ZASHIN&RICH CO., L.P.A.
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EMPLOYMENT LAW QUARTERLY

Volume XIII, Issue ii
Summer 2011

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The Number of Wage and Hour Cases Going Up, Settlement Values Going Down

*by Stephen S. Zashin**

Recent trends show the number of wage and hour lawsuits increased from 2007 to 2010. However, the settlement values for these cases have seen a sharp decline. The National Economic Research Associates, Inc. (NERA) discovered the recent trends by collecting data on 187 wage and hour cases. The collected cases include a number of allegations, such as off-the-clock work; unpaid overtime; missed, short, or late meal periods and rest breaks; employee misclassification; unpaid termination wages; failure to pay minimum wage; time shaving and improper tip pooling.

Not all the cases had a reported settlement value, but the 139 cases that did included settlements totaling $1.77 billion for an average settlement of $12.8 million per case and a median settlement of $4.3 million. During the three year period, the average settlement value declined in recent years from more than $20 million in 2007-2008, to approximately $10 million in 2009, to $7.6 million in 2010. The average per-plaintiff settlement also fell from about $8,000 in 2007 to just over $5,000 in 2010.

It is difficult to explain, for certain, the recent decrease in settlement values. One possible explanation are case-specific factors, such as the size of the potential class, the duration of the alleged class period, the number and type of allegations made in each case, and the jurisdiction involved. The number of class members participating and the duration of the class period have the greatest impact on settlement value, as settlement values increase significantly when there are a greater number of plaintiffs and/or longer class periods.

As the number of wage and hour lawsuits increase, employers must remain vigilant with their compliance efforts. If your company has any wage and hour concerns, please contact us.

** Stephen S. Zashin, an OSBA Certified Specialist in Labor and Employment Law, is licensed to practice law in Ohio and New York. Stephen's practice encompasses all areas of employment and labor law and works extensively in defending class and collective actions. For more information about wage and hour laws or any other employment matter, please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

Does Your Wellness Program Comply with the ADA?

*by Jason Rossiter**

Many employers now sponsor Wellness programs for their employees. These programs serve employees by encouraging healthy habits and providing early warning of potential health concerns. They also help employers control health insurance costs. Broward County, Florida (the "County") implemented such a program. The program was voluntary, and those who participated filled out a Health Risk Assessment questionnaire and completed a finger-stick blood test to measure blood sugar and cholesterol levels. If the testing revealed certain potential health problems, the County's health insurer then offered the employee an opportunity to participate in "disease management coaching" and obtain free medications.

In 2009, the County began penalizing employees who chose not to participate in the Wellness program by charging them an extra $20 on each of their bi-weekly paychecks. In *Seff v. Broward County*, a County employee sued the County on behalf of a class of his co-workers, arguing that the $20 charge was a way to compel the employees to submit to the Health Risk Assessment questionnaire process, and thus forced them to undergo a medical-related inquiry in violation of the Americans with Disabilities Act ("ADA").

The ADA makes it unlawful for employers to make "inquiries" about their employees' medical or health conditions, unless the inquiries are job-related and consistent with business necessity. But the ADA contains a "safe harbor" for employers who establish, sponsor or administer "bona fide benefit plan[s] that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." The employee in the *Seff* case argued that the $20 charge in essence forced employees to submit to medical inquiries in violation of the ADA, and that the safe harbor should not apply because the County's Wellness program was not truly based on any legitimate underwriting, classification, or administration risks, but instead on the County's desire to improve the health of its employees.

The court rejected these arguments and held that the safe harbor applied. The evidence showed that the County implemented the program "to classify various risks and decide what type of benefits plans will be needed in the future in light of these risks," and thus to determine "what kind of coverage will need to be provided … on a macroscopic level so it may form economically sound benefits plans for the future." In short, the County implemented the program on legitimate "insurance and risk assessment principles," rather than on "some independent desire for a healthy workforce," and thus was entitled to the benefit of the safe harbor.

Employers who sponsor Wellness programs should pay attention to this decision. The Equal Employment Opportunities Commission has taken the position that any coercive element to a Wellness program – such as the $20 charge in the *Seff* case – renders the program potentially unlawful under the ADA. While the safe harbor in the ADA protects employers who sponsor or administer Wellness programs for bona fide risk assessment reasons, *Seff* demonstrates that the safe harbor does not protect employers who implement Wellness programs merely out of the altruistic desire for healthy employees.

If you have questions about whether your company's Wellness program might run afoul of the ADA, please let us know.

** Jason Rossiter practices in all areas of employment litigation and is licensed to practice law in Ohio, Pennsylvania, and California. For more information about Wellness programs or any other employment issue, please contact Jason at 216.696.4441 or bjr@zrlaw.com.*

Maryland Joins Other States in Restricting Employer Use of Credit History

*by Stefanie L. Baker**

Maryland Governor Martin O'Malley signed Maryland's Job Applicant Fairness Act (the "Act") on April 12, 2011. The Act becomes effective October 1, 2011. Maryland joins Hawaii, Illinois, Oregon and Washington in the nationwide push to ban employer credit checks. Several other states are also considering restricting an employer's use of credit history, including: California, Connecticut, Florida, Georgia, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas and Vermont.

The Act states that an employer may not use an applicant or employee's credit report or credit history in determining whether to:

- Deny employment to an applicant;
- Discharge an employee; or,
- Determine compensation or the terms, conditions or privileges of employment.

However, the Act allows an employer to use an applicant's credit report or credit history if its use is "substantially job-related." While the Act does not explicitly define "substantially job-related," it exempts certain jobs from the requirements of the Act including:

- Positions involving money-handling (authority to issue payments, collect debts, transfer money, or enter into contracts);
- Positions involving access to personal information of a customer, employee, or employer;
- Confidential positions (access to company's trade secrets, intellectual property, personnel files);
- Positions involving a fiduciary responsibility to the employer (authority to issue payments, collect debts, transfer money, or enter into contracts); and,
- Managerial positions that control or direct part of the business.

Certain employers are exempt from the Act as well, including: any employer that is required to perform credit checks by federal or state law; financial institutions that accept deposits insured by a federal agency; and investment advisors registered with the U.S. Securities & Exchange Commission.

Under federal law, applicants must consent to a credit check in writing. In addition, if an employer uses a credit report under an exemption, the employer must disclose its use to an applicant or employee in writing. The Act does not prohibit employers from performing other employment-related background checks, including: driving records, criminal history investigations, and educational history investigations. However, employers must ensure these types of background checks do not include credit information.

An employee or job applicant who believes his or her employer or prospective employer violated the Act can file an administrative complaint with the Maryland's Commissioner of Labor and Industry. The Commissioner will attempt to resolve the dispute informally. If informal resolution is unsuccessful, the Commissioner may assess a fine against the employer of up to $500 for the first offense and up to $2,500 for a subsequent violation. Additionally, while the Act itself does not provide for a private cause of action in court, an employee likely could file a suit for wrongful termination or failure-to-hire under Maryland public policy.

Before October 1, 2011, Maryland employers should review their policies to make sure their use of a credit report complies with the Act.

** Stefanie L. Baker has experience drafting compliance policies under state and federal laws. For more information about the Maryland Act or any other state laws restricting employer use of credit reports, please contact Stefanie at slb@zrlaw.com or 216-696-4441.*

Mandatory Breaks Required for Retail Employees in Maryland

*by Michele L. Jakubs**

Maryland's Healthy Retail Employee Act (the "Act") went into effect March 1, 2011. The Act requires Maryland employers with 50 or more retail employees to provide breaks based upon the number of hours an employee works in a shift. Under the Act, a "retail establishment" is a "place of business with the primary purpose of selling goods to a consumer who is present at the place of business at the time of sale" and "retail employees" include those who are "engaged in actual sales, in a store." As such, employees who are not working in a "retail establishment," such as a corporate or other office, or do not sell are not covered by the Act and do not count toward the 50-employee requirement.

For purposes of applying the 50-employee rule, companies must include the total number of retail employees they have throughout Maryland. For example, a retailer that maintains several locations throughout the state must count all retail employees working throughout the state. However, the Act does not apply to employees who work at a single location with five or fewer employees, regardless of the number of employees the employer has throughout the state.

Covered employers must provide breaks as follows:

- A 15-minute break for a shift of four to six consecutive hours;
- At least a 30-minute break for a shift of 6 or more hours (an employer does not have to provide the 15-minute break if the employee is entitled to the 30-minute break); and
- If the employee's shift is 8 or more consecutive hours, an additional 15-minute break for each additional 4 hours worked. For example, if the employee works 12 hours, the employee must get one 30-minute break plus one 15-minute break.

Restaurant employees and employees exempt from overtime under the Fair Labor Standards Act ("FLSA") are not entitled to breaks under the Act. In addition, employers are not required to provide breaks to employees covered by a collective bargaining agreement or employees with an employment policy that includes breaks equal to or greater than those required by the new law.

The Act allows for a "working shift break." For example, if the employee's work prevents the employee from being relieved during one of the employee's breaks, or the employee consumes a paid meal while working, the employee may waive the break. Employees may waive the "working shift break" by entering into a written agreement with their employer.

The Act does not address whether an employer must pay the employee for the required breaks. However, under Maryland law and the FLSA, short breaks of less than 20 minutes constitute compensable work time that must be included in the sum of all hours worked in a week.

If an employee believes their employer is violating the law, the Act provides a process for employees to file a complaint with Maryland's Commissioner of Labor and Industry. Remedies include an order directing compliance with the law and potential civil penalties of $300 to $600 per employee for each instance of non-compliance. Additionally, in limited situations, a covered employee may bring a court action to enforce the Commissioner's order and for recovery of treble damages and reasonable attorneys' fees and costs. In order to avoid civil penalties, retailers in Maryland should review their break policies and employee handbooks to make sure they comply with these new requirements.

** Michele L. Jakubs, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment litigation and has extensive experience counseling employers on paid break time issues under the FLSA. For more information on Maryland's Healthy Retail Employee Act or any other FLSA compliance question, please contact Michele at 216.696.4441 or mlj@zrlaw.com.*

Sexual Orientation: A Protected Class?

*by George S. Crisci**

On April 25, 2011, the U.S. District Court for the Northern District of Ohio ruled that Shari Hutchinson's sexual orientation discrimination claim falls under the equal protection clause of the 14th Amendment of the U.S. Constitution. *See Hutchinson v. Cuyahoga County Bd. of County Comm'r*, No.1:08-CV-2966, 2011 U.S. Dist. Lexis 46633 (N.D. Ohio 2011). This is a potentially far-reaching decision and could prove to be the spring board for a federal law preventing workplace discrimination based on sexual orientation.

Hutchinson, a lesbian, began working for Cuyahoga County at its Child-Support Enforcement Agency (CSEA) in 2002. In 2008, she filed suit alleging, among other claims, CSEA denied her various promotions in favor of less qualified heterosexuals and that CSEA retaliated against due to her sexual orientation. Hutchinson brought her claims under 42 U.S.C. § 1983 ("Section 1983"), which prohibits the deprivation of federal rights by anyone acting under the color of state law. Hutchinson did not bring a claim under Title VII, which generally prohibits discrimination based on race, color, religion, sex, or national origin.

Cuyahoga County sought dismissal of the case on the basis that sexual orientation discrimination is not an actionable claim under Section 1983. The County based its argument, in large part, on the premise that Section 1983 mirrors Title VII and that since sexual orientation is not a protected class under Title VII it also is not a protected class under Section 1983. As a result, the County argued Hutchinson fails the first prong of her prima facie case in that she is not a member of a protected class. The Court, however, disagreed. While the Court acknowledged its past reliance on Title VII framework when analyzing Section 1983 claims, it ruled that rational basis review applied. The Court held "that an employee who alleges sexual orientation discrimination under § 1983 is not per se precluded from establishing an equal protection claim against her employer."

Public employers should take note of this ruling. While on its face, the ruling does not apply to private employers, they too should be aware of the court's finding. As with same-sex marriage, this case is evidence that the sexual orientation discrimination landscape is ever-changing.

** George S. Crisci, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. For more information about employment discrimination or any other labor or employment issue, please contact George at 216.696.4441 or gsc@zrlaw.com.*

The EEOC Implements Regulations Interpreting the Americans with Disabilities Amendments Act of 2008

*by David R. Vance**

The Equal Employment Opportunity Commission ("EEOC") released regulations regarding the Americans with Disabilities Amendments Act of 2008 ("ADAAA") on March 25, 2011. The EEOC's regulations took effect May 24, 2011 and apply to all private, state, and local government employers with 15 or more employees. The regulations also apply to employment agencies, unions, and joint labor-management committees.

The ADAAA makes several important changes to the Americans with Disabilities Act ("ADA"). While the ADAAA retains the ADA's basic definition of "disability" as "an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment," the regulations change the statutory interpretation of disability. Some of the regulation's major changes include the following:

Broad Coverage

It is now much easier for employees seeking the ADA's protection to establish the existence of a disability, as the regulation's interpretation broadens the definition of disability.

"Major Life Activities"

The regulations include two non-exhaustive lists expanding the definition of "major life activities." The first list includes many activities that the EEOC already recognized as major life activities (e.g., walking), as well as activities that the EEOC has not specifically recognized (e.g., reading, bending, communicating). The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions"). Since these lists are non-exhaustive, the regulations include nine "rules of construction" to help employers determine if an individual's impairment substantially limits a major life activity.

"Substantially Limits"

The regulations make clear that "substantially limits" is to be construed broadly in favor of expansive coverage. Additionally, the regulation's interpretation of "substantially limits" requires a lower degree of functional limitation as compared to the standard previously applied by the courts. The third "rule of construction" explains that "the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis." As a result, employees can show more easily that they have an impairment substantially limiting one or more major life activities.

Individualized Assessment

The regulations abolish any notion that certain medical conditions will "always" qualify as disabilities.

Episodic Conditions and Ameliorative Effects

The regulations make clear that the current effects of a disability are not the only factors that an employer must consider in determining whether a medical condition is substantially limiting. Impairments that are episodic or in remission – cancer, epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder and schizophrenia – also qualify as disabilities if substantially limiting when active.

Reasonable Accommodation

An individual must have an actual disability or record of an actual disability in order to qualify for a reasonable accommodation. Therefore, an individual who claims he or she is "regarded as" disabled will not qualify for a reasonable accommodation.

(continues on page 7)

The EEOC Implements Regulations Interpreting the Americans with Disabilities Amendments Act of 2008 (continued from page 6)

"Regarded As" Claims

Going forward, most ADA claims will likely be "regarded as" claims. An applicant is "regarded as" disabled if he or she is "subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor." The ADAAA substantially expands employer liability under the "regarded as" theory by removing the requirement that an employee prove that the perceived impairment substantially limits a major life activity. An employer may still defend a "regarded as" claim by asserting that the impairment at issue, whether actual or perceived, is both transitory and minor.

With the ADAAA and the EEOC's recent regulations, it is significantly more difficult for employers to prove that an employee's medical condition does not qualify as a disability. Therefore, employers should instead focus their ADA compliance efforts on the interactive process and providing a reasonable accommodation.

** David R. Vance has extensive experience with ADA and ADAAA compliance. For more information on the ADA or ADAAA including providing a reasonable accommodation, please contact David at drv@zrlaw.com or 216-696-4441.*

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

www.zrlaw.com