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EMPLOYMENT LAW QUARTERLY

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TOOLS OF THE TRADE:

Properly Verifying Employee FMLA Leaves

*By: Patrick M. Watts**

If you are an employer with more than fifty employees, you have probably faced the task of validating an employee's Family and Medical Leave Act ("FMLA") leave of absence. Generally speaking, the FMLA provides employers with four methods of validating an employee's need for leave: certification, clarification, second (and third) opinions, and recertification. These valuable employer tools are also riddled with the complexity of exceptions, prohibitions, and strict usage rules that employers must clearly understand prior to applying any verification method.

Certification: require and double check CHPs. The first method an employer may use to validate an employee's FMLA leave is requiring the requesting employee to provide it with a completed "Certification of Healthcare Provider," or CHP. The employer must provide the employee with a CHP form within two days after the employee provides notice that he or she needs a leave of absence that may be FMLA-qualifying. A sufficient CHP under the FMLA includes: (1) the date the serious health condition began; (2) the probable duration of the condition; (3) relevant medical facts; and (4) a statement that the employee is unable to work. Zashin & Rich recommends that employers utilize the Department of Labor's ("DOL") template CHP, or "WH Form 380."

The employee must return the CHP to the employer within the time period that the employer specifies. However, the employer must allow the employee at least fifteen (15) days to return the form. If the employee fails to provide the form within the specified time, the employer may delay, and possibly deny, the protected status of the employee's leave. If the employee provides an incomplete CHP, the employer must notify the employee and provide him or her with a reasonable opportunity to cure the deficiency. If the employee then fails to cure the deficiency, the employer may reject the employee's request for leave.

Under the FMLA, a CHP is sufficient to validate an employee's leave of absence if (1) the employee completes the CHP; (2) the employee provides the CHP within the specified time period; (3) the CHP indicates that the employee requires time off from work due to a serious health condition; and (4) a health care provider signs the CHP. Some courts have held that if the CHP is left unchallenged when provided, an employer may not later challenge the CHP's validity in litigation. Moreover, according to the DOL, an employer cannot unilaterally reject a CHP that meets the above criteria. Instead, the employer should utilize the other methods of validation that the regulations provide.

Clarification: contact the employee's health care provider. Upon receiving a complete CHP, the employer may seek clarification if the employer first obtains the employee's permission. However, the employer may contact the employee's healthcare provider only through another healthcare professional.

If the CHP is complete, the employer may seek clarification only of information already contained in the CHP. The employer cannot seek additional information from the healthcare provider that does not clarify information already provided.

Recertification: require the employee to recertify the condition. The FMLA's regulations cover four recertification situations: (1) pregnancy, chronic conditions, and permanent conditions; (2) conditions that cause an incapacity of more than thirty days; (3) intermittent conditions; and (4) all other situations not covered under (1) through (3).

An employer may request recertification every thirty days–but only in connection with an absence for pregnancy, chronic conditions or permanent conditions. For conditions involving incapacity of more than thirty days, an employer may request recertification only after the initial duration of incapacity stated in the employee's CHP passes. For intermittent leave, an employer may request recertification only at an interval equal to or greater than the period specified in the employee's CHP.

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FALLING ON DEAF EARS:

Willful Disregard of Safety Precautions Cuts off Comp

*By: Steve P. Dlott**

In a case that generated national publicity, the Ohio Supreme Court recently denied temporary total disability compensation to an employee whose reckless conduct precipitated his work injury.

In *State ex rel. Gross v. Industrial Commission*, a sixteen-year-old employee working at a KFC restaurant sustained severe burns after he lifted the lid of a pressure cooker containing boiling water. The employee filed a workers' compensation claim and began receiving temporary total disability benefits ("TTD"), which an employee injured on the job can receive for lost earnings while recovering.

The company investigated the accident and determined that the employee had willfully failed to follow safety instructions and procedures regarding the proper use and operation of the pressure cooker. The employee handbook specifically advised employees to never boil water in a pressure cooker to clean it. The handbook warned employees that violating any safety guideline that caused an injury was a dischargeable offense. Additionally, a warning label affixed to the top of the pressure cooker reminded employees not to close the lid with water or cleaning agents in the pot.

These were not the only warnings the employee ignored. The employee's supervisor had previously warned him not to put water into the cooker to clean it. The investigation further revealed that on the night of the accident, the employee's supervisor directed him to drain the water from the cooker. The employee ignored his supervisor, instead leaving water in the cooker and heating it with the lid on. Moments later, a second co-worker warned the employee not to open the cooker's lid because the now boiling water was under extreme pressure. The employee ignored all warnings, including the warning label on the cooker, and opened the lid. As a result, he injured himself and two of his coworkers. At the conclusion of its investigation, the company fired the employee.

The employer then asked the Industrial Commission of Ohio to terminate the employee's TTD compensation as of the date of his termination. The employer contended that the employee's termination constituted a voluntary abandonment of employment, which can disqualify an employee from TTD benefits. Generally speaking, "voluntary abandonment" means a person leaves his or her job for a reason unrelated to the injury. The Industrial Commission agreed that the employee's termination for workplace misconduct constituted a voluntary abandonment of his employment and terminated the employee's TTD benefits. The employee took his case to the Tenth District Court of Appeals, which reversed the Industrial Commission's decision. The Company appealed to the Ohio Supreme Court.

On appeal, the employee denied that he abandoned his employment. The employee argued that if a claimant is already disabled at the time of separation from employment, and thus does not have the physical capacity for the employment, there can be no abandonment. The employee claimed, therefore, that because his doctor certified temporary total disability months before he was fired, he could not have abandoned his job. The Court disagreed, finding that the employee's disability and the misconduct occurred simultaneously. Moreover, the Court reasoned, "the date of disability onset preceded the date of termination only because the Company investigated the accident first rather than firing him on the spot, which, given the gravity of the misconduct, may not have been unwarranted."

The Court also rejected the appellate court's application of its precedent, including *Coolidge v. Riverdale Local School District*, to classify the employee's separation from employment as involuntary. *Coolidge*, the Court explained, was an employment case that did not involve the claimant's eligibility for TTD compensation or any other workers' compensation law. The employee in this case "was not fired because of absenteeism or any work rule or policy related thereto" but rather "because he directly and deliberately disobeyed repeated written and verbal instructions not to boil water in the pressurized deep fryer and injuries followed."

Finally, the employee argued that allowing his negligent act to bar TTD compensation would reinsert negligence into Ohio's workers' compensation system, the purpose of which is to compensate injured employees regardless of fault. The Court rejected the employee's characterization of his behavior as negligent, noting that he willfully ignored repeated warnings not to engage in the prohibited conduct.

The facts of this case illustrate the unfortunate truth that thoughtful, thorough safety procedures will not automatically trigger employee compliance. Employers should consider this decision as an opportunity to examine not only their own safety procedures, but their follow-through as well. Review employee manuals and ensure that they clearly identify and prohibit dangerous work conduct, as well as designate such conduct as a dischargeable offense. Insist that front-line supervisors enforce compliance with safety procedures by holding employees accountable for failing to follow them. A thoroughly written em-ployment manual is meaningless without vigilant enforcement of its contents. Such precautions may not eliminate all workplace accidents, but they may, as illustrated in this case, dramatically reduce an employer's financial exposure when a non-compliant employee files a claim following a workplace injury.

***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*

CONGRESS POKES THE BEAR –

"Employee Free Choice Act" Passes the House, Awaits the Senate

*By: George S. Crisci**

On March 1, 2007 the U.S. House of Representatives passed H.R. 800, the "Employee Free Choice Act" ("EFCA") by a final vote of 241-185 with eight abstentions. The bill, as written, amends the provisions of the National Labor Relations Act ("NLRA") to permit union recognition based solely on signed employee authorization cards, impose limitations on the amount of time the parties have to negotiate a first contract, establish a mandatory dispute resolution procedure at the expiration of the initial bargaining period and increase the penalties on employers who violate the NLRA. This bill, if it passes the Senate and is signed into law, would be the most significant change to the NLRA since the 1947 passage of the Taft-Hartley Act.

At present, the National Labor Relations Board ("NLRB") exhibits a clear preference toward a Board-certified election as the primary method for establishing union representation. Although an employer may voluntarily recognize a union informally or through a card check, the employer is not required to recognize a union based solely on card checks. If an employer questions whether a union represents the majority of the employer's employees after a formal demand for recognition, the employer may file a petition with the NLRB requesting an election. The NLRA also provides that the employees and/or their bargaining representative may file a petition for election upon a showing that at least 30% of the employees in the proposed bargaining unit support the Union.

Upon a proper showing of interest, the NLRB conducts a secret-ballot election among the employees in the proposed bargaining unit. Both the Union and the employer are permitted to campaign during the time leading to the election, so long as neither party coerces or threatens employees regarding their decision. Once employees vote, the votes are tallied and the union is recognized as the bargaining representative for employees within the proposed bargaining unit if it obtains a majority of the votes.

Once a union is recognized, the parties have an obligation to bargain in good faith toward an agreement. So long as the parties bargain in good faith, there is no requirement that the parties actually reach an agreement. Rather, the parties are free to agree or not agree so long as each bargains in good faith with respect to the terms and conditions of employment.

If passed and signed into law, the EFCA would legislatively alter the Board's stated preference for a Board-conducted election. The EFCA amendment would require the NLRB to recognize a union *without an election* "[i]f the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative." To implement this legislative mandate, the EFCA also authorizes the Board to develop procedures "to be used by the Board to establish the validity of signed authorizations designating bargaining representatives."

In addition to broadening the permissible methods for recognition of a union, the EFCA imposes time limits on negotiations for an initial contract between an employer and a union. The parties must meet within 10 days of receiving a written request from the other party to bargain collectively. If the parties are unable to reach agreement after 90 days, either party may contact the Federal Mediation and Conciliation Service ("FMCS") to request mediation. The FMCS will then conduct mediation.

If the parties fail to reach a contract after 30 days of mediation, the EFCA requires the parties to submit the remaining open issues to an arbitration board established in accordance with FMCS rules and regulations. The arbitration panel will render a decision on the open issues binding on the parties for two years.

The EFCA also stiffens penalties and enforcement during organizing drives. Unfair labor practices are given investigative priority pursuant to Section 10(l) of the NLRA. Additionally, the EFCA permits the NLRB to seek injunctive relief upon an unfair labor practice *charge* of misconduct during an initial election campaign. Prior to this amendment, the NLRB had power under Section 10(j) of the NLRA to seek injunctive relief upon the issuance of an unfair labor practice complaint. These injunctive provisions are buoyed by increased financial penalties. Thus, if an employer is found to have discriminated against an employee based on his or her union activities during a representation campaign, the employer is liable for back pay and liquidated damages equal to two times the amount of back pay. Moreover,

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TOOLS OF THE TRADE:

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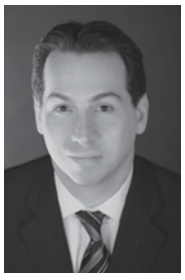
Employers may request recertification every thirty days for all other circumstances.

However, these rules have a few important exceptions. Employers may request recertification sooner than the above rules allow if: (a) the circumstances described in the original CHP change significantly, or (b) the employer receives information that casts doubt on the employee's reason for the leave. An employer can also require recertification upon a request for an extension of leave, so long as the leave is not due to pregnancy, a chronic condition, or a permanent condition. Finally, if an employer requires an employee to attain recertification, the employer may not then also require the employee to attend a second or third opinion concerning that recertification.

Second (and third) opinions. In addition to clarifying and seeking recertification of an employee's condition, an employer may request a second medical opinion if the employer has reason to doubt the validity of an employee's CHP. An employer must, however, grant an employee a provisional leave of absence while awaiting the second opinion. The employer may choose the second opinion physician, but the chosen physician cannot be a regular provider of services to the employer. The employer must bear the cost of the second opinion and any reasonable out-of-pocket travel expenses that the employee incurs to obtain the second opinion.

The employer may require a third opinion if the second opinion conflicts with the information contained in the initial CHP. The employee and the employer must jointly agree on the third-opinion healthcare provider. The third opinion is final and binding. The employer must pay for the third opinion as well as any reasonable out-of-pocket travel expenses the employee incurs to obtain the third opinion. An employer must provide an employee with a copy of any second or third opinion within two days of the employee's request.

Employers with a thorough understand of these FMLA tools of the trade have the ability to not only avoid liability for improper administration of employee leave, but also to curb abuse.



***Patrick M. Watts** is an OSBA Certified Specialist in Labor and Employment Law. Patrick practices in all areas of employment litigation with a focus on FMLA litigation and compliance. For more information about FMLA leave validation or other FMLA compliance issues, please contact Patrick at (216) 696-4441 or pmw@zrlaw.com.*

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employers who willfully or repeatedly commit unfair labor practices during representation campaigns are subject to a civil penalty of up to $20,000 for each violation.

Should the EFCA become law, employers will want to redouble their efforts to prevent unionization prior to any organized union campaign. The best employer defense against unionization is to ensure that employees have no reason to seek a union in the first place.

***George S. Crisci** is an OSBA Certified Specialist in Labor and Employment Law. George practices in all areas of public and private employment and labor law. For more advice on traditional labor law issues or other employment law inquiries, please contact George at (216) 696-4441 or gsc@zrlaw.com.*

Z & R SHORTS

Zashin & Rich welcomes two OSBA Certified Specialists to its Employment & Labor Group

Zashin & Rich recently welcomed two attorneys to the firm and to its expanding Labor and Employment Group. **Patrick Watts** received his undergraduate degree from the College of Wooster and his law degree from The Ohio State University Moritz College of Law. Patrick was admitted to practice before the Ohio Supreme Court in 2002. He is also admitted to practice before the U.S. District Courts for the Northern and Southern Districts of Ohio as well as the U.S. Court of Appeals for the Sixth Circuit.

Patrick is certified by the Ohio State Bar Association as a Labor and Employment Law Specialist. He has litigated and advised clients on a wide variety of labor and employment law matters, including Fair Labor Standards Act compliance, Family and Medical Leave Act issues, and various anti-discrimination laws.

George Crisci also recently joined Zashin & Rich. George has practiced employment and labor law in both the public and private sectors for more than 23 years. George is an Ohio State Bar Association Certified Specialist in Employment and Labor Law. *Law and Politics* and *Cincinnati* magazines named George an "Ohio Super Lawyer" in Labor and Employment law in 2004, 2005, 2006 and 2007.

George received his undergraduate degree from the College of Wooster, where he graduated with Departmental Honors and Phi Beta Kappa. He received his law degree from Case Western Reserve University School of Law, where he was a member of the Case Western Reserve Law Review and graduated Order of the Coif. George is admitted to practice law in the State of Ohio, the United States District Courts for the Northern and Southern Districts of Ohio

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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 workplace law.

SEPARATION ANXIETY: No Harm, No Injunctive Relief

*By: Lois A. Gruhin**

In *Aero Fulfillment Services, Inc. v. Tartar*, a Vice President of Sales at a Cincinnati, Ohio-based fulfillment-services company resigned after fifteen years of employment to take a similar position at another fulfillment-services company. This prompted his former employer, Aero to seek injunctive relief in court–but not promptly enough to get it. Not that timing was its only problem.

Aero originally hired the employee in 1990. In 1998, the employee signed an employment agreement that contained non-competition provisions. The agreement restricted the employee from disclosing confidential information. It further restricted him, for twelve months following his separation from the company, from soliciting the company's employees; and from competing within 100 miles of Cincinnati, Ohio. The agreement further stipulated that a violation of the covenants would result in irreparable injury and damage to the company.

The employee resigned in January 2005 and accepted a position with a fulfillment-services company based in Massachusetts. Six months later, Aero filed its complaint against the employee. About four months after *that*, in October 2005, Aero filed for injunctive relief. Aero claimed that the employee violated his agreement by disclosing its confidential information and trade secrets and using that information to solicit business in his new employment. At issue was "the Brock Study," a marketing study that the employee used in a presentation at a fulfillment-services trade conference. Aero alleged that the employee used this information to solicit fulfillment-industry business.

To obtain a preliminary injunction, Aero had to establish, among other things, that it would suffer irreparable harm if the court did not grant the injunction. After a three-day hearing, the trial court denied Aero's request, holding that it failed to present convincing evidence of irreparable harm, even if the employee had breached the confidentiality provision of his agreement.

An Ohio appellate court agreed, holding that Aero failed to show irreparable harm, for a number of reasons. First, Aero failed to show a threat of harm sufficient to justify equitable relief. The First District Court of Appeals explained that the company need not prove actual harm, as the mere threat of harm may be sufficient to grant an injunction, as it previously held in *Procter & Gamble Co. v. Stoneham*. However, "where the threat of harm is speculative, the moving party must do more than make a conclusory allegation of the threat of harm" to obtain an injunction. Otherwise, said the court, anyone could get one.

For example, in *Stoneham*, the evidence was "overwhelming." The employee in that case worked in Procter & Gamble's hair care division as a senior-level manager responsible for international marketing. In that role, he became familiar with all things hair-conditioning: development of new products; revitalization of existing products; product-specific market research results; product-specific financial data; technological developments in existing and new products; and a ten-year marketing plan for a best-selling hair-conditioning product.

When the employee went to the international division of a company whose hair care products competed with Procter & Gamble's products, Procter & Gamble went to court. In that case, a threat of harm existed because the employee possessed years of product-specific knowledge and began working in a position that caused him to directly compete with his old employer and his old product line. The *Stoneham* decision was based on the "inevitable-disclosure doctrine." According to this doctrine, a threat of harm warranting injunctive relief can be shown by facts establishing that an employee with detailed and comprehensive knowledge of an employer's trade secrets and confidential information has begun employment with a competitor in a substantially similar position to that held during the former employment.

Aero could not establish that the inevitable-disclosure doctrine applied to its case. Compared to the product-specific data in *Stoneham*, which the court described as "tangible, highly technical, and specific," Aero's information was general marking data about the service industry in which the company competed. The court found that Aero's competitors could have obtained the same data through their own research. Moreover, Aero failed to show that the Brock Study contained critical information, and further failed to explain how this information would have given the employee and his new employer any competitive advantage.

It certainly did not help Aero's case that it waited so long to file for injunctive relief. The company waited three months after it filed its complaint, almost ten months after the employee left, and little more than two months before the employee's non-competition and non-solicitation covenants expired to seek an injunction. The court found that this "lack of urgency" in filing for injunctive relief "militated against a finding of irreparable harm." Finally, the court found that the company failed to treat the Brock Study as confidential.

Personnel transitions can be painless or painful. Depending on your business, they can also be harmful to your company's best interests. Pick your lesson from this case, as there are several. First, be realistic about your non-competition agreements and what they should protect. Chances are that not every piece of paper or data under your roof is a protectable trade secret, even if you treat it as confidential property. Second, if your company actually considers certain materials to be confidential trade secrets, treat them that way: mark them appropriately, lock them up, restrict access to them and/or password-protect them. Finally, if a situation warranting legal action arises following a key employee's departure, take appropriate action as soon as possible.

***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 non-competition issues, 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.

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and the Eastern District of Michigan, the Sixth Circuit Court of Appeals, and the United States Supreme Court.

Please join us in welcoming Patrick and George to Z&R!

Steve Dlott Receives OSBA Certification as Specialist in Workers' Compensation

Zashin & Rich is also proud to announce that Steve Dlott is now an Ohio State Bar Association Certified Specialist in Workers' Compensation Law.

Andrew Zashin among Top 100 Ohio Super Lawyers

Andrew Zashin was recently included in *Ohio Super Lawyer* magazine's list of the "Top 100 Super Lawyers" in the State of Ohio. Only four family law attorneys were similarly recognized from a field of almost 30,000 lawyers. *Northern Ohio Live* magazine also included Andrew in its list of the "Top 50 Super Lawyers" in the Cleveland area, an honor accorded to only two family law attorneys.

Upcoming Seminars

Steve Dlott and **Stephen Zashin** will present a free seminar with **Dr. Kevin Trangle** on March 30, 2007 at the Monarch Building, 5885 Landerbrook Rd. in Mayfield Hts., Ohio from 9:00 a.m. to 11:00 a.m. Zashin & Rich and Ben Katz of Cedar Brook Financial Partners invite you to attend this informative crash course on warning signs, protective tips, and other practical advice for avoiding workplace disasters like out-of-control absenteeism. Please contact Zashin & Rich at (216) 696-4441 or nee@zrlaw.com for more information or to register.

Steve Dlott will present "How to Defend a Workers' Comp Claim" on April 24, 2007 at the Weymouth Country Club, 3946 Weymouth Road in Medina, Ohio. The seminar, sponsored by the Medina County Safety Council, begins at 9:00 a.m. and ends at 12:00 p.m. For only $25.00, attendees will receive three hours of Attorney Steve Dlott's expertise in workers' compensation matters *and* lunch. Please contact the Medina County Chamber of Commerce at safety@medinaohchamber.com or Zashin & Rich at (216) 696-4441 for more information.

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