ZASHIN&RICH CO.,L.P.A.
cleveland | columbus

EMPLOYMENT LAW QUARTERLY

Volume XII, Issue i
Spring 2010

In this issue:

EMPLOYERS BEWARE:

Use of Fake Job References On The Rise

*by Britt J. Rossiter**

There is a new breed of service providers that create fake job references for people struggling to find jobs. For an initial cost of $60 to $200, plus monthly fees, these services create fake companies, complete with telephone numbers, logos, websites, a LinkedIn profile and live references. Additionally, these service providers sell fake diplomas, transcripts, letters of recommendation, landlord references, doctor's excuses and even funeral excuses.

Founders of these companies claim that applicants utilize their services to get ahead in today's competitive job market. According to these companies, they simply provide a service made necessary by the poor economy. When asked about the ethical implications, one company proclaimed that it is helping its customers feed their families. One company claims to have guidelines including reviewing criminal backgrounds prior to giving references and refusing to provide references for lawyers, health care professionals and those seeking employment with the federal government. However, all other industries appear susceptible.

Questions regarding the legality of these services remain unanswered. In fact, even these service providers question the legality of their services by warning customers to check state laws regarding the legal implications of lying on one's resume. As for the legal implications to the service providers, speculation exists that they could face claims of fraud, misrepresentation and detrimental reliance, and could potentially face criminal prosecution, regardless of their disclaimers.

Hiring mistakes cost employers valuable resources. To avoid such mistakes, employers should consider the following practices:

Cross reference past employers listed on a resume or application against an applicant's social networking profile. Many social networking sites such as LinkedIn allow subscribers to list their employment history.

Insist on talking to real people when checking references. Fake employers often avoid live conversations with reference checkers. If the reference insists on faxing or sending written responses this may indicate a fake reference.

Verify a referring employer's incorporation. Ask the referring employer its state of incorporation. Follow up with the office of the secretary of state of the alleged incorporating state to verify.

Amend employee handbooks, application forms and workplace policies to make clear that falsifying a resume, application or reference is grounds for immediate termination.

Question inconsistencies on an applicant's resume with answers given during interviews.

*Britt J. Rossiter has extensive experience in developing hiring and retention employment policies. If you need further information about updating or developing employment policies please contact Britt at 216.696.4441 or bjr@zrlaw.com.

FMLA ENFORCEMENT:

Northern District of Illinois Bans Employers Doctor's Note Policy

*by Patrick M. Watts**

Recently, the court for the Northern District of Illinois ruled that a policy requiring employees to produce a doctor's note for each absence occurring during intermittent family medical leave violated the Family Medical Leave Act ("FMLA"). In *Jackson v. Jernberg Industries, Inc.,* 2010 U.S. Dist. LEXIS 1581 (January 26, 2010), the court reasoned that such a policy was an impermissible interference by the employer. The court held that the policy was not supported by the language of the FMLA and accompanying administrative rules and it discouraged an employee's right to leave under the FMLA.

The employer, Jernberg Industries, Inc., ("Jernberg") maintained an attendance policy that assigned employees points for each day an employee missed work. Generally each absence equated to one point. However, if an employee missed two or more consecutive days and produced a doctor's note Jernberg awarded only one point for all days missed. Jernberg expunged points upon the one year anniversary of receipt of a point. Accumulation of points triggered disciplinary actions: five points resulted in a written warning, eight points resulted in a second written warning, twelve points resulted in a three day suspension and fourteen points resulted in termination. The policy excluded leave taken under the FMLA. To receive FMLA leave, Jernberg required employees to sign a form stating they, "understood and agreed that for intermittent leave, documentation must be presented with each absence for the absence to be applied to the FMLA status." To satisfy this requirement, Jernberg required a doctor's note verifying the leave was related to an FMLA-certified condition.

The plaintiff went on continuous family medical leave from August 4, 2004 through October 24, 2004. Jernberg assessed no points to the plaintiff for this leave. On August 28, 2005, the plaintiff applied for intermittent family medical leave by completing Jernberg's form with the above detailed language. Prior to his leave, the plaintiff produced a Certification of Health Care Provider stating that the plaintiff's condition was a FMLA-certified condition, but did not list the specific dates the plaintiff would miss work. Jernberg approved the plaintiff's intermittent leave. Between August 29, 2005 and February 6, 2006, the plaintiff took 88 days of intermittent FMLA-leave, all of which were supported by a doctor's note verifying that the days were related to his FMLA-certified condition.

Between February and June of 2006, The plaintiff missed an additional 12 days of work, which he verbally claimed were related to his FMLA-certified condition but failed to produce a supporting doctor's note. Jernberg assessed the plaintiff one point for each of the 12 days missed. By the end of June 2006, the plaintiff exceeded the allowable points limit, and on June 29, 2006, Jernberg terminated the plaintiff's employment.

The plaintiff brought suit arguing that Jernberg's policy interfered with his FMLA rights. In particular, he argued the policy was an impermissible recertification requirement. Under 29 U.S.C. § 2615 an employer cannot interfere with, restrain or deny the exercise of or the attempt to exercise any FMLA rights, including intermittent leave. Further, under 29 C.F.R. 825.220(b) an employer cannot refuse or discourage an employee from taking family medical leave. In response, Jernberg argued its policy was a reasonable safeguard against employee abuse of FMLA leave.

The Court granted the plaintiff's motion for summary judgment finding that Jernberg's policy of requiring third party approval was onerous, and thus an impermissible interference with the plaintiff's FMLA rights. The court reasoned that the FMLA and supporting regulations do not expressly permit employers to request medical verification to substantiate absences taken during intermittent leave. To the contrary, the regulations expressly restrict employers from requesting additional information from health care providers beyond that required by a certification form. Additionally, the regulations provide employers the option of verifying absences through the recertification process once the recertification requirements are satisfied. However, even upon recertification, an employer cannot request a doctor's note because it can only seek information required by a certification form. The court further noted, that as a practical matter, Jernberg's policy discouraged the plaintiff from taking FMLA leave

(continued on page 3)

To Report or Not To Report an EPLI Claim

*by Stephen S. Zashin**

The Supreme Court of Connecticut in *National Waste Associates, LLC v. Travelers Casualty and Surety Co. of America,* 294 Conn. 511 (2010), reestablished the importance of employers timely notifying their employment practices liability insurance ("EPLI") carrier of events potentially covered by their policy. National Waste Associates, LLC ("NWA") filed a complaint against Travelers Casualty and Surety Co. of America ("Travelers"), after Travelers refused to provide a defense or indemnify NWA for a wrongful termination claim filed by one of NWA's former employees. Connecticut's highest court held that Travelers had no duty to indemnify NWA.

NWA purchased an EPLI policy from Travelers for the period of February 15, 2007 to February 15, 2009. On May 12, 2007, one of NWA's former employees filed a wrongful termination action against NWA. Prior to filing her wrongful termination complaint and prior to NWA's EPLI policy start date, the former employee also filed an action for unemployment benefits alleging that NWA wrongfully discharged her.

Based on the following provision in NWA's EPLI policy, Travelers successfully argued that its policy precluded coverage:

> This [l]iability coverage shall not apply to, and [Travelers] shall have no duty to defend or to pay, advance or reimburse [d]efense [e]xpenses for, any [c]laim…based upon, alleging, arising out of, or in any way relating to…any fact, circumstance, situation, transaction, event or [w]rongful [a]ct underlying or alleged in any prior or pending civil, criminal, administrative or regulatory proceeding..., against any [i]nsured as of or prior to [the effective date of the policy].

The Court agreed with Travelers that NWA's former employee's unemployment benefit proceeding was an "administrative proceeding" subject to the provision above. NWA's former employee made the same allegations in both her unemployment proceeding and later filed complaint – that NWA wrongfully discharged her. Since the unemployment proceeding occurred prior to the start of NWA's EPLI policy's coverage date, Travelers was not required to defend or indemnity NWA against its former employees later filed wrongful discharge complaint.

As this case demonstrates, it is critical for an employer to understand the intricacies and nuances of its EPLI policy. When it is unclear as to whether an incident should be reported to the carrier, employers should err on the side of reporting the incident so as to not preclude them from coverage later. More specifically, employers should alert their EPLI carriers when a former employee alleges wrongful discharge even if done in connection with a claim for unemployment benefits.

**Stephen S. Zashin, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience representing employers covered by EPLI insurance against claims of workplace discrimination, harassment and retaliation. If you need further information about EPLI coverage or reporting claims to EPLI providers please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

FMLA ENFORCEMENT *(continued from page 2)*

because it required the plaintiff to produce five doctor's notes in a 12 month period and required him to produce an additional six more to satisfy its policy.

This case demonstrates that employers should not request medical information from a health care provider beyond that expressly permitted by the FMLA. In addition, employers that have policies similar to Jernberg should rewrite their policy to avoid violating the FMLA, and may want to contact an attorney to audit the entirety of their FMLA policies.

**Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment Law, has extensive expertise in FMLA administration and litigation. If you have any questions regarding FMLA leave or whether your employment policies comply with the current FMLA regulations, contact Patrick at 216.696.4441 or pmw@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.

THE EMPEROR'S NEW CLOTHES: Fourth Circuit Rules On Donning and Doffing of Protective Gear Under a Collective Bargaining Agreement

*by Jon M. Dileno**

Recently, the United States Court of Appeals for the Fourth Circuit upheld a decision allowing an employer to maintain a policy of not paying employees for time spent donning and doffing protective gear. Generally, the Fair Labor Standards Act ("FLSA") requires employers to include in compensable work time the time spent donning and doffing if it is an integral and indispensible part of an employee's principal activities. Under 29 U.S.C. § 203(o), an employer may exclude from compensable work time any time spent "changing clothes or washing at the beginning or end of each work day. . . by the express terms of or by custom or practice under a bona fide collective bargaining agreement. . . ." In *Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209* (4th Cir. 2009), the Fourth Circuit agreed that donning and doffing protective gear is "changing clothes" within the meaning of 29 U.S.C. § 203(o), thus, allowing an employer with an organized workforce to exclude this time from compensable work time if doing so is an established practice under a bone fide collective bargaining agreement ("CBA").

The employer, Allen Family Foods ("Allen"), processed poultry. Prior to the start of a shift, Allen required employees to don protective gear in its locker room and to sanitize the gear by dipping their gloves into a tank, splashing solution onto their aprons and stepping through a foot bath. Allen gave employees a thirty minute lunch break during which time the production line was nonoperational. During scheduled lunch breaks, employees typically removed some of their protective gear. Upon returning to work, employees put their protective gear back on and re-sanitized. At the end of the shift, employees doffed their protective gear before leaving the site. As a long standing practice under their bona fide CBA, Allen did not pay its unionized employees for time spent donning and doffing protective gear before and after shifts or during lunch breaks.

In 2002, the union representing Allen's employees attempted to negotiate pay for time spent donning and doffing protective gear. While it was the subject of collective bargaining, Allen rejected this term, and the parties did not incorporate such a term into the employee's CBA. In 2007, employees initiated a lawsuit against Allen claiming violations of the FLSA for failing to compensate them for time spent donning and doffing protective gear. As their primary argument, the employees asserted that donning and doffing protective gear did not constitute "changing clothes" within the meaning of 29 U.S.C. § 203(o).

Upon completion of discovery, Allen filed a motion for summary judgment arguing that the plain meaning of § 203(o) permitted its pay practice. The District Court granted Allen's motion finding that donning and doffing protective gear was "changing clothes" within the meaning of § 203(o). On appeal, the Fourth Circuit determined that two conditions must be met in order to trigger § 203(o): (1) the activity must constitute "changing clothes," and, (2) the express terms of a CBA or practices under a bona fide CBA must exclude from compensable work time the time spent "changing clothes."

Ultimately, the Fourth Circuit considered the plain meaning of the terms "changing" and "clothes" with the purpose of § 203(o) and determined that donning and doffing protective gear constituted "changing clothes." Additionally, the employees conceded that Allen had a long standing practice under the CBA to exclude time spent donning and doffing protective gear from compensable work time. The Fourth Circuit found that § 203(o) permitted Allen's pay practice.

As an ancillary argument, the employees argued sanitizing protective gear did not constitute "washing" under § 203(o). However, the Fourth Circuit disagreed, finding that the plain meaning of "washing" included sanitizing protective gear. The Fourth Circuit also rejected the employee's argument that they should be paid for time spent donning and doffing before and after lunch breaks. The Court reasoned that this time actually occurred during a bona fide meal period under 29 U.S.C. § 785.19 and, in the alternative, that this time was de minimis.

In summary, § 203(o) applies only when the express terms of a bona fide CBA or customs or practices under a bona fide CBA exclude the donning and doffing of protective gear from compensable work time. Due to the complexity of this issue and the FLSA, employers should seek the advice of counsel if they have questions related to employee compensation.

Jon M. Dileno has extensive experience in handling FLSA allegations and negotiating collective bargaining agreements for public and private sector employers. If you need further information about the FLSA or collective bargaining please contact Jon at 216.696.4441 or jmd@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.

BULLS ON PARADE:

Do State Laws Follow the Lilly Ledbetter Fair Pay Act

*by Lois A. Gruhin**

In December 2009, the New Jersey Superior Court decided that it will not follow the recent Congressional Amendment to Title VII known as the Lilly Ledbetter Fair Pay Act of 2009 (the "Act"). The Act, in its preamble, expressly rejects the United States Supreme Court decision *Ledbetter v. Goodyear,* 550 U.S. 618 (2007) (the "Ledbetter case"). The Act also extends the definition of unlawful employment practices. The extended definition includes occurrences when an individual is affected by application of a discriminatory compensation decision, including each time compensation is paid. In *Alexander v. Seton Hall Univ.,* 410 N.J. Super. 574 (2009), the New Jersey Superior Court upheld a ruling that the plaintiff's claims were time barred under the New Jersey Law Against Discrimination ("LAD") despite the fact that Plaintiffs received a paycheck reflecting pay discrimination within the two year statute of limitations. This decision flatly rejected the Act by: (1) following the *Ledbetter* case and (2) failing to recognize an unlawful employment practice occurring when an individual receives compensation reflecting a discriminatory decision.

In August 2005, the plaintiffs discovered that their salaries were disproportionately lower than less senior, younger male faculty in similar positions. In July 2007, the plaintiffs filed their complaint alleging pay discrimination based on sex and age. Seton Hall filed a motion to dismiss arguing that the plaintiffs' claims were time barred because they were not brought within the two year statute of limitations from the date Seton Hall made the alleged discriminatory decision to pay male faculty more then female faculty. The plaintiffs argued that their claims were not time barred because each paycheck reflecting pay discrimination constituted a continuous violation of LAD rather than a discrete discriminatory act occurring outside the statute of limitations.

The trial court granted Seton Hall's motion to dismiss relying on the *Ledbetter* case. In the Ledbetter case, the United States Supreme Court ruled that Ledbetter was time barred from bringing her claim because the discriminatory decision to pay her less than her male counterparts occurred outside the statute of limitations. The United States Supreme Court rejected the argument that each paycheck constituted a continuous violation. The New Jersey Superior Court applied the reasoning in the *Ledbetter* case and held that the Act did not amend the LAD. As such, the Superior Court concluded that the statute of limitations for pay discrimination claims begins to run at the time the discriminatory decision is made. Any claims brought outside of the statute of limitations are time barred.

It remains unclear whether other states will follow the New Jersey decision to reject the Act or if this decision will spur state legislatures to amend state anti-discrimination laws to read similar to the Act. Therefore, until these questions and other interpretation questions are answered, employers should continue to monitor and retain compensation records indefinitely.

**Lois A. Gruhin has extensive experience defending employers against allegations of discriminatory pay practices and knowledge regarding document retention policies after the Ledbetter Act. If you need further information about pay practices or document retention policies please contact Lois at 216.696.4441 or lag@zrlaw.com.*

EEOC Claims Drop Slightly in 2009

*by Jessica T. Tucci**

COMPLAINTS FILED ANNUALLY WITH THE EEOC

Category	FY 2008	FY 2009	Percent Change
Total Charges	95,402	93,277	(2.2)%
Race	33,937	33,579	(1.1)%
Retaliation	32,690	33,613	2.8%
Sex	28,372	28,028	(1.2)%
Age	24,582	22,778	7.3%
Disability	19,453	21,451	10.3%
National Origin	10,601	11,134	5.0%
Religion	3,273	3,386	3.5%
Equal Pay Act	954	942	(1.3)%

The number of workplace discrimination claims filed with the Equal Employment Opportunity Commission ("EEOC") fell slightly from a record high of 95,402 claims filed in 2008 to 93,277 claims filed in 2009. The EEOC experienced a 15% spike in the number of discrimination claims filed in 2008 over the previous year, which led at least one EEOC official to incorrectly predict that claims might rise above 100,000 in 2009. While the number of claims filed in 2009 decreased, claims based on disability, religion, national origin and retaliation hit an all-time high. The record high number of disability claims comes in the wake of the Americans with Disabilities Act Amendments Act of 2008, which became effective January 1, 2009, and expanded protections under the law for disabled Americans.

To avoid facing an EEOC charge, employers should maintain open lines of communication with their employees so that their employees are less likely to cry foul in the event of a layoff, termination, reduction in hours or other important employment decision. Being concise, clear, open and honest with employees about changes in their employment status often provides an employee with a sense of closure and prevents the hassle of dealing with frivolous discrimination claims. Furthermore, employers should maintain clear and consistent Equal Employment Opportunity and anti-harassment reporting policies and take allegations of discrimination and harassment seriously by conducting thorough well documented investigations.

Factors influencing the large number of discrimination claims include increased diversity and demographic shifts in the labor force, a heightened awareness of the laws enforced by the EEOC and the high unemployment rate. Traditionally, the number of claims filed with the EEOC increases in tough economic times. As the economy continues to rebound, employers must maintain vigilant in their approach in understanding and complying with employment laws.

**Jessica T. Tucci has extensive experience in handling matters before the Equal Employment Opportunity Commission. If you need further information about EEOC policies or procedures or with updating or developing EEO policies please contact Jessica at 216.696.4441 or jtt@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

Zashin & Rich Co., L.P.A. is pleased to announce the addition of Roy E. Lachman as the chair of the firm's Class, Collective and Multidistrict Actions Group and Scott Coghlan as chair of the firm's Workers' Compensation Group.

Roy E. Lachman has over twenty-six years of experience as bank counsel, having served as General Counsel of AmTrust Bank and a number of its affiliated corporations. In addition, he also worked at a global law firm and as a Staff Attorney for a federal appeals court. He specializes in the law of banking and financial transactions, employment and discrimination matters, complex and class litigation, financial fraud, real estate and securities brokerage, insurance, legal compliance and internal investigations, and general commercial litigation. He has extensive experience dealing with administrative and regulatory agencies, both in helping clients avoid legal exposure and in limiting such exposure once it has arisen.

If you have any questions regarding class, collective, or complex litigation issues, please contact Roy (rel@zrlaw.com) at 216.696.4441.

Scott Coghlan has over seventeen years of experience defending workers' compensation claims. Scott has represented employers in hundreds of workers' compensation lawsuits in more than fifty of Ohio's common pleas courts, five courts of appeal, and the Ohio Supreme Court. Scott has won numerous jury verdicts resulting in the return of premiums to employers and regularly prosecutes and defends mandamus actions before the Franklin County Court of Appeals. He has also successfully obtained orders preventing claims for permanent total disability. Scott also defends employers with respect to claims of successorship liability, intentional torts and Violation of Specific Safety Rule (VSSR). He regularly counsels employers about developing workplace safety programs and establishing workers' compensation premium reduction programs.

If you have any workers' compensation issues or any employee injury issues, please contact Scott (sc@zrlaw.com) at 216.696.4441.

Zashin & Rich Would Like To Congratulate Its 2010 SUPERLAWYERS®

George S. Crisci
Jon M. Dileno
Victoria A. Glowacki
Patrick J. Hoban
Britt J. Rossiter
Patrick M. Watts
Andrew A. Zashin
Stephen S. Zashin

Upcoming Speaking Engagements

Patrick Watts will be one of the presenters of **"Employment Law Alphabet Soup"** on **June 8, 2010** at the Holiday Inn, Independence, Ohio. For more information, go to www.nbi-sems.com.

George Crisci will present **"Human Resources Issues"** on **June 16, 2010** at the Holiday Inn, Independence, Ohio. For more information, go to www.nbi-sems.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: 614.861.7612
f: 614.861.7616

www.zrlaw.com