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In this issue:

SOMETHING WICKED THIS WAY COMES: How to Spot and Get Ahead of a Class or Collective Action Forming in Your Workplace

*By: *Stephen S. Zashin and Christina M. Janice*

Hardly a day goes by without news that another employer has negotiated a settlement to a high profile class or collective action. Recent settlements such as the $55 million FedEx race discrimination case with its $15 million attorney fee award remind us that employment law cases are the fastest growing category of class and collective actions nationwide. In fact, employment cases now constitute over 10% of all class and collective filings in federal and state courts in arguably the most plaintiff-friendly state in the nation, California.

The settlements achieved in unlawful employment practices claims brought as class actions (in which an individual has the right to opt out), collective actions (in which an individual must opt in to participate), or a hybrid of both with federal and/or state law claims, can and do skyrocket into the hundreds of millions of dollars. These spoils are shared not only by "similarly situated" current or former employees who constitute the alleged "class," but also the specialized trial attorneys, experts, consultants and vendors who make lucrative livings from investing their resources into the cottage industry of these complex employment claims.

Experienced plaintiffs' lawyers know that most class and collective actions are settled before trial, to reduce a company's risk of a high jury verdict, punitive and liquidated damages, interest, spiraling attorney fees, costs, injunctive orders imposing on a company invasive and expensive programmatic relief, and a public and investor relations nightmare. This potential for big rewards with very little risk of ever going to trial has made the vehicle of class and collective litigation attractive to plaintiffs not only at the nationwide level, but locally with much smaller employers.

Because it only takes one disgruntled employee to file a class or collective action, virtually every employer bears a very real risk of the substantial disruption and expense of defending this kind of case and, in many instances, the governmental investigation that may come with it. A prudent employer will take proactive steps to recognize and protect against this highly invasive and costly form of litigation. The following general guidelines may prove useful:

1. *Know Your Risks.* Many federal and state claims for unlawful employment practices can be brought as class or collective actions, including but not limited to claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act ("ADEA"), the Employee Retirement Income Security Act ("ERISA"), the Equal Pay Act ("EPA"), and the Fair Labor Standards Act ("FLSA"). In fact, the fastest growing and one of the most challenging areas of employment litigation to defend is a company's wage and hour practices, including classification of employees and methods for calculating and paying overtime.
2. *Know the Players.* Class action attorneys frequently join together in loose regional or nationwide consortiums to investigate and finance claims brought as class or collective actions. They often will form joint ventures with governmental agencies such as the EEOC to take advantage of the investigatory powers such agencies have, and the particular types of litigation they can bring. The governmental agency benefits by the partnership through the opportunity to use the pending claims to impose extensive programmatic relief on a company. This programmatic relief may require a complete overhauling of the offending company's policies, procedures and practices, ongoing monitoring and reporting for anywhere from one to seven years, and the hiring of compliance per-

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URINE TROUBLE: Most Illicit Drug Users and Heavy Alcohol Users Are in the Workplace and May Pose Special Problems

*By: *Steven P. Dlott*

The Substance Abuse and Mental Health Service Administration ("SAMHSA"), a division of the Department of Health and Human Services, recently released a study finding that approximately 16.4 million current illegal drug users and approximately 15 million heavy alcohol users hold full-time jobs. The study was based on data collected between 2002 and 2004 from a sample of 128,000 persons aged 18 to 64.

The study found the highest rates of current illegal drug use were among food service (17.4 percent) and construction workers (15.1 percent). Highest rates of current heavy alcohol use were found among construction, mining, excavation and drilling workers (17.8 percent), and installation, maintenance, and repair workers (14.7 percent).

According to the study, illegal drug use and heavy alcohol use are associated with higher levels of absenteeism and frequent job changes. For example, nearly twice as many current illegal drug users skipped one or more days of work in the past month compared with workers who did not abuse drugs. Drug users were also far more likely to report missing two or more work days in the past month due to illness or injury compared with workers who did not abuse drugs.

The study also found that:

1. Among full-time workers who reported current illicit drug use, 12.3 percent said they had worked for three or more employers in the past year compared with 5.1 percent of non-abusing workers;
2. Nearly a third of current illicit drug users said they would be less likely to work for employers who conducted random drug testing;
3. Approximately 30 percent of the full-time work force reported that random drug testing took place in their current employment setting with workers in transportation and material moving (62.9 percent) and protective services (61.8 percent) most likely to be subject to random testing; and
4. Of the professions least likely to be subject to random testing, workers in legal occupations and arts, design, entertainment, sports, and medical, only ten percent reported working for an employer who tested for illegal drug or alcohol use on a random basis.

While unemployed persons had higher percentages of current illegal drug and heavy alcohol use, because full-time workers constitute approximately two-thirds of the adult population, the actual number of those using illegal drugs was higher among full-time workers.

Employers should be aware of the risks of their employees' illegal drug and heavy alcohol use and consider implementing a random drug testing policy to avoid the loss of productivity and severe injuries associated with worker drug and alcohol abuse.

***Steven P. Dlott** *heads the firm's Workers' Compensation Department, is an OSBA Certified Specialist in Workers' Compensation law, and has extensive experience in defending employers in workers' compensation matters. For information or assistance in any workers' compensation-related matter, please contact Steve at 216.696.4441 or spd@zrlaw.com*

Z & R SHORTS

Zashin & Rich welcomes Britt Rossiter to its Employment and Labor Group

Zashin & Rich recently welcomed **Britt Rossiter** to the firm and to its expanding Employment and Labor Group. Britt defends employers in a wide variety of labor and employment matters, including harassment, discrimination, and federal and state civil rights. Britt is licensed to practice law in Ohio and California and has defended employers in employment based disputes in Ohio, California and throughout the country. He has extensive experience in class and collective action litigation. *Law and Politics* and *Cincinnati* magazines named Britt an "Ohio Super Lawyer Rising Star" in Labor and Employment Law in 2006 and 2007.

Please join us in welcoming Britt to Z&R!

Upcoming Seminars

On October 24 and 25, 2007, **Stephen Zashin** and **George Crisci** will speak at the Midwest Labor and Employment Law Conference in Columbus, Ohio presented by the Ohio State Bar Association. George will address public records requests and public sector obligations concerning records requests. George will also speak on the topic of defending and handling mandamus actions if records are not produced appropriately.

Stephen will present "The Latest in Leave Law." This presentation will cover the latest trends in leave law with emphasis on FMLA, pregnancy, ADA and workers' compensation as they relate to employee leave. The latest FMLA-related case law trends will be addressed as well as how pregnancy-related leave is treated under FMLA and non-FMLA scenarios and insight as to how workers' compensation-related leaves should be treated.

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

KNOCKED-UP: Proposed Changes Would Result in Added Protections for Pregnant Workers

*By: *Britt J. Rossiter*

The Ohio Civil Rights Commission ("OCRC") recently held hearings relative to proposed regulatory changes to the Ohio Administrative Code concerning pregnancy discrimination. If the proposed changes take effect, pregnant employees – even those not eligible for FMLA leave – would be entitled to 12 weeks of maternity leave as soon as they are hired. If adopted, Ohio would join 18 other states that require employers to offer maternity leaves that exceed those mandated by the FMLA.

While the FMLA applies only to "covered" employers – those with 50 or more workers – and "eligible" employees – those who have worked at least one (1) year and 1,250 hours during the preceding 12 months – if enacted, the Ohio regulations would contain a less stringent standard. The Ohio regulations would apply to virtually all employers and employees.

If the new regulations are enacted, Ohio employers would be required to grant pregnant employees at least 12 weeks of unpaid leave, regardless of the size of employer or length of service of the employee. An exception, however, includes employers who are able to demonstrate a business necessity for not following this requirement.

While this change codifies a 12 week leave requirement for most Ohio employers, Ohio courts have previously interpreted the administrative code to provide for a leave of absence for a reasonable period of time on account of childbearing. This requirement applies regardless of whether an employer has a maternity or leave of absence policy. According to the Ohio courts that have examined this provision, a "reasonable period of time" may exceed 12 weeks depending on the circumstances.

The proposed regulations also bring about other significant changes. Perhaps most importantly, employers would be required to offer light-duty positions to pregnant employees if those positions are offered to workers temporarily disabled as a result of an on-the-job injury. This requirement represents a substantial increase in the protections afforded pregnant women under the current law. Employers who have a light duty program would have to make that program available to employees "affected by pregnancy, childbirth, or a related medical condition."

Finally, under the proposed regulations, employers would be required to reinstate employees to their original job, or to a position of like status and pay, upon her return from pregnancy leave.

Testimony from the hearing held before the Civil Rights Commission has been compiled and presented to the Commissioners for review. According to published media reports, the OCRC has indicated that it is revising its proposal after business groups said the rules would hurt small businesses and Ohio's economy. The Commission's chair further stated that the Commission may be willing to negotiate on the number of weeks of guaranteed leave in light of opposition from the Ohio Chamber of Commerce and others. It remains to be seen what modifications, if any, will be made to the proposed regulatory changes.

Employers should be aware of the potential changes to the Ohio Administrative Code and the increased protections afforded to pregnant workers. Any changes or modifications to an employer's policies should be reviewed to ensure that they comply with Ohio and federal law.

***Britt J. Rossiter** *has extensive experience representing employers in litigating and arbitrating workplace disputes in Ohio, California and throughout the country. For more information about pregnancy discrimination or any other employment-related tort, please contact Britt at 216.696.4441 or bjr@zrlaw.com.*

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sonnel. Pay attention to the public profiles of attorneys who represent your employees in their claims of unlawful workplace practice, and the agency personnel assigned to any complaints, charges or investigations.

3. *The Numbers Game.* Class and collective actions for unlawful discrimination are not just brought for obvious cases of intentional misconduct. While an employee or group of employees may not appear to have strong individual claims, they may be able to bring a "pattern and practice" claim that can be proven through their use of economists, industrial psychologists or other statisticians. These experts are retained to scrutinize your company's hiring, pay, promotions, discipline, and other historical data and personnel records. Their task is to calculate any statistically significant disparities they observe in terms or conditions of employment that favor one population of employees over another. Where any such disparity, real or imagined, is calculated "on paper," the employer then faces the daunting task of digging beneath the data to justify the numbers based on legitimate, non-discriminatory reasons. That a company does not set out to discriminate does not protect it from a claim that the effects of discrimination can be found in its statistics. To protect itself, your company must monitor its own data to anticipate and remedy any statistically significant disparities in terms and conditions of employment among its workforce.
4. *Launch Other Protective Countermeasures.* There are many countermeasures that can aid a company in preventing or defending a class or collective action brought by employees, plaintiffs' counsel and governmental agencies. Some of these are listed here. To afford your company the greatest protection:
   * Develop and retain thorough written employment policies and monitor federal and state law changes that impact your policies.
   * Develop consistent discrimination, harassment and other EEO training modules and implement them at all levels of your company.
   * Develop and enforce an employee evaluation protocol and promotional posting process that utilizes objective criteria to the greatest extent possible while reducing the risks of subjectivism, playing favorites, or vesting too much control in one member or a few members of management.
   * Develop and publicize one or more vehicles for employees to bring and have investigated confidential complaints, and consistently train your personnel assigned to handle them.
   * Maintain complete and well-organized personnel records and workforce data in such a format that your defense team can access and review it on short notice.
   * Implement and adhere to a strict document and electronic record retention policy.
   * Carefully craft and implement an alternate dispute resolution program culminating in arbitration as a contractual substitute to the forum of a courtroom.
   * Assign someone in your company to monitor the implementation and efficacy of your countermeasures with the authority to triage your management to grow and enhance these countermeasures as required.
   * Conduct annual compliance audits across all regulated aspects of your employment practices.
   * Make sure your company carries sufficient insurance to withstand a class or collective action.

Your investment in these and other countermeasures will give you valuable intelligence on your employment practices and any "problem areas" while potentially saving you tens of millions of dollars.

5. *Keep a Watchful Eye on the Horizon.* Even the most proactive company may sense something brewing on the horizon. Rarely does a class or collective action come without warning. Monitor your EEOC or state civil rights agency charges. Look for clusters of employees or patterns of complaints and investigate them thoroughly. Know how your company is perceived among your employees, in the marketplace and on the Internet. Coordinate and communicate your company's mission, culture, diversity and sensitivity. Take immediate and effective steps to remedy complaints brewing among groups of employees. Enable and empower your human resources personnel to get ahead of the ball by anticipating where clustered complaints may spread. Take decisive steps to stop an infectious practice that could be toxic to your company.

Protecting your company against the threat of class or collective litigation for unlawful employment practices is both a business and cultural necessity in today's litigious environment. Your company's vigilance can help prevent it from becoming another headline.

***Stephen S. Zashin** and **Christina M. Janice** defend employers in class and collective action litigation, pattern and practice statistical cases, compliance partnerships, and all aspects of employment related torts and violations of state and federal employment law. For more information on class and collective actions and corporate measures to protect against them, please contact Stephen or Christina at 216.696.4441, ssz@zrlaw.com or cmj@zrlaw.com.*

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RESTORATION CONSTERNATION:

Is Light Duty "Leave" Under the FMLA?

*By: Patrick M. Watts**

A light duty assignment may qualify as "leave" under the FMLA, even if an employee is not absent from work. While no court has directly addressed this question, Department of Labor regulations provide some guidance.

> ***the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of 'light duty.'

See 29 C.F.R. § 825.220(d).

The regulations provide that an employee may not waive his right to protection under the FMLA, but may voluntarily accept an employer's offer of "light duty" while recovering from a "serious health condition."

The Seventh Circuit Court of Appeals recently addressed the issue of whether an employee is entitled to his regular rate of pay while on light duty. In Hendricks v. Compass Group, USA, Inc., 2007 U.S. App LEXIS 18606, the plaintiff employee worked as a utility van driver for the defendant employer and made $12.23 an hour. Hendricks injured her rotator cuff while at work, applied for, and received workers' compensation benefits. One week later, she returned to work to a light duty assignment at a rate of $9.00 per hour. Eventually, she exhausted her 12 week FMLA leave and did not return to her previous position.

Hendricks sued her employer seeking $3.23 for each hour she worked on light duty – the difference between her regular rate of pay and what she was paid for the light duty work. She contended that she was on "FMLA light duty" and that her employer was required to compensate her at her normal utility driver rate. The court disagreed.

The Hendricks court concluded that there is "no such thing as 'FMLA light duty.'" The court observed that the statute and regulations do not address the rate of pay an employee must receive while on light duty because that matter is addressed by workers' compensation. Moreover, the Court noted that the FMLA requires employers to restore employees to the same or an equivalent position, but the requirement only applies if the em-ployee is physically able. Hendricks was not physically able to return to her former position or to an equivalent position. As such, the court found that her employer was not required to pay Hendricks her normal rate while on a light duty assignment.

The Hendricks court, however, failed to address a significant issue – whether an employee is entitled to FMLA protection while receiving workers' compensation benefits and working light duty. Though the court noted that the regulations "contemplate" light duty when an employee receives workers' compensation and FMLA leave concurrently, it failed to address whether an employee participating in a workers' compensation light duty program is also entitled to restoration to the employee's position pursuant to the FMLA.

Employers should evaluate their leave policies to ensure that they are in compliance with the FMLA and with their state's workers' compensation statutes. The result in Hendricks leaves open the possibility that employees receiving workers' compensation benefits who are working a light duty assignment may be entitled to the restorative benefits of the FMLA.

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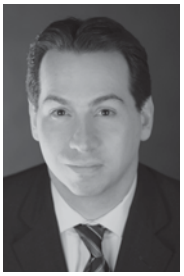

AWOL: States Enacting Family Military Leave Acts

*By: Patrick O. Peters**

With record numbers of soldiers, both active duty and reserve, and their families facing extended tours of duty overseas, a growing number of states are enacting Family Military Leave Acts. Not to be confused with the "other" FMLA, states' Family Military Leave Acts provide certain protections to family members of military personnel during periods of deployment including unpaid leave entitlements.

While each state law varies, generally the acts allow family members of active duty military personnel to take unpaid leave prior to, immediately following, and during their family members' deployment. While Ohio has not passed a Family Military Leave Act, Illinois, Indiana, Maine, Minnesota, Nebraska and New York have enacted some form of Family Military Leave law.

Under the Illinois Act, employers who have between 15 and 50 employees must provide up to 15 days of unpaid leave to employees who are either the spouse or parent of soldiers called into active duty. Employers with more than 50 employees must provide such employees with up to 30 days of leave. The Illinois Act contains eligibility and notice requirements and employees are entitled to restoration in the same or an equivalent position held prior to the leave. Additionally, employees, at their own expense, may continue all employ-

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ment benefits. Finally, under the Illinois Act, an employer may require an employee to exhaust all accrued vacation leave, personal leave, compensatory leave and any other leave (excepting sick and disability leave) before granting an employee leave.

Under the Indiana Military Family Leave Law, which went into effect on July 1 of this year, eligible employees are entitled to 10 days of unpaid leave but may only take the leave during the 30 days before or after active duty or while the active duty soldier is on leave. Under the Maine Family Military Leave Law, effective September 20, 2007, employers with 15 or more employees must grant eligible employees leave during active deployment while the soldier is on leave and during the 15 days prior to and following deployment.

The New York Family Military Leave Law, which has been in effect since 2006, contains no notice and few eligibility requirements. In New York, the spouse of a – who works at least 20 hours per week – may take up to 10 days unpaid leave while the person in the military is on leave from active duty.

In Minnesota, employers must grant the family member of a person killed or injured while on active duty in the military up to 10 days of unpaid leave. An eligible employee need only provide the employer with as much notice as possible prior to taking leave. While there is no requirement that an employer grant leave to family members during periods of active duty deployment – either before, immediately after, or while the soldier is on leave – employers are required to provide up to one (1) day's leave for family members to attend send-off or homecoming ceremonies.

Like Illinois, Nebraska employers with 15 to 50 employees must provide up to 15 days of unpaid leave when a member of the military is called to active duty for 180 days or longer. Employers with more than 50 employees must provide 30 days unpaid leave. The Nebraska's law contains eligibility and notice requirements and employees are entitled to restoration in the same or an equivalent position held prior to the leave. While on leave, employees can continue to receive employment benefits at their own expense.

Clearly, it is important for employers who operate in these states to be familiar with these Family Military Leave laws.

***Patrick O. Peters** *practices in all areas of employment litigation including military leave. For more information concerning military leave, please contact Pat at 216.696.4441 or pop@zrlaw.com.*

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