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Unpaid Break Time for Nursing Mothers is Now Mandatory

*by Michele L. Jakubs**

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act ("PPACA"). PPACA Section 4207 ("Section 4207"), entitled "Reasonable Break Time for Nursing Mothers." This law amends Section 7 of the Fair Labor Standards Act by requiring employers to grant employees who are also nursing mothers a reasonable amount of break time to express milk. The break time is unpaid and must be granted each time the employee has the need to express milk for up to one year following the birth of a child.

Employers must also designate a lactation area, other than a bathroom, that is out of sight, sufficiently private and free from intrusion.

Section 4207 does not apply to employers with less than fifty employees if compliance would impose an undue hardship on the employer. Factors for determining an undue hardship include the employer's size, financial resources, nature of the work performed, or structure of the place of business.

Importantly, Section 4207 also does not preempt state laws that provide greater protections to nursing mothers. Several states have already implemented laws regarding the rights of nursing employees in the workplace. For example, the state of Indiana has enacted a law which protects nursing mothers in the workplace. This law has many similar provisions to those set forth in Section 4207, but it exceeds the scope of Section 4207 in that it applies to businesses with twenty-five employees or more, and it requires employers to provide a cold storage space or allow employees to bring their own portable cold storage device to store expressed milk. Ohio presently does not have a law protecting nursing employees in the workplace, but it does have a law protecting individuals nursing in public.

Section 4207 took effect immediately. However, the Department of Labor is currently establishing complimentary rules to clarify the law including enforcement procedures. Consequently, employers employing fifty or more employees should implement policies that comply with Section 4207 immediately if they have not done so already. Further, employers of all sizes should review state and local laws to ensure compliance with laws related to nursing employees.

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Employee or Non-Employee That is the Question...

*by Stephen S. Zashin**

Congress recently introduced the Employee Misclassification Prevention Act ("EMPA") known as H.R. 5107 with its counterpart S. 3648. EMPA, if passed, would require employers to keep certain records concerning non-employees or independent contractors who perform labor or service for remuneration.

EMPA would amend the Fair Labor Standards Act ("FLSA") by creating a special penalty for employers who misclassify employees as non-employees or independent contractors. The Department of Labor could impose fines as high as $5,000 per violation and "willful" violations would be subject to triple damages.

Presently, there are a multitude of different tests applied by various government agencies to determine whether a particular individual is an independent contractor or an employee; employers should apply the most stringent of these tests to avoid liability under the various laws for which this is an issue (including the FLSA as well as Title VII and other antidiscrimination statutes).

In Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) the U.S. Supreme Court examined twelve factors to determine whether the hired individual is an employee or independent contractor under common law agency principles. The Court considered most important the hiring party's ability to control the manner and means by which the work was accomplished, but stated that there were other relevant factors to look at and that no single factor outweighed another.

Employers should carefully review the following factors when determining whether a particular person should be deemed an independent contractor or an employee:

1. The skill required;
2. The source of the instrumentalities and tools;
3. The location of the work;
4. The duration of the relationship between the parties;
5. Whether the hiring party has the right to assign additional projects to the hired party;
6. The extent of the hired party's discretion over when and how long to work;
7. The method of payment;
8. The hired party's role in hiring and paying assistants;
9. Whether the work is part of the regular business of the hiring party;
10. Whether the hiring party is in business;
11. The provision of employee benefits; and,
12. The tax treatment of the hired party.

The consequences for making the wrong decision and misclassifying the person can be severe: liability for failure to withhold and pay the employer's share of employment and social security taxes; liability for failure to make contributions to employee benefits plans; disqualification from retirement benefits plans, liability for wage-hour violations (such as failure to pay overtime); liability for health insurance claims under COBRA; and, liability for violations of employee's rights under laws protecting employees from discrimination.

Employers may avoid misclassification problems by increasing the frequency of communication between workers and their employees. Employers should schedule recurring meetings with their workers to assess job duties and responsibilities; this can be done during annual performance reviews.

The passing of EMPA would heighten the importance of avoiding worker misclassification. Employers should clarify the terms of their relationship with workers and anticipate future changes. Employers who take a proactive approach to classification issues will help to minimize their risk of costly consequences and future litigation.

**Stephen S. Zashin, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience with employee classification issues. If you have classification questions or any other questions regarding employment or labor issues please contact Stephen S. Zashin 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 employment and labor law.

HANDBOOK DISCLAIMER: Include One or Suffer the Consequences

*by Lois A. Gruhin**

Employers frequently rely on employee policy manuals and handbooks to disseminate important policies and practices. These manuals and handbooks may subject unsuspecting employers to contractual liabilities, especially when a properly crafted disclaimer is not included.

A recent Ohio Court of Appeals decision offers significant insight regarding the importance of including disclaimers in handbooks and policy manuals. According to the holding of *Dunlap v. Edison Credit Union, Inc.*, an employer may avoid contractual liability for the contents of a handbook by including in the handbook an express disclaimer of contractual intent and a reservation of rights to change the contents of the handbook.

In *Dunlap*, a retiring employee sought compensation for 38.5 unused vacation days. She argued that a provision in the policy manual – *"'Employees will receive vacation pay for all unused vacation at the time of termination'"* – entitled her to all of her accrued and unused vacation time dating back to 2000. In response, the employer argued that the manual was not a contract, but instead was merely a "set of guidelines." The employer also argued that the purpose of the manual was only "to establish a framework around which the efforts of all employees can be coordinated."

The employee manual in question contained the following additional language: *"The Board of Directors and Credit Union Management may modify, suspend or delete any of the policies stated in the [policy manual] without notice. To be effective, such changes must be in writing and signed by the Manager."* Importantly, the manual also included a multi-part disclaimer:

> The manual is a management guide to general human resource methods at the Credit Union. It does not promise that the policies mentioned will be applicable in any given instance. The manual does not change the employment-at-will relationship in any way.
>
> The [manual] is not an employment contract and does not provide any enforceable contractual rights to the employee with respect to his/her terms or conditions of employment. Neither these guidelines, nor any written or oral polices, practices or procedures which may develop from these guidelines create either an express or implied employment contract.

The Court of Appeals held that these disclaimers prevented the employee from recovering her vacation time. The Court held that while, in other circumstances, handbooks and policies might form the basis of an express or implied contractual obligation, that could not be the case here in light of the disclaimers, which specifically negated the possibility of contractual intent. Because of the disclaimers, therefore, the handbook became "merely a unilateral statement of rules and policy which creates no obligations and rights."

This decision clarifies that employers can avoid untended contractual obligations arising out of a handbook by including a well crafted disclaimer to make it clear that there is no intent to contract, and that the employer reserves the right to change the policies in the *handbook at any time.*

**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 drafting and editing employment policies and manuals. For more information about employee handbooks or any other employment or labor issues, please contact Lois at 614.224.4411 or lag@zrlaw.com.*

UP IN SMOKE: **Employers Need Not Reasonably Accommodate Medicinal Marijuana Use**

*by David R. Vance**

The Supreme Court of Oregon recently ruled that an employer has no duty to reasonably accommodate medical marijuana use by employees.

The Oregon Medicinal Marijuana Act ("OMMA") authorizes persons holding a registry identification card to use marijuana for medicinal purposes and exempts those persons from criminal prosecution. The federal Controlled Substances Act ("CSA") does not authorize medicinal marijuana use and classifies marijuana as an illegal drug for which criminal charges may be imposed.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, the employer, Emerald Steel Fabricators ("Emerald Steel"), hired a temporary employee as a drill press operator. Unbeknownst to Emerald Steel the employee used medicinal marijuana off the clock one to three times per day. Emerald Steel considered the employee for a permanent position but fired the employee when the employee disclosed his use of medicinal marijuana. Emerald Steel fired the employee despite the fact that he provided his registry card and documentation from his treating physician attesting that medical marijuana was the most successful form of treatment for his medical condition.

Two months later, the employee filed a complaint with the Oregon Bureau of Labor and Industries ("BOLI"). The employee claimed that Emerald Steel discriminated against him in violation of Oregon Revised Statute § 659A.112, which prohibits discrimination against an otherwise qualified individual because of a disability and requires an employer to make a reasonable accommodation to those with disabilities. BOLI found that the employee was not fired based on his disability, but ruled that Emerald Steel violated Ore. Rev. Stat. § 695A.112 by failing to reasonably accommodate the employee's disability and denying employment opportunities to an otherwise qualified person.

On appeal, Emerald Steel argued that Ore. Rev. Stat. § 659A.112 must be interpreted consistent with its federal counterpart – the Americans with Disabilities Act (ADA). Further, Emerald Steel argued that because the ADA prohibits protection to those engaged in illegal drug use and CSA classifies marijuana as an illegal drug the employee's use of medical marijuana is not protected by Ore. Rev. Stat. § 695A.112. The Court of Appeals upheld BOLI's reasoning that Emerald Steel did not properly preserve its argument at the administrative level. However, the Oregon Supreme Court disagreed and proceeded with review on the merits of Emerald Steel's argument.

The Oregon Supreme Court ruled in favor of Emerald Steeling finding that employers are not required to reasonably accommodate the use of medicinal marijuana by employees, and employers do not engage in discrimination when terminating employees for use of medicinal marijuana. The Oregon Supreme Court recognized the United States Supreme Court's ruling in *Gonzalez v. Raich*, 545 U.S. 1 (2005), that under the Commerce Clause Congress may prohibit the possession, manufacturing and distribution of marijuana even when state law permits it for medical use. The Oregon Supreme Court furthered reasoned that as a result of *Gonzalez*, CSA partially preempted OMMA to the extent that OMMA explicitly authorized use of a drug CSA classified as illegal. Therefore, the Oregon Supreme Court ruled that Ore. Rev. Stat. § 695A.112 similar to the ADA does not protect those engaged in illegal drug use. Therefore, Emerald Steel was relieved of its obligation to reasonably accommodate the employee pursuant to Ore. Rev. Stat. § 695A.112.

Strictly speaking, this decision allows Oregon employers to use discretion without being subject to discrimination claims when hiring, retaining or discharging employees who use medicinal marijuana. However, this issue remains unsettled in other jurisdictions such as California with laws similar to OMMA. Therefore, employers operating in these jurisdictions should proceed with caution when making employment related decisions related to an employee's use of medicinal marijuana.

**David R. Vance, a member of the firm's Cleveland office, has extensive experience with drug and alcohol issues. For more information about reasonably accommodating employees or any other employment or labor issues, please contact David at 216.696.4441 or drv@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.

Alcoholics Who Violate a No Call/No Show Policy Are Not Protected by the ADA

*by Patrick M. Watts**

Recently, the Second Circuit Court of Appeals held in *VandenBroek v. PSEG Power CT LLC*, that where regular attendance is an essential job function, the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA") did not protect an alcoholic employee who nonetheless repeatedly violated his employer's attendance policy.

The plaintiff in the case, Bruce VandenBroek, worked as a boiler utility operator at Power Connecticut LLC ("PSEG"). PSEG maintained a no-call/no-show rule requiring employees to call their shift supervisor before the start of a missed shift so that PSEG could arrange coverage. In 2005, VandenBroek took FMLA leave to treat back pain and recover from back surgery. In February 2006, VandenBroek violated the no-call/no-show policy on two occasions. The day after VandenBroek violated the no-call/no-show policy for a second time, he informed PSEG he was entering a program for treatment of alcoholism and drug abuse.

On March 1, 2006, VandenBroek's physician released him for work beginning March 6, 2006. On March 2, 2006, PSEG terminated VandenBroek for violating its no-call/no-show policy. VandenBroek filed suit against PSEG alleging violations of the ADA and FMLA. Specifically, he alleged PSEG discriminated against him by terminating his employment for conduct causally related to his disability and retaliated against him for taking leave afforded to him by the FMLA.

The Second Circuit upheld the District Court's finding that VandenBroek failed to establish a prima facie case to support his discrimination claim. Essentially, the Second Circuit agreed with the lower court that VandenBroek was not "otherwise qualified" to perform his job because PSEG could not rely on his regular attendance. The Court reasoned that while attendance is essential to most jobs, it was particularly important in this case where attendance is necessary to prevent a power outage or explosion.

Further, VandenBroek *improperly relied on Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511 (2d Cir. 1991), which held that when an employer terminates an employee based on conduct caused by a disability, the employer terminates the employee because of the employee's disability. The District Court distinguished *Teahan*, a case decided under the Rehabilitation Act of 1974, because the ADA, 42 U.S.C. § 12114(c)(4), permits employers to "hold an employee…who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the…alcoholism of such employee."

The Second Circuit also upheld the District Court's decision that the employer did not retaliate against VandenBroek because he had taken FMLA leave, but rather terminated the employee for a legitimate business reason: violating the employer's "no call/no show" policy. The Court found the employer's decision to terminate VandenBroek was unrelated to his prior FMLA absences for back pain and nasal surgery.

VandenBroek provides only limited guidance for employers making employment related decisions when dealing with employees suffering from alcoholism. Employers making decisions to terminate employees suffering from alcoholism because of poor attendance must be prepared to show specific reasons why attendance is an essential job function. Additionally, this issue has not been decided by the United States Supreme Court. As a result, employers operating outside the Second Circuit may not be afforded similar discretion.

Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment litigation with a focus on FMLA and ADA litigation and compliance. For more information about FMLA or ADA compliance or any other labor or employment issue, please contact Patrick at 216.696.4441 or pmw@zrlaw.com.

THE ENEMY FROM WITHIN: The Dangers of Unrestricted Technology

*by Britt J. Rossiter**

In a time when most employees have unlimited access to the Internet, employers must establish a clear and concise electronic information policy to avoid disclosure of sensitive and confidential information by its employees. Without a clear and concise electronic information policy, employers risk infinite abuses of employee work time, exposure to viruses, loss of trade secrets, and misuse of employer owned property.

An effective electronic information policy includes an unambiguous statement regarding the employer's expectations of computer use, data storage, and distribution of employer owned documents. Additionally, the policy must establish simple rules regarding use of employer issued e-mail accounts, cellular and smart phones, and personal digital assistants ("PDAs"), as well as a requirement to maintain the confidentiality of employer owned documents and proprietary information. Employers must also establish ownership of networks, computers, servers, files, e-mails, and phones to reduce an employee's expectation of privacy when using employer owned property.

Any policy should clearly define the scope of permitted internet usage. Leaving internet use entirely within the discretion of an employee may lead to the very abuses that the policy is designed to eliminate. Employers should also describe what kinds of language, material, and images employees are permitted to transmit when using employer-provided networks and computing equipment, including mobile phones. The policy should make employees aware that the employer intends to utilize technology to monitor all activity and that employees have no expectation of privacy when using company-owned systems and networks.

The policy should also prohibit employees from syncing confidential business information, including customer lists, into "cloud" based Internet services without the employer's permission. The policy should also prohibit employees from using their own personal smartphones, mobile broadband cards, online services such as Google Voice, or other such technologies as a means of circumventing the employer's policies or of stealing confidential data.

Most importantly, employers should enforce all of these policies by implementing monitoring mechanisms.

Employers should distribute their policy to all employees and designate a contact person who can answer questions about it. Finally, since technology changes rapidly, employers should revisit their electronic information policies at least annually.

**Britt J. Rossiter has extensive experience drafting and editing electronic information policies. For more information about the ever changing technology issues facing employers or any other employment or labor issue, please contact Britt at 216.696.4441 or bjr@zrlaw.com.*

ON THE EDGE: Government Employers Walk a Thin Line When Contemplating Searches of Technology Utilized by Their Employees

*By: George S. Crisci**

On June 17, 2010, the United States Supreme Court ruled that a government employer may search employee text messages sent from a government-issued pager, despite an employee's reasonable expectation of privacy when the search is motivated by a legitimate work-related purpose and it is not excessively intrusive in light of the purpose.

In *City of Ontario, California v. Quon*, No. 08-1332 (June 17, 2010), the employee, Jeff Quon, alleged that his employer, the City of Ontario, ("Ontario") and Arch Wireless ("Arch"), the pager provider, violated his Fourth Amendment rights and the federal Stored Communications Act (SCA) by searching the text messages he made on his government issued pager.

Ontario issued its police officers pagers with text messaging capabilities. The police officers, including Quon, signed Ontario's computer policy, which stated that Ontario "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." The policy did not apply explicitly to the pager text messages, although Ontario informally informed its employees that it would treat the text messages in a similar manner.

Almost immediately after the pagers were issued, Quon exceeded the number of allowed text messages for the month. Quon reimbursed Ontario for the overages. Ontario told Quon that an audit of his text messages would not occur so long as he paid for the overages. This pattern continued for the next few months, which prompted the police chief to investigate whether Ontario's text message contract with Arch met the department's text messaging needs. Subsequently, the police chief and Quon's supervisor requested and obtained two months worth of text message transcripts. Upon review, they discovered Quon used his pager mostly for personal use. As a result, Ontario allegedly disciplined Quon for violating its employment policies.

Quon filed suit alleging that Ontario and Arch violated his Fourth Amendment rights and the SCA by obtaining and reviewing his text messaging transcripts, and that Arch violated the SCA by turning over the transcripts. The District Court granted Arch's motion for summary judgment on the SCA claim, but denied the motion of Ontario and Arch as it applied to the Fourth Amendment claim. The District Court applied a two part test – whether Quon had a reasonable expectation of privacy in the text messages, and whether the text message audit was reasonable – to determine whether Ontario and Arch violated Quon's Fourth Amendment rights. The District Court determined that Quon had a reasonable expectation to privacy, but Ontario had not violated his Fourth Amendment rights because the search was reasonably conducted to determine the efficacy of Ontario's text messaging plan. The Ninth Circuit reversed the District Court, and instead found that Ontario's search, while conducted for a legitimate work-related reason, was unreasonable in its scope. Quon appealed to the Supreme Court.

The Supreme Court ruled that Ontario did not violate Quon's Fourth Amendment rights. In reaching its conclusion, the Supreme Court did not rule on whether Quon had a reasonable expectation of privacy with regards to his text messages, but instead assumed he had such an expectation of privacy, and then determined that the review of the text messages was a reasonable search.

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ON THE EDGE *(continued from page 7)*

The Supreme Court held that a search conducted by a government employer is Constitutional if it is "justified at its inception and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search." The Court found that Ontario's search was justified because it was reasonable for Ontario to conduct the audit to determine the adequacy of its contract with Arch. Additionally, the scope of the search was reasonable because it was an efficient and expedient way to determine whether Quon's text messages were work-related.

Government employers should remain cautious when searching employee information stored in government issued/owned property. Additionally, government employers should keep searches involving personal employee information limited in its scope so as to avoid violating its employees' Fourth Amendment rights. Government employers contemplating such a search may wish to consult counsel to address issues raised in Quon prior to conducting a search involving private employee information.

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Z&R Shorts

George Crisci's article entitled "Recent Developments in Public Sector Collective Bargaining" has been selected for inclusion in the 2010 edition of the OSBA CLE Institute's The Best of Labor & Employment Law.

Stephen Zashin will be part of a panel presenting **"Trial: Direct and Cross of an Expert Witness on Damages"** at the 47th Annual Midwest Labor & Employment Law Seminar on **October 14, 2010** at the Hilton at Easton Town Center in Columbus, Ohio. For more information go to www.ohiobar.org.

Congratulations Zashin & Rich Co., L.P.A. Family Law Attorneys for receiving a 1st Tier ranking in Cleveland, Ohio by U.S.News – Best Lawyers®.

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