sales naturally result only from sales engineers' ability to work with customers to provide engineering and technical support and to resolve engineering-related issues. In addition, the employees spend well in excess of fifty percent of their time performing engineering versus sales activities and generally do so without direct supervision. Finally, the DOL also considered the fact that sales engineers earn higher salaries as compared to sales assistants, who perform more

(continued on page 6)

MORE IS MORE:

EEOC Revises EEO-1 Report, Adds Stuff

*By: Lois A. Gruhin**

If you are a large employer or federal contractor, filing an annual report with the Equal Employment Opportunity Commission ("EEOC") should be old hat. The report–Standard Form 100, Employer Information Report EEO-1, or "EEO-1" for short–has been around since 1966. Private employers must file an EEO-1 if they have 100 or more employees. Certain private employers that contract with the federal government also must file an EEO-1 if they have 50 or more employees. Reporting employers must file by September 30 each year.

The "Employment Data" section of an EEO-1 report breaks down an employer's workforce into gender, race/ethnicity, and job categories. The EEOC uses the data employers provide in EEO-1 reports to investigate charges of discrimination and to analyze trends in female and minority employment. The format has not changed much over the years, but in 2003 the Commission got an itch to make some revisions. Part of the impetus for the changes was a 1997 government-wide revision of standards for reporting race and ethnicity to reflect the increasing diversity of the Nation's population. The EEOC finally approved the EEO-1 modifications this past November.

Self-identification. The Commission reaffirmed its position that self-identification, as opposed to employer visual identification, is the preferred method for gathering ethnic/racial information from employees. Employers should offer employees the opportunity to self-identify but also provide a statement that identification is voluntary and solely for purposes of the employer's compliance with the law. Employers may use employment records or visual observation to gather racial/ethnic data only when employees decline to self-identify.

"Two Question Format." The old EEO-1 first broke down employees into gender and then into five racial/ethnic categories. The revised EE0-1 takes a different approach. It starts with two major ethnic categories: "Hispanic or Latino" and "Not Hispanic or Latino." These two major categories then each break down by gender. Only the "Not Hispanic or Latino" category further breaks down into six racial categories. The EEOC declined to further break down the "Hispanic or Latino" ethnic category into racial categories.

The Commission chose this approach because it has been shown to yield more accurate data about Hispanics/Latinos. The Commission calls this approach the "two-question format" because it foresees employers asking employees first to report their Hispanic/Latino status, and second to report their race(s).

Racial categories. The "Not Hispanic or Latino" ethnic category is broken down into six racial categories (italicized words indicate revisions):

- White;
- Black *or African American*;
- *Native Hawaiian* or *other* Pacific Islander;
- *Asian*;
- American Indian or Alaska Native; and
- *Two or more races.*

The "Native Hawaiian or other Pacific Islander" category used to be "Asian or Pacific Islander." "Asian" is now its own category, and employers in the State of Hawaii are no longer exempt from filing EEO-1 reports as they were before this EEO-1 change. The Commission also adopted the extra "two or more races" category, perhaps the most controversial EEO-1 change. Although the Commission believes such data will prove useful in analyzing national employment trends, some employers and employer groups believe that this category will yield inaccurate data.

Job Categories. The old EE0-1 included nine job categories, while the revised EE0-1 includes ten (italicized words indicate revisions):

- *Executive/Senior Level* Officials and Managers;
- *First/Mid Level* Officials and Managers;
- Professionals;
- Technicians;
- Sales Workers;
- Administrative Support Workers;
- Craft Workers;
- Operatives;
- Laborers and Helpers; and
- Service Workers.

The Commission divided the old category "Officials and Managers" into the "Executive/Senior Level" and "First/Mid Level" subcategories. The intention is

(continued on page 4)

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

cleveland office:
55 public square, 4th floor
cleveland, ohio 44113
p: 216.696.4441
f: 216.696.1618

columbus office:
fifth third center, suite 1900
21 east state street
columbus, ohio 43215
p: 614.224.4411
f: 614.224.4433

www.zrlaw.com

Brain • Food • Breakfast Law Series • Volume II

Happy 2006! Are you keeping your new year's resolutions? This year, **Zashin & Rich Co., L.P.A.** will assist human resource professionals, managers and business leaders who have resolved to both eat breakfast and feed their brains more often.

Join Zashin & Rich attorneys for breakfast refreshments as they discuss topics from and take your questions about the ever-evolving world of workplace law in **Volume II** of our **3-part seminar series:**

February 16, 2006 • • • *Baby FMLA: the basics.* Think ABCs and building blocks. This seminar will feed you the fundamentals (and the muffins) you need to build a strong, healthy FMLA knowledge base. It will also allow you to ask all the questions you perhaps wanted to ask at other seminars but didn't, fearing they were too basic. Look for more information about this seminar in coming weeks.

March 23, 2006 • • • *Brainy FMLA: advanced instruction for FMLA whiz-kids.* If you have already mastered the basics and seek to nourish your growing hunger for FMLA knowledge (and bagels), this seminar is for you. It will cover complex scenarios, FMLA intricacies, and real-world problems that will challenge even the best-informed HR manager. Look for more information about this seminar in February.

April 27, 2006 • • • *Interplay: solving the FMLA-ADA-workers' comp leave of absence puzzle.* Even FMLA aficionados sometimes face confusion when other leave issues enter the mix. If an employee with a disability requests leave as a reasonable accommodation, what of the FMLA? What are an employee's rights and your obligations if an employee cannot return to work for an extended period of time due to a workplace injury? And what do you do with their health insurance in the meantime? It is imperative for employers to understand where the FMLA, ADA, and workers' compensation laws intersect in situations like these. This seminar will discuss that interplay and include a brief discussion of COBRA-related issues (and breakfast-related pastries). Look for more information about this important seminar in March.

All brain • food seminars:

- take place at our offices, located at 55 Public Square, 4th Floor, Cleveland, 44113. Call (216) 696-4441 for directions or more information.
- begin with registration at 8:30 a.m. and conclude at 10:00 a.m.
- are strictly limited to 20 attendees. You may register in advance by calling (216) 696-4441 (please ask for Nicale) or sending an email to nee@zrlaw.com.
- cost $30.00 per attendee, or $75.00 for advance registration for all 3 seminars.
- include breakfast refreshments.
- are led by Zashin & Rich attorneys who practice only workplace law all day, every day.
- include time for your questions.

Join us for the brain • food • breakfast law series. It's just good for you.

GOOD CENTS:

(continued from page 1)

establish an injured worker's deceit is through cross-examination. If the employee is lying, a skillful litigator can demonstrate that point.

• *Cases that involve lost time, or temporary total disability.* An IC award of temporary total disability ("TTD") to an injured worker is the ultimate penalty to an employer. A TTD award causes the Bureau of Workers' Compensation to set a "reserve" on the claim, which inevitably results in skyrocketing premiums for employers. Defeating lost time claims often requires vigorous cross-examination as to why the injured worker cannot return to work, even with restrictions, as well as convincing testimony from your own witnesses as to the employer's willingness and readiness to accommodate those restrictions. This is, quite simply, what lawyers do.

Hiring an attorney to represent you at Industrial Commission hearings is no guarantee of success, but it clearly levels the playing field if the claimant is represented. In most cases, it also significantly increases the employer's likelihood of success. You may decide that the risk of paying high legal fees outweighs the potential benefits of having a lawyer by your side. But ask yourself: in the long run, does that make good cents?

**Steve Dlott defends employers in all aspects of workers' compensation law. For more information about workers' compensation claims, or preventative claims administration or aggressive claims management, please contact Steve at (216) 696-4441 or spd@zrlaw.com.*

MORE IS MORE:

(continued from page 3)

for each subcategory of Officials and Managers to include individuals with equivalent influence and responsibility, even though their titles may be different at different organizations. The Commission also reassigned individuals in business and financial occupations from the old "Officials and Managers" category to the "Professionals" category. Finally, the Commission made some other minor revisions, such as changing "Office and Clerical" to "Administrative Support Workers" and "Laborers" to "Laborers and Helpers."

Will more EEO-1 categories yield more useful information to the EEOC? Only time will tell. Regardless, reporting employers must use the revised EEO-1 starting in the 2007 reporting cycle.

**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 the EEO-1 Report or specific reporting obligations, please contact Lois at (614)224-4411 or lag@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.

SUFFICIENT NOTICE MEANS SOMETHING HERE:

Sixth Circuit Finds for Employer in FMLA Notice Case

*By: Stephen S. Zashin**

If you are a company that lives by a clear, concise, well-communicated set of policies and procedures for requesting FMLA leave, you may, unfortunately, be familiar with the following scenario.

In Walton v. Ford Motor Co., the employer's internal procedures described how employees should request leave under the Family and Medical Leave Act ("FMLA"): by notifying the employer's labor relations department within two business days of an absence and completing the proper forms. The employer issued multiple notices to its employees about this procedure, posted the notices on bulletin boards, and attached a bulletin to employee paychecks about requesting FMLA leave. The bulletin specifically stated, "Do not request FMLA through security," referring to the employer's plant security office.

The employee injured himself at home on April 18, 2001. At work the next day, he told his supervisor that he had twisted his knee and planned to visit the employer's medical department. The nurse at the medical department diagnosed the employee with a knee sprain. The employee did not request leave or obtain any forms from the medical department, and he returned to work for the rest of the morning. At noon, the employee told his supervisor that he had a doctor's appointment that afternoon.

The employee's doctor instructed him not to work until a specialist could evaluate his injury. The next day, April 20, the employee called the plant security office and informed security that he had seen a doctor but could not return to work until he saw a specialist on April 24. Security logged the employee's call, indicated that he was absent because he was "sick," and recorded his expected date of return. The employee then saw a specialist who diagnosed him with a torn MCL, or superficial medial collateral ligament, and restricted him from work for four weeks. The following day, the employee again called the plant security office and informed security that he had seen a specialist and would return to work in four weeks. Security logged the employee's call, indicated that he was absent because he was "sick" and recorded his expected date of return. The employee never provided his supervisor or the employer's labor relations or medical departments with the reason for his absence or any medical documentation.

On April 27 the employer notified the employee via registered letter that he was to contact the labor relations department within five business days or face termination. The notice further provided: "If you are unable to work because of illness or injury, and so report to the Employment Office within the time stated above, you will be granted a sick leave of absence to cover the period of your disability upon presenting satisfactory evidence thereof." On May 4, the employer terminated the employee.

On May 9, the employee finally contacted the labor relations department and provided his union representative with medical documentation. Although the employee claimed that he did not receive the five-day notice until May 8, postal records confirmed that he received notice from the post office of the certified letter on April 30. The employee's union representative forwarded the medical documentation to the employer and provided the employee with FMLA paperwork. The employee submitted his paperwork to his employer on May 17. The employer nonetheless refused to reinstate the employee, who brought suit under the FMLA in federal court.

To prove that the employer interfered with his FMLA-qualifying leave, the employee had to establish that he gave his employer *notice* of his intention to take leave. An employer cannot deny FMLA leave because an employee failed to comply with internal procedures or failed to assert specific rights under the statute. However, an employee must give an employer enough information, verbally or otherwise, to impart his or her need for time off due to a serious health condition.

What does "sufficient notice" mean, then? It depends. Under these facts, the Sixth Circuit (covering federal courts in Michigan, Ohio, Kentucky, and Tennessee) held that the employee did *not* provide his employer with sufficient notice of his intent to take FMLA leave. Although the employee informed his supervisor that he had twisted his knee and planned to visit the plant's medical department, he returned to work *immediately following that visit*. Moreover, the employee never indicated to either the medical department or his supervisor that he would need time off for his knee, even after he initially visited his own doctor. Therefore, the Court found that the employee's supervisor did not have sufficient notice that the employee suffered a "serious health condition" requiring FMLA leave.

The Court likewise held that the employee's telephone calls to the security office were insufficient notice to his employer. Even if the employee's supervisor and labor relations department had received security's call-in log showing that the employee took a "sick day," that simply would not provide enough information. Moreover, the employer's five-day notice complied

(continued on page 6)

ZASHIN&RICH CO.,L.P.A.
55 public square
4th floor
cleveland, ohio 44113
attorneys at law

www.zrlaw.com

ARE SALES ENGINEERS OVERTIME-EXEMPT?

(continued from page 2)

routine sales activities. The DOL thus concluded that a sales engineer's primary duty is performing exempt engineering activities.

Why do I care about these questions? Your company many not employ a single sales engineer, but you may employ degreed individuals in specialized positions. Will you know whether or not those positions are exempt? Anyone?

**Michele Jakubs practices in all areas of employment litigation and wage and hour compliance and administration. For more information concerning FLSA exemptions or other compliance questions, please contact Michele at (216)696-4441 or mlj@zrlaw.com.*

SUFFICIENT NOTICE:

(continued from page 5)

with FMLA regulations, which require that an employer sometimes "seek additional information concerning an absent employee's condition." The regulations do not "seek to punish the employer when the employee fails to respond to such an inquiry."

The Court paid attention to the employer's many efforts to communicate proper procedure to employees. The Court also noted that the employee "knowingly and repeatedly violated [the employer's] express prohibition against requesting FMLA leave through [its] security office." Finally, the Court noted that the plant's security guards were not employees, but independent contractors–another reason the employee never informed his actual *employer* of his need for leave.

This decision demonstrates that "sufficient notice" means something within the Sixth Circuit–although its exact parameters remain undefined. This case also demonstrates that employers can defend against FMLA claims with clear policies that are thoroughly disseminated to employees.

**Stephen Zashin is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in defending employers in FMLA litigation, as well as counseling employers on FMLA compliance. For more information about notice issues or other questions about the Family and Medical Leave Act, please contact Stephen at (216)696-4441 or ssz@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.