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EMPLOYMENT LAW QUARTERLY

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NLRB HAS LEGENDARY SEPTEMBER TO REMEMBER

*By: *George S. Crisci*

The National Labor Relations Board ("NLRB"), which regulates and enforces the National Labor Relations Act ("NLRA"), has been criticized in recent years for its tremendous backlog of undecided cases. At times, hundreds of cases were pending before the NLRB for a final decision, some of which languished for years. Several of those cases involved major issues that have a significant impact upon the process of unionization and collective bargaining in private sector employment.

In September 2007, the NLRB made a sizeable dent in its backlog issuing decisions in dozens of these cases. The five-member NLRB (three of whose terms expired at the end of 2007) put its stamp on federal labor law by issuing six major decisions during a three-day period. Given that the three-person majority of the NLRB consisted of Republicans appointed by President Bush, all of these decisions favored employers and/or disfavored unions.

These decisions were each decided along a party-line 3-2 vote and impact a broad range of issues covering the spectrum of federal labor law. Here is a brief summary of those rulings and the issues they decided:

- **"Permanent" Employment Status of Replacement Workers:** Striking employees traditionally are not entitled to reinstatement to their old jobs once a labor dispute ends if they were "permanently" replaced during the strike. They are entitled to reinstatement only when the employment of the permanent replacement ends. In Jones Plastic & Engineering Co., 351 NLRB No. 011 (Sept. 27, 2007), the NLRB overruled a ten year precedent and held that persons hired as "at-will" employees to replace striking employees (who are usually not "at-will" employees) can be considered "permanent replacements." Consequently, striking employees who are replaced by "at will" employees are not entitled to immediate reinstatement.

- **Refusal to Hire a Union "Salt":** A "salt" is a person who is sent by a union to a non-unionized workplace to obtain employment and attempt to unionize the employees. More than ten years ago, the U.S. Supreme Court held that a "salt" can be included as an "employee" who is entitled to protection under the NLRA. In Toering Electric Co., 351 NLRB No. 018 (Sept. 29, 2007), the NLRB held that a "salt" who is refused employment is not protected under the NLRA unless it can be proven that the person is "genuinely interested in seeking to establish an employment relationship with the employer." The NLRB explained that it was attempting to address certain "abusive tactics" by labor unions, such as having persons who were not interested in obtaining employment submit applications and then engage in conduct that was designed to motivate an employer not to hire them so that they could file unfair labor practice charges.

  In May of 2007, the NLRB changed the traditional remedy for salts who were unlawfully refused employment. Previously, the remedy for an unlawful discharge or refusal to hire included the employer's payment of backpay to the employee for the period from the unlawful act until the employer made a valid offer of employment. In Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (May 31, 2007), the NLRB held that a full backpay remedy is unavailable unless the union proves that it would have allowed the salt to continue working indefinitely for the employer and would not have moved the salt to a different employer. In addition, the salt would not be entitled to employment if the salt would have left the job before the NLRB issued a decision that the refusal to hire was unlawful.

- **Challenges to Voluntary Recognition of a Union:** For decades, unions have obtained "voluntary recognition" as a collective bargaining representative without a secret-ballot election by presenting the employer with union authorization cards from a majority of the employees to be represented and asking the employer to recognize the union (called a "card-check majority"). When voluntary recognition occurred, a union's status as bargaining representative could not be challenged by the employees for a "reasonable period of time," which often provided the union with sufficient time to negotiate a labor contract (which then generally bars challenges for up to three more years). In Dana Corporation, 351 NLRB No. 028 (Sept. 29, 2007),

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SUPREME COURT BARS COMMON LAW CLAIM FOR AGE DISCRIMINATION

**by Britt J. Rossiter*

Finding that the Ohio Civil Rights Act ("OCRA") provides a "full range of remedies" for plaintiffs alleging discrimination due to their age, the Ohio Supreme Court recently upheld dismissal of a lawsuit brought outside of the statute, pursuant to the common law under a theory of violating public policy.

In Leininger v. Pioneer Natl. Latex, 2007-Ohio-4921, the Ohio Supreme Court closed a loophole previously available to plaintiffs that fail to timely file age discrimination lawsuits. The OCRA, R.C. 4112.01, et seq., provides a statutory framework for the prosecution of age discrimination lawsuits including a 180-day limitations period. Compared to the four-year limitations period applicable to a common law public policy claim, the shorter statutory requirement favors employer defendants.

Marlene Leininger, age 60, claimed she was wrongfully discharged by her employer, Pioneer National Latex (Pioneer), in 2001. Leininger felt many of her responsibilities as a human resources administrator were ultimately given to a 21 year old co-worker.

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EPLI UPDATE: TIMELY NOTIFY YOUR CARRIER OF A POTENTIAL CLAIM

**by Stephen S. Zashin*

Employers routinely maintain insurance coverage for the defense of claims brought against them by their employees. This type of insurance is commonly known as Employment Practices Liability Insurance ("EPLI") and often includes the defense of employment discrimination claims. Generally, EPLI policies include a "timely notice" provision requiring the insured employer to notify the carrier of a potential claim "as soon as practicable," or similar language to that effect. As one employer recently discovered, the failure to give an insurance carrier the notice required under an EPLI policy could result in a loss of coverage for the claim.

In American Ctr. for Int'l Labor Solidarity v. Federal Ins. Co., 518 F. Supp. 2d 163 (D.C. 2007), a federal district court held that an employer who failed to provide its carrier with notice of a potential claim for 17 months violated a condition precedent of the insurance contract and was not entitled to coverage under the policy. The dispute between the insurance company and its insured involved the definition of a "claim" requiring notice.

In August 2002, the employer received notice that a former employee had filed a charge of discrimination against it with the Equal Employment Opportunity Commission ("EEOC"). The initial notice indicated that no action was required of the employer at that time. Later, in November 2002, the employer received a second, more detailed notice of the charge, requesting that the employer either agree to participate in mediation or submit a position statement. The employer declined the request for mediation and, through its outside counsel, submitted a position statement on December 19, 2002 setting forth its analysis of the facts of the charge.

Following its investigation, the EEOC dismissed the charge of discrimination and issued a Right-to-Sue letter to the employee. On December 12, 2003, the employee filed a race discrimination lawsuit against the employer in federal court.

On January 20, 2004, the employer notified its carrier of the claim and requested that its outside counsel be assigned to defend the lawsuit. In March 2004, the insurer denied coverage because the employer had failed to give timely notice (defined in the policy as "as soon as practicable") of the claim. According to the policy, a "claim" included a "formal administrative or regulatory proceeding."

The employer then sued the insurer for coverage, arguing that the charge of discrimination before the EEOC was not a "formal" administrative proceeding because the EEOC could not adjudicate liability and used informal methods to resolve charges of discrimination. The court disagreed and concluded that administrative proceedings before the EEOC are "formal" because nearly all aspects are prescribed by statute or regulation; the EEOC's investigation can produce significant consequences for the parties; and the EEOC is empowered to take testimony, receive evidence, subpoena witnesses, and compel witness attendance through initiation of enforcement proceedings.

While the court noted that the determination of the EEOC does not control the outcome of the lawsuit, it reasoned that the proceedings do have consequences to resulting litigation. By failing to give the insurer the notice required under the policy and unilaterally electing to waive mediation, the court found that the employer prejudiced the insurer's right to investigate and potentially resolve the claim.

The effect of this decision on employer's EPLI policies depends on whether the policy contains language defining a federal or state administrative hearing as a "claim" requiring notice to the insurance carrier. This court's decision should serve as a reminder to employers to review the terms of their EPLI policies and provide notice to their insurance carriers immediately so as to avoid a loss in coverage over a claim.

Zashin & Rich Co., L.P.A. is approved to defend claims covered by insurance policies carried by most EPLI carriers. For more information about these carriers, please contact Stephen Zashin.

***Stephen Zashin**, *an OSBA Certified Specialist in Labor and Employment Law, has extensive experience defending employers involved in employment litigation, as well as administrative hearings before the Equal Employment Opportunity Commission and various state administrative civil rights agencies. For more information about the defense of an administrative hearing, lawsuit, or EPLI, please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

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the NLRB held that the voluntary recognition of a union can be challenged by a secret-ballot election. Employees who opposed unionization could file with the NLRB a petition supported by 30 percent of the employees to be represented within 45 days after receiving notice of both the voluntary recognition and the employees' right to seek an election challenging the recognition. Absent such notice, any voluntary recognition – even if a labor contract subsequently is negotiated – can be invalidated by a timely-filed petition for a secret-ballot election.

This is the second decision in 2007 that weakened a union's ability to maintain its status as a bargaining representative. In Truserv Corporation, 349 NLRB No. 23 (Jan. 31, 2007), the NLRB overturned a ten year precedent regarding the disposition of a decertification petition filed when unfair labor practice charges against an employer are pending but those charges subsequently are settled. The NLRB previously required that any petition challenging the union's majority status that is filed after the employer's allegedly unlawful conduct, and before the settlement, must be dismissed. Now, a decertification petition filed after the occurrence of alleged unfair labor practices by the employer, and prior to settlement of those charges, should not be dismissed where there has been no finding or admission that the employer actually engaged in the alleged wrongful conduct.

- **Employer Lawsuits Against Unions:** For many years, an employer committed an unfair labor practice if it unsuccessfully sued a union in retaliation for the union engaging in statutorily protected activities regardless of whether the employer had an objectively reasonable basis for suing the union. In BE & K Construction Co., 351 NLRB No. 029 (Sept. 29, 2007), the NLRB held that an employer's reasonably based, but unsuccessful, lawsuit against a union is not an unfair labor practice, even if the employer had a retaliatory motive for doing so. Consequently, it will be easier for employers to sue a union in response to the union's activities without running the risk of committing an unfair labor practice.

- **Limiting "Make-Whole" Remedies Based Upon Improperly Obtained Evidence of Employee Misconduct:** Employees who suffer an adverse employment action (such as a discharge) because of an employer's unfair labor practices traditionally are entitled to a "make-whole" remedy, such as reinstatement with backpay. In Anheuser-Busch, Inc., 351 NLRB No. 040 (Sept. 29, 2007), the NLRB established an important exception by overruling cases decided more than ten years ago. The NLRB held that the employer had committed an unfair labor practice when it installed and used hidden surveillance cameras without first negotiating with the union, and it ordered the employer to cease and desist from using the hidden surveillance cameras. However, the NLRB refused to provide a make-whole remedy to 16 employees who were discharged or disciplined for misconduct that had been detected through the use of the hidden cameras. Rather, the NLRB held that these employees were disciplined "for cause," so they were prohibited under the NLRA from receiving reinstatement and/or backpay. It did not matter that the evidence had been improperly obtained through the employer's unlawfully implemented hidden cameras.

- **Proof of Mitigation of Damages:** An employer traditionally has been permitted to challenge a backpay award to an employee who was unlawfully discharged or suspended by contending that the employee failed to mitigate damages. In the past, the employer had the burden of showing both that there were substantially equivalent jobs available to the employee and that the employee unreasonably failed to apply for those jobs. In St. George Warehouse, 351 NLRB No. 042 (Sept. 29, 2007), the NLRB shifted to the employee the burden of showing that he or she took reasonable steps to seek substantially equivalent jobs that were available. This decision potentially makes it easier for employers to reduce the size of a backpay award and more difficult for employees to obtain a full backpay award unless they have taken reasonable steps to find another job when such employment opportunities were available.

With the start of 2008, the terms of three Board members (two Republicans and one Democrat) expired, leaving the NLRB with only two members. Until those vacancies are filled, few decisions will be issued, and none will be of the significance summarized above.

The lasting impact of these major decisions is uncertain. The Democratic majority in Congress has already introduced legislation to overturn many of these decisions. While a Presidential veto of any such legislation by President Bush is a virtual certainty, there is no telling who will hold that power after the 2008 election.

For the present, however, employers should enjoy the improvements to the labor front that have been brought about by these decisions and consult with experienced labor counsel to determine how best to take advantage of them.

***George S. Crisci** *is an OSBA Certified Specialist in Labor and Employment Law. George represents employers in all facets of employment law, and both public and private sector management in actions before the NLRB. For more information concerning any labor or employment issue, please contact George at 216.696.4441 or gsc@zrlaw.com.*

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UPDATE: CHANGES TO THE OHIO AND FEDERAL MINIMUM WAGE

**by Michele L. Jakubs*

On May 25, 2007, President Bush signed into law the Fair Minimum Wage Act of 2007 (the "Act"). The Act amended the Fair Labor Standards Act ("FLSA") of 1938 and increased the federal minimum wage to $5.85 an hour on July 24, 2007, and will further increase the federal minimum wage to $6.55 an hour on July 24, 2008, and to $7.25 an hour on July 24, 2009. The FLSA provides additional regulations that apply to all employees that include child labor, record-keeping, and enforcement provisions in addition to rules relative to overtime compensation and the minimum wage.

The July 24, 2008 increase to the 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, an Amendment to Ohio's Constitution, raised Ohio's minimum wage effective January 1, 2007. Under the Ohio Amendment, Ohio's minimum wage adjusts annually to reflect inflation as tracked by changes to the consumer price index. On January 1, 2008, the Ohio minimum wage increased to $7.00 an hour. The Ohio Amendment also requires employers to maintain certain payroll information and provide it, free of charge, to their employees upon request. Moreover, employers must furnish new employees with certain information – including the employer's name, address, telephone number, email address, website, fax number, and the name and address of the employer's statutory agent. Employers must keep this information current and provide updates to current employees within 60 days of a change.

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.

***Michele L. Jakubs** *practices in all areas of employment litigation and wage and hour compliance and administration. For more information concerning changes to the minimum wage or any other aspect of the FLSA, please contact Michele at 216.696.4441 or mlj@zrlaw.com.*

SUPREME COURT BARS COMMON LAW CLAIM FOR AGE DISCRIMINATION

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Leininger filed her lawsuit more than 180-days after her termination. The Ashland County Court of Common Pleas granted Pioneer's motion for summary judgment finding that Leininger missed the deadline for filing a statutory claim and that Ohio law did not provide her with an alternative common law cause of action.

The Fifth District Court of Appeals, relying on a 1997 Supreme Court of Ohio decision, Livingston v. Hillside Rehabilitation Hospital, 1997-Ohio-155, reversed the trial court's decision and vacated the order granting summary judgment. Livingston, decided without an opinion, reversed an appellate decision that refused to allow an age-based common law claim for wrongful discharge.

The Leninger Court reversed and reinstated summary judgment for the employer. The Court found that the statute had been amended since Livingston to expand the range of remedies available to victims of age discrimination. Consequently, there are no longer "gaps" or limitations in the statute necessitating the recognition of a separate common law right of action. The Court noted that the statue allows a plaintiff to obtain a variety of remedies including a cease and desist order barring further discriminatory acts; reinstatement with backpay; restored seniority and fringe benefit credit; and all damages, including punitives and attorneys fees. While limited to claims of age discrimination, the Court's rationale suggests that its prohibition on public policy claims would also apply to other protected classifications under the Ohio Civil Rights Acts including sex, national origin, religion, and disability.

Although Leininger is a favorable decision for Ohio employers, it does not absolve employers of potential liability for age discrimination. Quite the opposite, Leininger recognizes that remedies are available to employees pursuant to the statute, including punitive damages and attorneys fees. The Leininger decision, however, is useful when defending a claim brought in an Ohio court outside of the 180-day limitations period.

***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 age discrimination or any other employment-related tort, please contact Britt at 216.696.4441 or bjr@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.

HOTMAIL – NLRB LIMITS EMPLOYEES' USE OF COMPANY EMAIL TO FURTHER UNION ACTIVITY

**by Jon M. Dileno*

On December 16, 2007, the National Labor Relations Board ("NLRB") rendered a much anticipated decision in The Guard Publishing Company d/b/a/ The Register-Guard, 351 NLRM No. 70. In a 3-2 split, the NLRB held that "employees have no statutory right to use [an employer's] email system for Section 7 purposes." The majority characterized the ruling as a natural extension of the well-established precedent that an employee has "'no statutory right…to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory." Under the decision, an employer can lawfully craft a policy restricting the use of the employer's email system for non-work-related messages, including those related to union activity.

The NLRB based its decision on the premise that employers have a "basic property right" to "regulate and restrict employee use of company property." Email and computer equipment qualify as company property and, therefore, an employer has a legitimate business interest in maintaining the efficient operation of its email system. The NLRB viewed Register-Guard's Communications Systems Policy ("CSP") as a codification of this legitimate business interest in company property. The CSP stated in relevant part:

> *Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.*

In 2000, Register-Guard disciplined Suzi Prozanski ("Prozanski"), a company employee and the union president, for violating the CSP. Prozanski repeatedly used Register-Guard's email system to distribute union-related messages to employees. She received written warnings for three specific violations. Two of the emails solicited employees to support the union's collective bargaining efforts and to participate in union activities. The other email clarified facts related to a union rally and was otherwise not a solicitation.

In 2002, an administrative law judge ("ALJ") ruled that Register-Guard discriminatorily enforced the CSP, according to the NLRB standard endorsed in Fleming Co., 336 NLRB 192 (2001), enf., denied 349 F.3d 968 (7th Cir. 2003). Under the Fleming framework, "[i]f an employer allows employees to use its communications equipment for non-work related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes." The ALJ found that Register-Guard permitted its employees to use email for various personal messages, including baby announcements, jokes, party invitations, and the occasional offer of sports tickets or request for services such as dog walking. Consequently, the ALJ determined that the company had committed an unlawful discriminatory practice consistent with Fleming.

The NLRB reversed the ALJ's decision and applied a narrower, more employer friendly standard for determining whether an employer's conduct discriminates against Section 7 activities. Now, unlawful discrimination must involve "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." Under this new framework, the NLRB must determine the nature of each individual union-related communication to effectively compare it to "similar" non-union communications. For example, in Register-Guard the NLRB held that the company could legally prohibit Section 7 communications that are solicitous because there was no evidence that the company permitted employees to use company email to solicit support for any group or organization. The Board found email to be more similar to employer owned equipment like telephones and bulletin boards, which may be restricted during nonworking hours, than to face-to-face solicitation, which cannot be restricted during nonworking hours.

The NLRB's decision in Register-Guard increases the employer's ability to restrict certain non-work communications, while allowing others. Under this new framework, the employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., car for sale) and solicitation for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use. It is important that employers review their current policies and procedures relative to the use of company email and enforce them uniformly.

***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 full gamut of collective bargaining proceedings. For more information concerning organized labor protected activity or any other labor issue, please contact Jon at 216.696.4441 or jmd@zrlaw.com.*

LEGAL BRIEF

The IRS recently issued the 2008 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business. Beginning January 1, 2008, the standard mileage rates for the use of a car (including vans, pickups or panel trucks) will be 50.5 cents per mile for business miles driven, compared to 48.5 cents per mile for 2007.

The standard mileage rate for business is based on an annual study of the fixed and variable costs of operating an automobile conducted by Runzheimer International, independently contracted by the IRS.

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Z & R SHORTS

Zashin & Rich Welcomes Pat Hoban to Its Employment and Labor Group

Patrick J. Hoban represents public and private sector employers in labor relations and employment issues. Pat, previously an attorney with Littler Mendelson's Cleveland office (formerly known as Duvin, Cahn & Hutton), represents municipal clients in collective bargaining, labor arbitrations, unfair labor practice proceedings and provides day-to-day counsel to public employers on matters including contract administration, work rules, compliance with state and federal employment regulations and civil service issues. Pat has also represented and advised large national and local private sector employers on a variety of issues arising under labor contracts and the National Labor Relations Act. Additionally, he has successfully represented clients before the Ohio State Employment Relations Board, the National Labor Relations Board and in Federal Court.

Please join us in welcoming Pat to Z&R!

George Crisci Designated a 2008 Ohio Super Lawyer

Zashin & Rich Co., L.P.A. is pleased to announce that **George S. Crisci** has been named as a 2008 Ohio Super Lawyer in the field of labor and employment law. Only five percent of Ohio attorneys receive this honor each year. Super Lawyers is a list of outstanding lawyers from more than 60 practice areas who have attained a high degree of peer recognition and professional achievement. The exclusive list of Ohio Super Lawyers is published annually in the January issue of Cincinnati Magazine, Northern Ohio Live and Ohio Super Lawyers Magazine.

Congratulations, George!

Upcoming Speaking Engagements

On January 24, 2008, **Stephen Zashin** moderated a panel discussion on the topic of "Claims Management: Fostering an Integrated Relationship between Insurers and Defense Counsel to Ensure Timely Resolution" at the Employment Practices Liability Insurance Conference presented by the American Conference Institute in New York, NY. The discussion included tips for streamlining the claims process; key reasons why claims are denied; top ways defense counsel can stay out of trouble with carriers and ensure that they will be used again; establishing a mutual understanding of expectations from the defense counsel and carrier perspectives; understanding various perspectives when weighing the factors to settle or try a case; controlling defense costs; who has the final say in whether to settle or try a case; and notice provisions: untangling the uncertainties.

George Crisci will speak at the State and Local Government Bargaining & Employment Law Committee of the Section of Labor and Employment Law of the American Bar Association's Midwinter Meeting in Puerto Vallarta, Mexico on February 1, 2008. George will present "Mandatory Bargaining Subjects" to the committee.

On April 16, 2008, **Steven Dlott** will speak at the Second Annual Advanced Workers' Compensation seminar being held in Cleveland. Steve will present "Claims Management Best Practices to Minimize Costs and Maximize Efficiency" and "Employer Pitfalls and Protections." The event will be held at the Hilton Garden Inn, 1100 Carnegie Avenue, Cleveland, Ohio with registration at 8:00 a.m. Please contact Sterling Education Services, Inc. at (715) 621-00855-0498 or go to www.sterlingeducation.com for more information.

George Crisci will present a private client training in January on the topic of "Proper Performance Document Techniques." **Stephen S. Zashin** will present two private trainings in January and February to clients on various topics associated with the FMLA.

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