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EMPLOYMENT LAW QUARTERLY

Volume XI, Issue I
Winter 2009

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GOOD TO THE LAST DROP?

COURT HOLDS THAT PREPARING TO COMPETE IS NOT COMPETING AND THAT CUSTOMER LISTS ARE NOT ALWAYS TRADE SECRETS

*By Lois A. Gruhin**

The Ohio Court of Appeals, Eighth Appellate District, recently held that preparing to compete does not constitute competition in violation of a non-compete agreement. In Berardi's Fresh Roast, Inc. v. PMD Enterprises, Inc., et al., as part of a divorce settlement, a husband sold his interest in the couple's coffee roaster business to his spouse and entered into a non-compete agreement which prevented him from re-entering the coffee industry for three years. The ex-wife subsequently sold the company to her divorce attorney. Prior to the expiration of his non-compete agreement the ex-husband began seeking financing of a new coffee business; signed a lease for a warehouse two months prior to the expiration of his non-compete agreement; and two weeks before the expiration of his non-compete agreement took possession of the warehouse and equipment so his company would be ready for business when his non-compete agreement expired.

The Court found in favor of the defendant husband and concluded that preparations to compete do not constitute competition. The Court stated that the husband's actions prior to the expiration of the non-compete agreement did not show that he "actively engage[ed]" in the coffee industry and that in any case, "preparing to compete is not equivalent to competing."

On appeal, the Appellate Court upheld the lower Court's decision that preparations to compete do not constitute competition. In responding to the other issues on appeal, the Appellate Court held that misappropriation of trade secrets under the Uniform Trade Secrets Act depends on whether the information at issue "derives its independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." After acknowledging that client lists may constitute trade secrets even if obtained in part from public sources, the Court of Appeals held the subject client list did not constitute a trade secret because the new company's list contained only "the client's name, address and telephone number."

The 10th Appellate District in Chornyak & Associates, Ltd. v. Nadler affirmed a trial court's decision denying trade secret status to an employer computer file containing customer preference information and other items because the employer shared that information with the customers in question, with no restrictions on the customers' ability to use or redistribute the document.

Employers need to be proactive in protecting their trade secrets. Precautions must be taken to guard the secrecy of the information. All confidential and proprietary information, including trade secrets, should be marked confidential

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UNEASY COMPANY: COURT DETERMINES TEMPORARY AGENCIES AND EMPLOYERS ARE JOINT EMPLOYERS UNDER THE FLSA

*By Michele L. Jakubs**

Employers who utilize temp agencies can constitute joint employers with the temporary agency under the Fair Labor Standards Act ("FLSA".) Such joint employment relationship may occur even when the employer does not have "formal control" over the temporary workers and the temporary employees receive pay from the referral agency.

In Barfield v. New York City Health and Hospitals Corp., a temporary employee received pay from three referral agencies for continuous work performed at one hospital. The 2nd Circuit Court of Appeals held that the hospital still amounted to a joint employer under the FLSA. As a result, the court determined that the hospital had to pay the worker any overtime she accrued while working there, because it had "sufficient control" over her and the work she did.

In that case, the plaintiff sought overtime pay while working at a single place of employment at the behest of three referral agencies. In order to collect overtime, the employee therefore had to show that the hospital was her employer. Because the FLSA defines an "employer" as "any person…acting directly or indirectly in the interest of an employer in relation to an employee," and the referring agencies had already paid the employee's wages, the employee sought to prove that the hospital was also her employer for purposes of the FLSA.

According to the court's application of the "Economic Realities" test, the hospital was her joint employer and thus responsible for paying her overtime. In its analysis, the 2nd Circuit found that the hospital had the power to hire and fire referred agency employees, supervised or controlled agency employees' work schedules and conditions of their employment and that the hospital kept employment records of the referred workers' shifts. The court noted that even though the hospital never retained "formal control" over the employee since it did not pay her wages, "the fact that the hospital also exercised some authority … helps establish the economic realities of its status as a joint employer."

The court also used the "functional control" test. Under that test, the Court found that the agency employee performed all work discreetly, in a single place, integral to the hospital's "process of production," and that each referral agency assigned temporary employees to the same hospitals wherever possible to promote continuity of care and productivity. The court noted that the plaintiff's responsibilities remained constant regardless of the referring agency, she worked predominately or exclusively for the hospital, the hospital exhibited control over the plaintiff's schedule and that her supervisors "demonstrated effective control over the terms and conditions of the plaintiff's employment." According to the court, these factors created a joint employer relationship between the hospital and the temporary agencies under the FLSA.

As a result of this decision, and others like it, employers must understand their relationships with temporary agencies. Only with an understanding of the actual relationship can an employer accurately measure its potential employment based liabilities.

**Michele L. Jakubs, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment litigation and wage and hour compliance and administration. For more information concerning the FLSA or any aspect of employment law, please contact Michele at 216.696.4441 or mlj@zrlaw.com.*

YOU CAN'T HANDLE THE TRUTH: ALTERED DOCUMENTS MAY SATISFY USERRA'S MINIMUM REQUIREMENT FOR REEMPLOYMENT

*By Patrick J. Hoban**

In a recent case illustrating the difference between a returning service member's right to re-employment and his employer's need to satisfy its interest that the employee remains fit for his job, the Sixth Circuit held that a returning serviceman satisfied the documentation requirement for reemployment under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), despite submitting an altered version of his discharge papers to his employer.

In In re Petty, a police department required all returning service members to furnish a copy of their discharge papers, or DD-214, as a compliment to other paperwork before reinstatement. The police department also conducted evaluations of all officers returning from leave for any extended period of time, regardless of reason, to ensure their fitness for duty. Despite an honorable discharge, the employee, a ser-

geant with the police department, omitted specific facts stemming from a serious but contentious disciplinary infraction he incurred overseas that required him to resign his command.

After discovering the employee's altered DD-214 and the omission in his personal history, the police department initiated an investigation into the employee's conduct, citing the police department's "zero tolerance" policy for dishonesty. While the police department returned the employee to work, it placed him in a desk job taking reports and answering phones, as opposed to his previous position as a patrol sergeant.

The employee charged that his reinstatement violated his rights under USERRA, especially in light of the fact that the police department's investigation ultimately agreed with his position that his military charges were unfounded. The employee complained that the police department had to return him to work as a patrol sergeant or to a "substantially similar position." He also charged that the police department impermissibly denied him the right to work off-duty security jobs, and that the Department's return-to-work process impermissibly delayed his rehire. The Sixth Circuit Court of Appeals agreed.

Stating that USERRA focuses on securing rights for returning veterans and "not on ensuring that any particular document is produced," the Court held that the documents met the minimum USERRA requirements. USERRA only requires that the employee receive a discharge "under honorable conditions," and that an employee need not explain all circumstances surrounding conduct overseas. The Court stated also that the congressional intent behind and the language of USERRA trumped the police department's stated interest in maintaining its return-to-work process to ensure their officers' continued qualifications to serve:

> In USERRA, Congress clearly expressed its view that returning veterans' reemployment rights take precedence over such concerns [The police department]…questions only whether [the employee's] conduct during his military service would disqualify him from returning to service in the police department. But [the employee's] separation from military service is classified as 'under honorable conditions,' which Congress has made clear suffices to qualify him for USERRA benefits.

Citing the police department's ability to investigate its employees' continued fitness to serve upon reinstatement and that USERRA allows terminations "for cause" after reinstatement, the Court remanded the case back to the district court and ordered summary judgment in favor of the employee on his reemployment claims.

This case serves as a reminder that if a returning employee presents an honorable discharge, an employer generally may not deny that employee reinstatement rights. This proposition holds true despite the fact that the returning employee may have engaged in unacceptable behavior while in military service.

**Patrick J. Hoban practices in all areas of labor and employment law, with a focus on private and public sector labor law. For more information on USERRA or any other labor or employment issue, contact Pat at 216.696.4441 or pjh@zrlaw.com.*

ECONOMY DOWN, EEOC FILINGS UP: JOB BIAS CLAIMS REACH THEIR HIGHEST POINT IN YEARS

*By Stephen S. Zashin**

In 2007, the EEOC received 82,792 private sector discrimination charges. At the time, the filings represented a 9% across the board increase from 2006, representing the largest annual uptick in filings since 1993.

In fiscal year 2008, the EEOC reported receiving 95,402 charges. This represents a 15.2% increase from 2007, perhaps the largest one-year increase ever. Many bloggers and analysts predict the trend to continue. As long as the economy continues to go downhill, employers should expect to see more EEOC and OCRC charges filed against them. Ultimately, a good percentage of these charges will result in lawsuits.

**Stephen S. 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.*

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

RUNNING WITH THE DEVIL: DRUG AND ALCOHOL TESTS FOR TRANSPORTATION EMPLOYEES

*By Steve Dlott**

Any employer who conducts the drug and alcohol tests required by the Department of Transportation ("DOT") is subject to regulations set forth in the United States Code. The DOT's regulations do not permit employers from removing or "standing down" employees, even from safety sensitive functions, until the employer receives a verified test result, or a waiver of the result. Upon receipt of a verified positive test result, the regulations require that an employer immediately remove the employee from performing safety-sensitive functions. While the length and the consequences of the employee's removal depend on the severity of the test result and the employee's history, once the employer receives a verified positive test result, the initial course of action for the employer remains the same: immediate removal.

Under the regulations, a verified test result must come from a Health and Human Services ("HHS") certified laboratory. That certified laboratory must have the test reviewed by a Medical Review Officer – a licensed physician who, among other things, evaluates medical explanations for certain drug test results.

If an employer subject to the regulations receives the results of a verified drug or alcohol test indicating the employee somehow substituted or adulterated the employee's sample in any way to mask the presence of banned substances, the regulations treat it as a "refusal to test." Under such circumstances, an employer may immediately remove the employee from safety-sensitive functions.

Sometimes, an employer may receive an invalid test result for other reasons (*e.g.*, too small of a sample, a mechanical testing error, etc.). In such cases, the results are not invalid; they are "cancelled." If an employer receives verified, but cancelled, test results, an employer must immediately:

- Direct the employee to provide a new test specimen (typically urine) under direct supervision, with NO advance notice to the employee;
- Attach NO consequences to the initial invalid test, other than collecting a new specimen;
- Instruct the specimen supervisor and/or collector to note the reason for the subsequent test on the Federal Drug Testing Custody and Control Form ("CCF") as the same reason for the original test; and
- Ensure that the new test specimen is produced under direct supervision.

Some situations, such as pre-employment tests, return-to-duty tests, or follow-up tests demand a negative result as a requisite for employment. When an employer receives a cancelled test in these instances, the regulations direct employers to get another specimen immediately.

An employer must check the drug and alcohol testing record of any new hire the employer intends to use to perform safety-sensitive duties. As a result, the regulations require that an employer do the following:

- Obtain the employee's prior written consent for the release of this information. If the employee refuses to provide this consent, the employer "must not permit the employee to perform safety-sensitive functions."
- Request the following information about the new hire from all previous employers regulated by the DOT:
  - Alcohol tests with a 0.04 or higher result;
  - Verified positive drug tests;
  - Refusals to be tested;
  - Any violations of DOT drug and alcohol regulations; and
  - Documentation that any employee who violated DOT drug and alcohol regulations successfully completed a return-to-work program.

Even the most diligent and safety-conscious employer can have difficulty navigating drug-testing regulations. Concerns range from employee pay during the pendency of test results to

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Z & R SHORTS

Zashin & Rich Co., L.P.A. Welcomes Two Attorneys to its Growing Employment and Labor Group.

David Vance

Rick Hanrahan

Zashin & Rich recently welcomed David Vance and Rick Hanrahan to the firm and its expanding Employment and Labor Group. Both defend employers in a wide variety of labor and employment matters, including all aspects of labor relations, harassment, discrimination, and federal and state civil rights. David received his undergraduate degree, cum laude, in business from Ohio University and graduated from The Ohio State University Moritz College of Law. Rick received his undergraduate degree, cum laude, in education from Ohio University and graduated from the Toledo College of Law..

Please join us in welcoming David and Rick to Z&R!

Upcoming Seminars

February 19, 2009

Stephen Zashin will present "The New FMLA Regulations" at the American Payroll Association Greater Cleveland Chapter's Chapter Meeting at the Holiday Inn in Independence.

April 2, 2009

George Crisci will present "The Advancement of Collective Bargaining: After Lorain, ODOT, Youngstown, Defiance, Toledo, Twinsburg – Are we on course or have we lost our way?" at the State Employment Relations Board's ("SERB") 25th Anniversary Conference in Columbus, Ohio.

April 7, 2009

Steve Dlott will be part of a panel presentation on "Advanced Workers' Compensation in Ohio" at the Hilton Garden Inn in Cleveland, Ohio. For more details or registration, please contact Sterling Education Services at 715.855.0498 or on the web at www.sterlingeducation.com.

May 6, 2009

Steve Dlott and Patrick Watts will present "Navigating Leave of Absence Issues, Including ADA, FMLA, and Workers' Compensation" at the Ohio Health Care Association Convention".

May 21, 2009

Steve Dlott and Patrick Watts will present "New Issues in ADA, FMLA, and Workers' Compensation" at the Lake/Geauga County Chapter of the Society for Human Resource Management ("SHRM").

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

columbus office:
17 south high street, suite 750
columbus, ohio 43215
p: 614.224.4411
f: 614.224.4433

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

www.zrlaw.com

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and proprietary and kept locked and secured. Only employees who need to access the information should have access to those documents. If the information is kept in electronic form it needs to be password protected and be accessible only by certain employees, not by every employee in the company. The employees should sign a form that pops up every time he/she accesses the information acknowledging the employee's understanding that the information is confidential and proprietary. Remember to only disclose confidential and proprietary information to those employees who need to access it to perform their job. Otherwise your trade secrets slowly will drip away from you.

**Lois A. 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.*

RUNNING WITH...

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community and employee safety and fallout from false-positive and false-negative test results. As a consequence, employers conducting the drug and alcohol tests required by the DOT must proceed with caution.

**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 on drug or alcohol testing or in any workers' compensation-related matter, please contact Steve at 216.696.4441 or spd@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.