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EMPLOYMENT LAW QUARTERLY

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LOCK IT UP:

Safeguard company property against trade secret theft

*by Lois A. Gruhin**

In today's difficult economic times, trade secret theft is becoming more frequent, particularly in the areas of corporate information technology, finance, accounting, sales, marketing, human resources, and communications. Employers have found that former employees steal data by transferring it to a CD or DVD and copy e-mail lists, employee records, and customer information. Often, former employees then use this information to find a new job or with their new employer.

There are a number of different methods and safeguarding techniques employers should consider to protect their confidential business information. Some of these include:

- Ensuring that documents and electronic data are adequately protected with locks, passwords, or other restrictions on access;
- Requiring employees to sign non-compete/non-disclosure agreements;
- Conducting exit interviews and obtaining assurance form the exiting employee that he/she has returned all company property and reminding the employee of any agreements he/she may have signed;
- Terminating computer access immediately after the employee leaves the company; and
- Conducting trade secret/ non-compete audits regulary.

It is critical for companies to safeguard their trade secrets and technical information. Companies must be able to maintain customer relationships without worrying that former employees might use stolen information to the company's detriment. Implementing proper procedures and safeguards to protect confidential business information can help alleviate these concerns and assure your company's viability.

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 law matters. For more information about trade secrets, non-compete agreements or any other labor or employment issue, please contact Lois at 614.224.4411 or lag@zrlaw.com.

SPECIAL DELIVERY: **Workers' compensation awards must account for all jobs**

*by Scott Coghlan**

Recently, the Ohio Supreme Court held in *State ex rel. FedEx Ground Package Sys., Inc. v. Indus. Comm.* that a Workers' Compensation claimant is entitled to both an average weekly wage (AWW) and full weekly wage (FWW) which includes income from a second job, even when that second job is unrelated to the first and when the second job pays more than the first.

In that case, Christopher Roper, injured himself while working for FedEx. In addition to his job at FedEx, Roper worked a second job with a pest control company and also operated another business on the side. After his injury at FedEx, FedEx set Roper's AWW at $160.45 and set his FWW at $250.80. FedEx derived these figures from his earnings at FedEx without taking into account his earnings from his second job at the pest control company.

Roper then moved the Industrial Commission of Ohio to increase his AWW and FWW to reflect his combined earnings from FedEx and the pest control company. The district hearing officer did so based on the "special circumstances" provision of R.C. 4123.61, increasing his AWW award to $417.05 and his FWW award to $457.36. The Franklin County Court of Appeals eventually affirmed the order.

The Ohio Supreme Court similarly affirmed, holding that the AWW, as the basis for benefit computation, "should approximate the average amount that the claimant would have received had he continued working after the injury as he had before the injury." The Court further stated that, while R.C. 4123.61 refers to the "average weekly wage for the year preceding the injury," the formula may be discarded if the AWW cannot justly be determined by applying the formula. When this occurs, the statute provides that the administrator for the Bureau of Workers' Compensation "shall use such method as will enable the administrator to do substantial justice to the claimants." Id.

To no avail, FedEx argued that the inclusion of wages from other, concurrent jobs would create a disincentive for claimants to return to work. FedEx also argued that secondary wages should be excluded entirely, or in the alternative that they be limited to situations where the two jobs are similar in character. In response to FedEx's first argument, the Court noted that R.C. 4123.56(A) expressly prohibits temporary total disability payments when the employer makes work available to the employee in a manner that is within his or her physical capabilities, or when another employer does so. The court, in dispensing with the second argument, noted that R.C. 4123.61 "refers to wages earned in the year prior to injury without qualification or exclusion." The court also noted that similar jobs can also have disparate earnings. Thus, limiting AWW awards to jobs which are similar in nature would not necessarily eliminate the wage differential which could potentially exist.

FedEx also challenged the amount of the FWW the Commission awarded to Roper. The Court also upheld this amount, giving broad deference to the Commission's calculation relying on Joint Resolution No. R80-7-48, issued by the Industrial Commission and Bureau of Workers' Compensation. The resolution states that the full weekly wage equals "the gross wages (including overtime pay) earned over the aforementioned six week period divided by six" or "the employee's gross wages earned for the seven days prior to the date of injury, excluding overtime pay," whichever is higher. The Court found that the Commission did not abuse its discretion in using the first formula to calculate Roper's FWW amount.

As a result of this case, employers need to understand that AWW and FWW awards must include all of an injured worker's income from the year prior to the injury from all employers. In addition, employers need to offer employment within the physical capabilities of the injured worker as soon as possible so as to minimize temporary total compensation payments.

**Scott Coghlan, the chair of the firms' Workers' Compensation Group, has extensive experience in all aspects of workers' compensation law. For more information about workers' compensation compliance, please contact Scott at 216.696.4441 or sc@zrlaw.com.*

Unions Winning a Higher Percentage of Representation Elections, but the Numbers Don't Tell the Full Story

*by Jon M. Dileno**

According to National Labor Relations Board ("NLRB") data, unions won 68.5 percent of representation elections conducted by the NLRB in 2009. This is up from the prior year's 66.9 percent and represents the highest win rate since 1955 when unions won 67.6 percent of the elections in which they participated. The 2009 union election win-rate represents more than a ten percent increase since 2004, although unions have won more representation elections than they have lost in each of the past 13 years.

While the union win-rate increased in 2009, the number of voters eligible to participate in the elections decreased from 2008. Additionally, the NLRB conducted 1,293 elections in 2009 as compared to 1,612 in 2008, with the number of elections in 2009 (1,293) being nearly half the number of elections conducted in 1996 (3,300). Thus, while unions are winning at a greater percentage, the dramatic decrease in elections has resulted in a corresponding decrease in the actual number of elections they are winning.

Notably, these NLRB statistics do not reflect the full extent of organizing by labor unions. Many unions organize through check-card recognition, neutrality agreements, and methods other than NLRB-run, secret ballot elections. These statistics should encourage all non-union employers to review and revise workplace policies related to union organizing and monitor their workplaces for potential union organizing efforts.

**Jon M. Dileno practices in all areas of labor and employment law, with a focus on private and public sector labor law. For more information on NLRB statistics or any other labor or employment issue, contact Jon at 216.696.4441 or jmd@zrlaw.com.*

TAKING IT ALL OFF:

Are employers required to pay employees for changing clothes?

*by Patrick M. Watts**

Recently, the Department of Labor ("DOL") issued yet another opinion letter regarding whether changing clothes at the beginning or end of the workday is compensable time under the Fair Labor Standards Act ("FLSA"). The DOL also addressed whether changing clothes could be considered a "principal activity" under the Portal to Portal Act making compensable all employee activities that occur after the changing of clothes at the beginning of the workday.

What are clothes?

The FLSA provides that when determining hours worked by an employee, the employer shall exclude "time spent in *changing clothes* or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement…" 29 U.S.C. §203(o). The DOL has issued five (5) opinion letters over the past fifteen (15) years regarding the meaning of this provision and the meaning of "clothes." In one opinion letter, the DOL concluded that "clothes" did not include protective equipment such as: mesh aprons, plastic belly guards, mesh sleeves, plastic arm guards, wrist wraps, mesh gloves, runner gloves, polar sleeves, rubber boots, shin guards and weight belts. See Wage and Hour Opinion Letter, December 3, 1997. Later, the DOL revised its view of "clothes" and determined that "clothes" included protective gear. See Wage and Hour Opinion Letter, FLSA 2002-2.

In its most recent opinion letter, the DOL retreated to its previous position and now advises that "clothes" do not include protective gear. In support, the DOL cited to the legislative history of the law and also to current court cases which conclude that protective gear are not clothes. In citing the legislative history, the DOL noted that during Congressional

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debate on this provision an example of bakery employees was utilized to explain the purpose of this provision. The DOL concluded that the example of bakery employees changing "clothes" was incompatible with meatpackers or employees changing protective gear. Moreover, the DOL cited to three cases which concluded that, among other things, helmets, smocks, plastic aprons, arm guards, gloves, hooks, knife holders, sanitary and safety equipment, and protective equipment did not constitute "clothes." As a result, the DOL advises that time spent changing protective gear or equipment is not exempt from compensable time based on the express terms of or by custom or practice of a collective bargaining agreement as provided by 29 U.S.C. §203(o). The DOL disavowed any previous opinion letter which is inconsistent with this most recent opinion.

Can the workday start when the employee is changing clothes?

In the second part of its recent opinion letter, the DOL addressed whether changing clothes could still constitute a "principal activity," even if the act of changing clothes itself was not compensable. If changing clothes is a principal activity, then walking time and waiting time after changing clothes at the beginning of the day (and walking and waiting time before changing clothes at the end of the day) would constitute compensable time.

The DOL determined that changing clothes may be a principal activity. The DOL first noted that the language of §203 assumes that changing clothes can be a principal activity because that section states that "time spent in changing clothes or washing *at the beginning or end of each workday…*" The DOL concluded that the language itself assumes that the changing of clothes, while exempt from compensability in some cases, remains part of the workday. The DOL also cited to several court cases which addressed this issue. Many of these courts concluded that simply because the activity was not compensable did not also mean that the activity could not be considered the start of the workday. One court noted that although changing clothes may not be compensable under the FLSA, "it does not affect the fact that these activities could be the first 'integral and indispensable' act that triggers the start of the continuous workday…" As a result, the DOL concluded that changing clothes, even when not compensable, may still be a principal activity which effectively starts the workday.

Notably, the DOL did not opine that changing clothes will always be non-compensable or that changing clothes will always be a principal activity. Employers must consider a variety of factors to answer these questions, including whether there is a custom or practice or express language within a collective bargaining agreement and also whether changing clothes is an integral and indispensable act to an employees job. If you need assistance analyzing these or any FLSA compliance issues, please contact us.

**Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience in all aspects of workplace law including FLSA compliance. For more information about FLSA compliance or any other labor or employment issue, please contact Patrick at 216.696.4441 or pmw@zrlaw.com.*

CHILD'S PLAY: U.S. Department of Labor issues final child labor regulations

*by Michele L. Jakubs**

The United States Department of Labor (DOL) final regulations concerning child labor took effect on July 19, 2010. The regulations govern the employment of children for non-agricultural jobs. The final regulations incorporate statutory amendments to the Fair Labor Standards Act (FLSA) and specific recommendations made by the National Institute for Occupational Safety and Health and give employers clear notice of jobs that children may not perform.

The FLSA requires workers be at least 16 years old to work in non-agricultural occupations. However, the DOL deems certain occupations suitable for workers between 14 and 15 years old. For example, prior to the regulations, 14- and 15-year olds could work in retail, food service, and gasoline service establishments. With the new regulations, permissible occupations for workers ages 14-15 now include: office and clerical work, computer programming, writing software, tutoring, serving as a peer counselor or teacher's assistant, singing, playing a musical instrument, cashiering, modeling, price marking, assembling orders, packing and shelving, bagging and carrying out customer orders, kitchen work, and other food, beverage prep and service work. Fifteen year olds can also work as lifeguards.

The new regulations make clear that any job not specifically permitted for 14- and 15-year olds is prohibited. The regulations also include a non-exhaustive list of prohibited occupations including: manufacturing, mining, processing, working with a hoisting apparatus, working with power-driven machinery such as lawn mowers and golf carts, all work requiring the use of ladders or scaffolds, and occupations in warehousing, storage, communications, public utilities or public messenger services. Fourteen and 15-year olds also are prohibited from door-to-door "street" sales. However, charitable or fundraising efforts, such as selling cookies for the Girl Scouts or school fundraisers, are exempt from this provision.

The new regulations also clarify times and maximum number of hours 14- and 15-year olds may work. From June 1st through Labor Day, 14- and 15-year olds may work between the hours of 7 a.m. and 9 p.m. They may work a maximum of 8 hours per day and no more than 40 hours in one week. When school is in session, 14- and 15-year olds may work between 7 a.m. and 7 p.m. Additionally, during the school year they may not work more than 3 hours per day or 18 hours per week.

The new regulations also expand prohibitions for workers between the ages of 16 and 18. The prohibited occupations for workers between ages 16 and 18 now include: working with, tending, riding upon, repairing, servicing or disassembling an elevator, crane, manlift, hoist or high-lift truck; and working with chain saws, reciprocating saws, wood chippers and abrasive cutting discs.

The regulations also increase the penalties for child labor violations. Violators can be subject to a civil penalty between $11,000 and $50,000 for each violation and $100,000 for repeated or willful violations. The regulations also add a new penalty for causing death or serious injury to an employee under the age of 18. "Serious injury" is defined as:

- Permanent loss or substantial impartment of one of the senses (sight, hearing, taste, smell, tactile sensation);
- Permanent paralysis or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand, or other body party; or
- Permanent paralysis of substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

In addition to the above, the regulations also include new work-study programs for workers aged 14-15. As a result of these new regulations, this may be a good time for employers to revisit their child labor policies and make any necessary changes.

**Michele L. Jakubs, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment litigation and FLSA compliance. For more information about complying with child labor laws, please contact Michele at 216.696.4441 or mlj@zrlaw.com.*

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

Z&R Shorts

Welcome Stefanie L. Baker

Zashin & Rich Co., L.P.A. is pleased to announce the addition of Stefanie L. Baker to its Employment and Labor Group.

Stefanie's practice encompasses all areas of public and private labor and employment issues.

Stefanie earned a B.A. with honors from Miami University. She earned her law degree (J.D.) with honors from Cleveland-Marshall College of Law. During law school, Stefanie served as Editor-in-Chief of the Journal of Law and Health. She was also a member of Moot Court and completed an externship with the Honorable Christopher A. Boyko of the Northern District of Ohio. Stefanie is admitted to practice law in the State of Ohio. She is a member of the Ohio State Bar Association, the Cleveland Metropolitan Bar Association, and the Cleveland-Marshall Law Alumni Association.

Please join us in welcoming Stefanie to Z&R!

Congratulations to Patrick J. Hoban

Zashin & Rich Co., L.P.A. would like to congratulate Patrick J. Hoban on his recent certification by the Ohio State Bar Association as a Specialist in Labor and Employment law. Pat fulfilled several requirements to earn this specialty certification, including demonstrating a substantial and continuing involvement in Labor and Employment law. Congratulations Pat!

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