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EMPLOYMENT LAW QUARTERLY

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In this issue:

TO PAY OR NOT TO PAY:

Summer Interns under the Fair Labor Standards Act

*By: Patrick M. Watts**

Generally, summer interns are employees covered by the Fair Labor Standards Act ("FLSA") and are entitled to minimum wage and overtime protection. However, if interns qualify as "trainees," rather than employees, the wage and hour requirements of the FLSA do not apply.

The U.S. Supreme Court has established a six factor test to determine trainee status. If the relationship between the employer and the intern meets all six criteria, the employer can treat the intern as a trainee. An intern is a trainee if: (1) the training is similar to training that would be offered at a vocational school (even though it includes actual operation of the facilities of the employer); (2) the training is for the intern's benefit; (3) the intern does not displace regular employees (but may work under close supervision); (4) the employer receives no immediate advantage from the intern's activities; (5) the intern is not necessarily entitled to a job at the completion of the training; and, (6) the employer and the intern understand that the intern is not entitled to wages for the training.

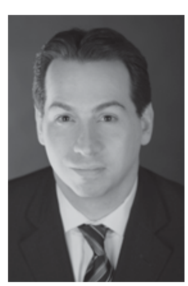
In addressing the substance of the training, courts and the Department of Labor ("DOL") compare the curricula from community colleges and other similar institutions to determine if the employer's training is similar. They next consider whether the skills learned are useful to the individual and transferable to other employers. For instance, one court determined that employees received general and non-transferable training when the employees assisted truck drivers by riding in trucks, moving boxes, learning general vending machine maintenance, and completing general paperwork. Equally important in the analysis is whether the intern has filled a position normally held by an employee.

The most important consideration relative to an intern's status is the benefit of the intern's work. In order for an intern to qualify as a "trainee," an employer must provide training and cannot receive productive work from the intern. One court held that an employer received an immediate advantage when an intern performed productive work and the only cost to the employer was for supervision. Other courts have held that when an intern's duties consist of simply assisting other employees, the employer receives an immediate advantage.

Courts have, however, held that employers are permitted to receive the immediate advantage of a well-trained applicant pool as a result of their training programs. While *entitlement* to a future position with an employer is prohibited, if an employer decides to hire a trainee, the employer does not have to compensate him or her until the training program has ended.

Finally, both the employer and the intern must understand that the trainee will not receive compensation for the training. While a written agreement is not required, a prudent employer attempting to meet each of the above factors should obtain written confirmation of this understanding.

Situations that satisfy each of the above requirements are limited. Generally, summer interns hold jobs that fall within the protections of the FLSA and are not "trainees". Under most circumstances, employers must adhere to wage and hour requirements relative to summer interns as employees.



***Patrick M. Watts** *is an OSBA Board Certified Specialist in Labor and Employment Law. Patrick practices in all areas of employment litigation. Patrick has litigated numerous FLSA claims and has defended and provided advice regarding DOL Wage compliance investigations. For more information about the use of summer interns or the FLSA, please contact Patrick at (216) 696-4441 or pmw@zrlaw.com.*

U.S. SUPREME COURT STRIKES DOWN TITLE VII PAY DISCRIMINATION CLAIM WHERE UNLAWFUL ACTION OCCURRED OUTSIDE OF CHARGING PERIOD

*By: George S. Crisci, Esq.**

According to the latest Census Bureau estimates, full-time year-round female workers make 77 cents for every dollar a male earns. This statistic has not gone unnoticed by advocacy groups who believe that this situation is caused by discriminatory employment practices and by plaintiffs' attorneys who are all too willing to take up the cause by filing pay discrimination lawsuits. A decision issued by the U.S. Supreme Court will make it more difficult to bring certain types of pay discrimination claims because they will be untimely. The decision, however, does not affect all pay discrimination claims. Therefore, as explained below, the much better practice is for employers to avoid becoming vulnerable to such claims by engaging in a "self-audit" of their pay practices.

A discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII") is not timely unless a charge of discrimination is filed with the Equal Employment Opportunity Commission (EEOC) within 180 days (or 300 days in states, such as Ohio, that have a comparable state agency) after the alleged discriminatory act or decision occurs (known as the "charging period"). Courts repeatedly have had to decide whether a discrimination claim is based upon conduct that occurred during the charging period or simply involves the continuing effects of prior conduct that occurred outside the charging period. In the latter instance, the claim is untimely. This issue arises frequently in pay discrimination cases, where the employee's claim is based upon a decision that occurred long ago, but the effects of that action are felt every time the employee receives a paycheck. The U.S. Supreme Court recently addressed this issue. The Court held that many of these pay discrimination claims are untimely unless the employee's compensation is based upon a decision that occurred during the charging period.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, pay raises for salaried employees were based upon performance evaluations conducted by the employees' supervisors. Plaintiff Lilly Ledbetter, who worked for Goodyear from 1979 to 1998, claimed that one of her supervisors had retaliated against her when she rejected his sexual advances during the early 1980's by giving her negative performance evaluations and did so again during the mid-1990's when he allegedly falsified deficiency reports about her work. This alleged retaliation impacted the amount of her pay increases. She also claimed that this retaliatory treatment had a continuing impact upon how much she was paid. However, she waited until 1998 (shortly before she retired) before complaining to the EEOC about her pay. By the time the case went to trial, the supervisor had died. She claimed primarily that "her pay was not increased as much as it would have been had she been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment." A jury agreed with Ledbetter and awarded her damages, but the appellate court reversed because her claims were untimely.

Ledbetter argued that her pay discrimination claims were timely for two reasons. First, she contended that each paycheck issued to her during the charging period that contained an amount that was based upon prior unlawful action was a separate act of discrimination (known as the "paycheck accrual rule"). Second, she focused upon a decision denying her a pay raise that occurred during the charging period that she claimed was unlawful because it "carried forward intentionally discriminatory disparities from prior years."

The Supreme Court rejected both arguments because neither one was based upon an alleged intentional discriminatory act that occurred during the charging period. The Court explained that "[a] disparate treatment claim comprises two elements: an employment practice and discriminatory intent," and both have to occur during the charging period for the discrimination claim to be timely. Thus, "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from past discrimination." The Court added, however, that "if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed." Ledbetter's claim was untimely because she "makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not com-

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U.S. SUPREME COURT STRIKES DOWN TITLE VII PAY DISCRIMINATION CLAIM…

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municated to her. Instead, she argues simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period. But current effects alone cannot breathe life into prior, uncharged discrimination . . . ." The Court suggested that Ledbetter "should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her."

The Supreme Court also noted that there are important exceptions to this rule. The most prominent is a claim that is based upon a "facially discriminatory pay structure that puts some employees on a lower scale because of" some unlawful classification such as race or gender. In distinguishing between the two, the Court explained that "an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.' The fact that pre-charging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period."

Another important exception involves claims under the Equal Pay Act (EPA). The Court noted that such claims do not require the filing of a charge nor do they require proof of discriminatory intent. Although Ledbetter originally filed an EPA claim, the trial court dismissed that claim and Ledbetter did not pursue it on appeal.

The timeliness requirements established in *Ledbetter* are very helpful to employers. Previously, employers were forced to defend against pay discrimination claims that were based upon conduct that occurred many years in the past. This can prove especially difficult when the evidence tending to prove or disprove such a claim has become stale or non-existent. Employers, however, must be cautious in applying these timeliness requirements because there are some noteworthy exceptions, such as a separate claim under the federal Equal Pay Act or a claim based upon a facially discriminatory pay policy.

Employers in Ohio also should remember that the *Ledbetter* decision applies only to claims under federal law. Ohio courts have not yet adopted the decision and its underlying reasoning for similar claims of pay discrimination under Ohio's discrimination statute – Chapter 4112 of the Ohio Revised Code – and there is no guarantee that the Ohio Supreme Court will do so. Moreover, the limitations period for commencing a discrimination claim under Ohio law (which does not require a charge filing before commencing a lawsuit) is much longer: six years in most cases versus 300 days under federal law. Likewise, other states may not adopt the *Ledbetter* reasoning.

Employers are strongly encouraged to seek legal counsel in determining whether the favorable timeliness requirements under *Ledbetter* apply to a pay discrimination claim or a pay structure issue.

Finally, although the result in *Ledbetter* is welcome news for employers, preventative action is essential to successfully defend pay discrimination claims that are timely filed. Employers are encouraged to conduct an "employer pay equity self-audit" which is designed to assist employers in analyzing their own wage-setting policies and establishing consistent pay practices for all.

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

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

BREAKS AND REST PERIODS:

What are employers required to pay for under the FLSA?

*By: Christina M. Janice**

Under federal law, employers are not required to provide employees with a lunch break or a rest period. However, when employers do provide breaks, the Fair Labor Standards Act ("FLSA") sets forth criteria that determine whether an employer must pay for that break. The Department of Labor ("DOL") and the courts generally recognize two categories of breaks: rest and meal periods.

1. Rest Periods

DOL Regulations provide that rest periods of a short duration, running from 5 minutes to "about 20 minutes," must be included as "hours worked" by an employee. However, break time does not qualify as hours worked when the break exceeds 20 minutes, the time is sufficient for the employee to use it for his own purposes, and the employer completely relieves the employee from duty.

Employers are not required to include unauthorized extensions of work breaks as hours worked when the employer has expressly and unambiguously communicated that: (1) the authorized break is for a specific length of time; (2) an extension of the break is against company rules; and (3) the employee will receive discipline for an extension of the authorized break.

2. Meal Periods

DOL Regulations provide that bona fide meal periods do not count as hours worked. Generally, the meal period must last 30 minutes or longer, but may be shorter under certain circumstances. DOL Regulations require that during a meal period the employer must completely relieve the employee from duty for the purpose of eating a regular meal. While some courts strictly require that the employer completely relieve the employee from duty, others utilize the "predominant benefit" test to determine whether a meal period qualifies as hours worked.

Under the predominant benefit test, a meal period will qualify as hours worked if the predominant benefits serve the employer rather than the employee. In court, an employer has the burden to demonstrate that the employee received the predominant benefit of the meal period. Courts consider factors such as (1) the limitations and restrictions placed on the employees during the meal period, (2) the extent to which those restrictions benefit the employer, (3) the duties the employer holds the employee responsible for during the meal period, (4) and the frequency by which the employer interrupts the meal period.

As the restrictions and duties become greater during the meal period, the employer likely receives the predominant benefits. When analyzing whether meal periods should be included as hours worked, employers should thoroughly review restrictions on meal periods, the duties employees must perform during those periods, and the frequency that the employer interrupts the employee's meal period.

***Christina M. Janice** *defends employers in class action litigation and all aspects of employment related torts and alleged violations of state and federal employment law. For more information about wage and hour requirements under the FLSA, please contact Christina at cmj@zrlaw.com or (216) 696-4441.*

Z & R SHORTS

Zashin & Rich welcomes two attorneys to its Employment and Labor Group

Zashin & Rich recently welcomed two attorneys to the firm and to its expanding Employment and Labor Group. **Jon Dileno** represents employers in the full spectrum of labor and employment matters in both the public and private sector. Jon serves as chief negotiator for some of the most high profile labor negotiations in Ohio. Jon has also successfully defended both private employers and public entities in numerous cases involving discrimination, retaliation, wrongful discharge, intentional tort, and defamation.

Jon received his undergraduate degree, *cum laude*, from Baldwin Wallace College and his law degree from Tulane University, *cum laude*, where he received the Outstanding Labor Law Student Award. Jon is admitted to practice law in the State of Ohio, the United States District Court for the Northern and Southern Districts of Ohio, and the Sixth Circuit Court of Appeals.

Patrick Peters also recently joined Zashin & Rich. Pat's practice areas include labor relations, equal employment opportunity, employment discrimination, and all other employment related torts. Pat earned his B.B.A. from the University of Notre Dame and went on to earn his law degree, *cum laude*, from Case Western Reserve University School of Law. Pat is admitted to practice law in the State of Ohio and the United States District Court for the Northern District of Ohio.

Please join us in welcoming Jon and Pat to Z&R!

Upcoming Seminars

On June 28, 2007, Stephen Zashin and Steven Dlott will present "Interplay: Solving the FMLA, ADA and Workers' Compensation Leave of Absence Puzzle" to the Greater Cleveland Safety Council. The event will be held at the Holiday Inn South, 6001 Rockside Road, Independence, Ohio with registration at 11:15a.m. and a luncheon meeting to follow at 11:30.am. Cost, including lunch, is $22 for members of the Council and $27 for non-members. Please contact the Greater Cleveland Safety Council at (216) 621-0059 or gcsafety@ameritech.net for more information.

On August 7, 2007, Stephen Zashin and George Crisci will speak at the Council on Education in Management's Ohio FMLA Update 2007 seminar. Stephen will present "The Tangled Web of the FMLA, ADA, Workers' Comp, and Other Leave Laws: Pulling the Threads Apart." George will present "Weeding-Out Fraudulent Claims and Avoiding Intermittent Leave Abuse: Effectively Using Recertification, Second and Third Opinions, and Fitness-for-Duty Examinations." The seminar will be held in Cuyahoga Falls. To register or for more information visit www.counciloned.com or contact the Council on Education and Management at (800) 942-4494 or registration@counciloned.com.

MOVIN' ON UP:

Congress Passes a New Minimum Wage

*By: Patrick O. Peters**

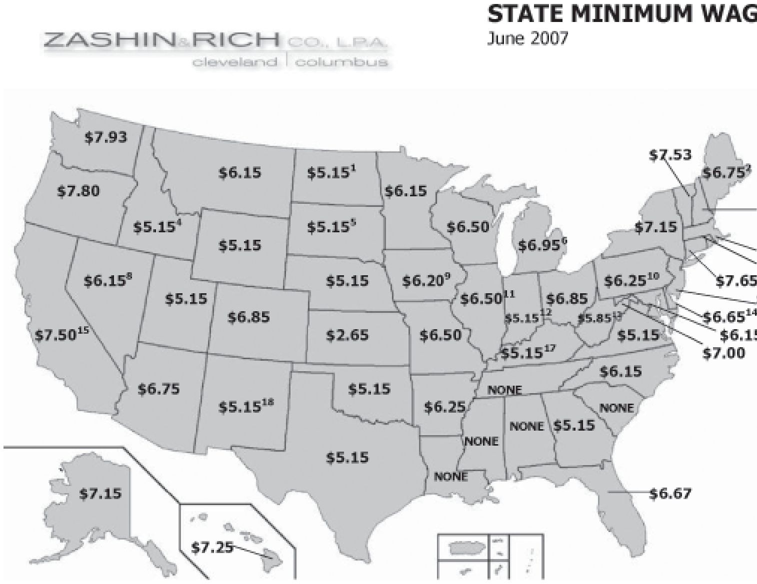
On May 25, 2007, President Bush signed into law the Fair Minimum Wage Act of 2007 (the "Act"). The Act serves to amend the Fair Labor Standards Act ("FLSA") of 1938 and increases the federal minimum wage from $5.15 an hour to $5.85 an hour on July 24, 2007, to $6.55 an hour on July 24, 2008, and to $7.25 an hour on July 24, 2009. The FLSA provides rigorous regulations that apply to all employees that include child labor, recordkeeping, and enforcement provisions in addition to rules relative to overtime compensation and the minimum wage.

The new federal minimum wage will have no immediate impact on most employers in states, such as Ohio, that have a higher state minimum wage. In November 2006, Ohio voters approved Statewide Issue 2. Issue 2 is an Amendment to Ohio's Constitution that raised the minimum wage from $5.15 an hour to $6.85 an hour and became effective January 1, 2007. Under the Ohio Amendment, Ohio's minimum wage will adjust annually, beginning January 1, 2008, to reflect inflation as tracked by changes to the consumer price index.

Allegations of wage and hour violations comprise one of the largest areas of potential liability for employers. Wage and hour litigation has increased 300% over the past decade and lawsuits based on FLSA violations are one of the fastest growing sources of employment-based class/collective action litigation. Wage and hour violations that commonly result in litigation include: misclassifying employees as "exempt" and failing to pay them overtime; failing to pay non-exempt employees overtime, including overtime not approved in advance; failing to pay for time worked "off the clock," including allowing employees to arrive early to prepare for work or stay late to "close up;" and granting compensatory or "comp time" in lieu of overtime pay.

Employers should regularly conduct an audit of their wage and hour practices to minimize the risk associated with wage and hour violations. These audits include a thorough review of employee classification and payroll records and analysis of employment policies to ensure compliance with the FLSA. Taking proactive steps will help decrease an employer's exposure to wage and hour liability, deter administrative agency investigation, and minimize exposure to litigation.

STATE MINIMUM WAGES
June 2007



[1] North Dakota: increase to $5.85 an hour "as of the effective date of the [anticipated] increase in the federal minimum wage," to $6.55 an hour a year later, and to $7.25 an hour a year after that.
[2] Maine: increase to $7.00 an hour on Oct. 1, 2007.
[3] New Hampshire: increase to $6.50 an hour on Sept. 1, 2007 and to $7.25 an hour on Sept. 1, 2008.
[4] Idaho: will track with and conform to the federal minimum wage
[5] South Dakota: will increase to $5.85 an hour as of "the effective date of the increase in the federal minimum wage ... or July 1, 2007, whichever is later," to $6.55 an hour a year later, and to $7.25 an hour a year after that.
[6] Michigan: will increase to $7.15 an hour on July 1, 2007, and to $7.40 an hour on July 1, 2008.
[7] Massachusetts: will increase to $8.00 an hour on Jan. 1, 2008.
[8] Nevada: will increase to $6.33 an hour on July 1, 2007, for employers that do not provide qualified health insurance, and to $5.30 an hour for those that do.
[9] Iowa: will increase to $7.25 an hour on Jan. 1, 2008.
[10] Pennsylvania: will increase to $7.15 an hour on July 1, 2007.
[11] Illinois: will increase to $7.50 on July 1, 2007, to $7.75 on July 1, 2008, to $8.00 on July 1, 2009, and to $8.25 on July 1, 2010.
[12] Indiana: will track with and conform to the federal minimum wage.
[13] West Virginia: will increase to $6.55 an hour on June 30, 2007, and to $7.25 an hour on June 30, 2008.
[14] Delaware: will increase to $7.15 an hour on Jan. 1, 2008.
[15] California: will increase to $8.00 an hour on Jan. 1, 2008.
[16] Maryland: for employees of government contractors $11.30 in the Baltimore-Washington area and $8.50 in the rest of the state.
[17] Kentucky: will increase to $5.85 an hour on July 1, 2007, to $6.55 an hour on July 1, 2008, and to $7.25 an hour on July 1, 2009, after which minimum wage will track with and conform to the federal minimum wage.
[18] New Mexico: will increase to $6.50 an hour on Jan. 1, 2008 and $7.50 an hour on Jan. 1, 2009.

***Patrick O. Peters** *practices in all areas of employment litigation and wage and hour compliance and administration. For more information concerning the new minimum wage or any other aspect of the FLSA, please contact Pat at (216) 696-4441 or pop@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.

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

www.zrlaw.com

PUBLIC SECTOR UPDATE:

Supreme Court Limits Unions' Rights to Use Non-Member Fees for Political Purposes

*By: Jon M. Dileno, Esq.**

On June 14, 2007, the United States Supreme Court rejected a challenge to a Washington law that bars public-sector unions from spending non-members' fees on political activity without first receiving their permission. In *Davenport v. Washington Ed. Assn.,* the Court held that a state may require its public-sector unions to receive affirmative authorization before spending fees on political activities. *Id.* at syllabus.

While most states allow public-sector unions to levy fees on non-member employees in exchange for collective bargaining representation, the Court previously ruled that those fees may not be used for "ideological purposes not germane to the union's collective bargaining duties." *Davenport*, supra., citing *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 235-236 (1977). These ideological purposes include unions' political activity.

Under the Washington state law, the non-members had to grant the union permission in order for the union to use non-member fees for a purpose other than collective bargaining.

The Supreme Court held that the fact that "*courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of non-members does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement." *Id.* (emphasis in original). The ruling paves the way for further restrictions on public-sector unions relative to the collective bargaining fees they generate from non-members.

***Jon M. Dileno** represents employers in the full spectrum of labor and employment matters in both the public and private sector. Jon's experience in collective bargaining matters extends beyond negotiating labor contracts and covers the gamut of collective bargaining proceedings. For more information concerning collective bargaining or any other labor issue, please contact Jon at (216) 696-4441 jmd@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.