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

Volume XIV, Issue iii
Fall 2012

In this issue:

2
Bad Medicine: Michigan Medical Marijuana Act Imposes No Restrictions on Private Employers Who Terminate Employees For Use of Medical Marijuana

3
The Voters Have Spoken: What Employers Can Expect From President Obama's Second Term

4
Does Your Company Need Employment Practices Liability Insurance?

5-6
Time Is Not On Your Side: Ohio Supreme Court Interprets 90-Day Notice Requirement Following Discharge for Workers' Compensation Retaliation Claims

6
Z&R Shorts

Putting a Price on Twitter Followers: The Importance of Employers Retaining Control of Their Social Media Accounts | *By: B. Jason Rossiter**

A trade secrets suit accusing former PhoneDog LLC employee Nathan Kravitz of continuing to use a company Twitter account after his separation recently settled following litigation in the United States District Court for the Northern District of California. Despite the case's settlement and the lack of a formal court opinion, the case should serve as a warning to employers whose policies fail to address social media and related issues.

PhoneDog is an interactive mobile news web resource that reviews mobile products and services and allows users to research, price, and shop mobile carriers. PhoneDog hired Kravitz in April 2006 as a product reviewer and video blogger and assigned him a Twitter account with the name (or handle) of "@PhoneDog_Noah". Kravitz regularly updated and submitted content (or tweeted) through the account. PhoneDog assigned other employees Twitter accounts with similar names ("@PhoneDog_Name") and claimed that all the Twitter accounts used by its employees, as well as the account passwords, constituted the company's proprietary, confidential information.

Kravitz left PhoneDog in 2010. After leaving PhoneDog, the company asked Kravitz to relinquish control of the Twitter account, which at the time had 17,000 followers. Kravitz refused and instead changed the Twitter account name to "@noahkravitz". Kravitz continued to use the account and often tweeted to his followers, which had increased dramatically.

PhoneDog responded by filing suit for theft of company property, alleging $340,000 in damages calculated as $2.50 per follower per month for an eight month period. PhoneDog claimed that Kravitz's list of Twitter followers was akin to a client or customer list. However, Kravitz's attorneys presented documents demonstrating that PhoneDog had agreed to let Kravitz continue using the account following his separation and, in fact, asked him to continue tweeting occasionally on its behalf, which he did. Under the only public terms of the parties' settlement, Kravitz maintained sole custody of the account.

While the parties ultimately settled without a judicial decision, this case presents a valuable lesson for employers – that they should establish clear guidelines as to the use of social media and what happens to various social media accounts upon an employee's discharge or separation.

**B. Jason Rossiter practices in all areas of employment litigation and is licensed to practice law in Ohio, Pennsylvania, and California. Jason has extensive experience helping employers navigate through social media and related technology issues. For more information about this ever changing area, please contact Jason (bjr@zrlaw.com) at 216.696.4441.*

Bad Medicine: Michigan Medical Marijuana Act Imposes No Restrictions on Private Employers Who Terminate Employees For Use of Medical Marijuana

*By: Patrick M. Watts**

The Sixth Circuit recently affirmed a district court's dismissal of a former Wal-Mart employee's claim of wrongful discharge. The employee tested positive for marijuana, which he was using in accordance with the Michigan Medical Marijuana Act ("MMMA").

The former Wal-Mart employee in *Casias v. Wal-Mart Stores, Inc.*, used medical marijuana on the advice of his doctor and in accord with the MMMA. The employee suffered from sinus cancer and an inoperable brain tumor. When the employee suffered an injury at work, his manager took him to the hospital. Pursuant to Wal-Mart's policies, the hospital tested the employee for drugs, and he tested positive. In response, the employee produced his user registry card to the hospital staff and explained that he was a qualifying patient under Michigan law. He further stated that he did not use marijuana at work and that he did not come to work under the influence.

Wal-Mart's corporate office directed the manager to discharge the employee for his use of marijuana. The employee filed suit in state court, claiming wrongful discharge and violations of the MMMA. Wal-Mart removed the case to federal court and moved to dismiss on the grounds that the employee failed to state a claim. The district court dismissed the employee's action for failure to state a claim.

The Sixth Circuit affirmed the district court's ruling. The court first analyzed and interpreted the statute, which provides that, "[a] qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act . . ." Casias argued that the term "business" in the MMMA is independent, while Wal-Mart countered that it modifies the phrase "licensing board or bureau." The Sixth Circuit sided with Wal-Mart's interpretation. The Court found that the MMMA imposes no restrictions on private employers, including Wal-Mart. The MMMA does not refer in any way to employment. The Court also noted that its interpretation was in line with those of courts in California, Montana, and Washington holding that similar state medical marijuana laws do not govern private employment actions.

This decision is likely to surface in Colorado and Washington, two states which have recently legalized the use of marijuana for more than medical use. To combat the tension between state laws which allow for marijuana use, and federal laws which do not, some states have introduced bills to reconcile these differences. For example, a U.S. Representative from Colorado has recently introduced legislation which urges the Department of Justice to respect Colorado's state law and not prosecute those citizens who are in compliance with state law, even if in violation of federal law.

The laws governing the use of marijuana throughout the country are ever-changing and employers need to be wary of these changes and how they impact the workplace.

**Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor & employment law and has extensive experience dealing with drug laws that impact the workplace. If you have any questions on how these recent changes may affect your policies or procedures, please contact Patrick (pmw@zrlaw.com) at 216.669.4441.*

The Voters Have Spoken: What Employers Can Expect From President Obama's Second Term | *By: David R. Vance**

On November 6, 2012, Americans voted to keep President Barack Obama in office for another four years. What can employers expect from President Obama's second term as President?

First, it is noteworthy that the GOP retained control of the House of Representatives. This makes it unlikely that the President will be able to push through any sweeping legislation, at least not until after the 2014 midterm elections. However, a Republican controlled House is nothing new to the President, and he has worked around it in two ways. First, the President has issued a large number of Executive Orders. Second, the President has urged various federal agencies, including the Equal Employment Opportunity Commission ("EEOC") and the Occupational Safety and Health Administration ("OSHA"), to take expansive, aggressive positions on existing laws. The President is expected to utilize similar actions in his second term.

OSHA is one such agency which may become much more active. OSHA's Injury and Illness Prevention Program has been in development for over three years, but the Agency is expected to make it a focus during Obama's second term. OSHA also is expected to put comprehensive rulemaking in place to regulate crystalline silica, which is a form of quartz to which workers performing blasting, foundry work, tunneling, and sandblasting regularly are exposed. Finally, OSHA has proposed stricter injury and illness reporting obligations on employers. These regulations would require employers to report workplace amputations to OSHA within 24 hours, as well as all inpatient hospitalizations within eight (8) hours.

The EEOC is expected to take similar actions. The EEOC's Strategic Enforcement Plan calls for taking action against employers who require pregnant employees to take medical leaves of absence if they are unable to perform their job duties. Currently, reasonable accommodation of normal pregnancy is not required. The EEOC also intends to enforce non-discrimination against individuals based on their lesbian, gay, bisexual, or transgender status. Currently, some courts have said that "gender stereotyping" and discrimination based on gender identity is a form of sex discrimination, but Title VII does not directly address this, and it does not prohibit discrimination based on sexual orientation.

The National Labor Relations Board ("NLRB") has been aggressive during the last four years and that is not expected to change. During the President's first term, the Board's decisions and rulemaking have favored organized labor. This trend is expected to continue into the President's second term. Based on the Board's actions during the President's first term, employers should expect more Board decisions and opinions invalidating employer social media policies, taking a dim view toward employment-at-will disclaimers, and taking an expansive view on protected concerted activity.

President Obama's reelection also means that the Patient Protection and Affordable Care Act ("PPACA") is here to stay. The three federal agencies tasked with PPACA's enforcement are expected to move quickly to promulgate new regulations. Although several legal challenges are still moving through the courts, employers need to ensure that they are compliant with the requirements of the Act.

Employers must also navigate new legalized marijuana statutes in two states. Voters in Colorado and Washington have approved legalization of the sale or possession of marijuana in small amounts. However, employers operating in these states should note that legalized marijuana may not affect the exclusion from protection under the Americans with Disabilities Act for "current use of illegal drugs." This is true because the illegal drug definitions in the ADA are based on federal law. In other words, under the ADA as currently enacted, it may not be a violation for a Colorado or Washington employer to take action against an employee for testing positive for marijuana. This is far from a settled area, however, as representatives in Congress from both states have introduced federal legislation asking the federal government to respect their states' laws.

These are but a few of the changes and issues the President's second term may pose for employers. If the President's first four years were any indication, employers can expect many more changes.

**David R. Vance practices in all areas of labor & employment law and has extensive experience dealing with administrative agencies, particularly the EEOC. If you have any questions on how any of these potential changes may affect your company, please contact David (drv@zrlaw.com) at 216.696.4441*

Does Your Company Need Employment Practices Liability Insurance?

*By: Stephen S. Zashin**

Many employers maintain insurance coverage for the defense of claims brought by current or former employees. This type of insurance is commonly known as employment practices liability insurance ("EPLI"). EPLI policies typically provide coverage for a broad-range of claims including discrimination, retaliation, harassment and wrongful termination. Most EPLI policies also cover other workplace torts.

Certain EPLI policies exclude coverage for claims arising under the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Employee Retirement Income Security Act, Occupation Safety and Health Administration claims, claims for punitive damages, claims alleging intentional acts and claims arising under workers' compensation laws. When purchasing a policy, employers need to be aware of any exclusions to the policy. However, even with potential exclusions, most EPLI policies offer substantial coverage and can be tailored to the needs of an employer's business.

Employers can purchase EPLI policies with coverage amounts up to millions of dollars. EPLI policies generally include a deductible, which is often referred to as a self-insured retention, which varies based on the cost of the policy. Typically, the cost of legal defense is included in the aggregate insurance limits, along with the costs of judgments and settlements. The assignment of legal counsel is outlined in policy. Oftentimes, the insurance company may appoint counsel from a pre-approved list of "panel counsel." Members of these pre-approved panels often have a continuing relationship with the insurance company and are selected based on their skill in defending employment based claims.

EPLI coverage is usually written on a claims-made basis. This means the incident resulting in the claim must have occurred during the coverage period. Employers often cannot forecast when a claim may be filed against them, and employees often file such claims months or even years after the alleged discrimination, harassment, or discharge occurred. Therefore, it is important for employers to maintain consistent coverage.

No matter how carefully and skillfully an employer manages workplace conduct, a potential for a claim always exists. The number of discrimination claims filed with the Equal Employment Opportunity Commission alone has steadily risen over the past few years, as has the amount of damages the EEOC has collected. EPLI coverage can be an excellent resource for employers defending against an ever increasing number of employment related lawsuits and can help control the legal costs associated with such lawsuits.

The best way to avoid litigation is to establish strong workplace rules and strictly enforce them. However, an employer's management of workplace conduct is not foolproof and with employee lawsuits on the rise, now is good time for employers to consider obtaining an EPLI policy or renegotiating their current policy.

**Zashin & Rich Co., L.P.A. is approved to defend claims covered by most EPLI carriers. Stephen Zashin, an OSBA Certified Specialist in Labor and Employment Law and the head of the firm's labor and employment group, has worked closely with numerous representatives from various insurance providers and can help put those relationships to work for you. For more information about EPLI coverage and how it can help protect your business, please contact Stephen (ssz@zrlaw.com) at 216.696.4441.*

Time Is Not On Your Side: Ohio Supreme Court Interprets 90-Day Notice Requirement Following Discharge for Workers' Compensation Retaliation Claims

*By: Scott Coghlan**

Recently, the Ohio Supreme Court addressed when the 90-day period begins for a discharged employee to notify his or employer of a possible workers' compensation retaliation claim under Ohio Revised Code Section 4123.90. Under R.C. 4123.90, employers are prohibited from taking retaliatory action–defined as discharging, reassigning, demoting, or taking any other punitive action–against an employee following the employee's pursuit of benefits associated with workers' compensation. The Court held that, as a general rule, the 90-day period begins to run on the date the employee is discharged. However, the employer has an affirmative duty to notify the employee of the discharge within a reasonable period of time following the discharge so as not to interfere with the employee's 90-day period.

In *Lawrence v. City of Youngstown*, the City of Youngstown suspended employee Keith Lawrence without pay. Two days later, the city terminated Lawrence's employment. Lawrence alleged that he never received a copy of the termination letter. Lawrence filed his complaint against the city in Mahoning County Common Pleas Court on July 6, 2007, alleging workers' compensation retaliation under R.C. 4123.90 and racial discrimination. In support of Lawrence's R.C. 4123.90 claim, the complaint asserted that he had filed a workers' compensation claim against the city and that his termination related to the filing.

After holding a hearing, the trial court ruled in Youngtown's favor, and the magistrate granted summary judgment in favor of Youngstown. As to Lawrence's R.C. 4123.90 claim, the magistrate construed the disputed facts in favor of Lawrence and assumed that he did not know of his discharge until February 19, 2007. However, the magistrate concluded that the operative date for starting the 90-day notification period was January 9, 2007, the date the city's records indicated it discharged Lawrence, and that Lawrence's delayed awareness of the termination was not relevant.

The Seventh District Court of Appeals affirmed. As to the sole issue appealed by Lawrence, the court held that R.C. 4123.90's 90-day notice period begins on the date of actual discharge, not the date the employee receives notice of his or her discharge. Therefore, the appellate court determined that the trial court had no jurisdiction over the retaliation claim because Lawrence's notice to his employer was received more than "ninety days immediately following the discharge."

The Ohio Supreme court reversed the appellate court's decision. It held that "discharge" as used in R.C. 4123.90 means the date that the employer issued the notice of discharge, not the date of the employee's receipt of that notice or the date of the employee's discovery of a R.C. 4123.90 cause of action. In this case, the employer apparently never sent a written notice to the employee (it sent it to the Union instead). Lawrence eventually learned of his discharge, but his attorney did not send his notice of the claim until more than 90 days after Lawrence's discharge (but less than 90 days after Lawrence received notice of his discharge). The Court held that the lack of notice to the employee precluded dismissal of the case for failure to comply with the 90-day notice requirement. The Court also concluded that R.C. 4123.90, when read in conjunction with R.C. 4123.95, places an implicit affirmative responsibility on an employer to provide its employee notice of the employee's discharge within a reasonable time after the discharge occurs in order to avoid impeding the discharged employee's 90-day notification obligation under R.C. 4123.90. The Court reasoned that a reasonable time for an employer to inform an employee of a discharge is an inquiry dependent on the facts of each situation. The Court did opine though that a delay of several days would not prevent the 90-day notification period from beginning to run on the actual day of the discharge.

(continues on page 6)

Time Is Not On Your Side: Ohio Supreme Court Interprets 90-Day Notice Requirement Following Discharge for Workers' Compensation Retaliation Claims

(continued from page 5)

Based upon this decision, employers should provide their employees with clear and timely notice of their discharges within a reasonable time after the discharge occurs. According to the Ohio Supreme Court, this ensures that an employee will not be given additional time to meet his or her 90-day notice obligation.

**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 (sc@zrlaw.com) at 216.696.4441.*

Z&R Shorts

Zashin & Rich Co., L.P.A. is pleased to announce the addition of **Helena Oroz**, **Emily A. Smith**, and **Jonathan D. Decker** to its Employment and Labor Group.

Helena's practice encompasses all aspects of general workplace counseling, compliance, and employment litigation defense work. After working as employment counsel for a Fortune-500 company and representing employers at an internationally esteemed law firm, Helena returned to Z&R to put her varied experiences and sharpened expertise to work for the firm's clients.

Emily's practice focuses on labor relations, equal employment opportunity, employment discrimination, unfair competition, and all other employment related torts. Prior to joining Z&R, Emily practiced in the areas of director and officer liability insurance coverage, employment practices liability coverage, and other professional liability coverage. Emily practices in Z&R's Columbus office.

Jonathan's practice encompasses all areas of employment and labor law, including employment discrimination, retaliation, and labor relations. Jonathan earned his law degree from Cleveland-Marshall College of Law. While in law school, Jonathan was a legal extern with the United States Equal Employment Opportunity Commission. Jonathan also was a member of the school's nationally-ranked moot court team, where he earned the Lewis F. Powell Medal for Excellence in Oral Advocacy.

Please join us in welcoming Helena, Emily, and Jonathan to Z&R!

Ohio's 2013 Minimum Wage Increase

On January 1, 2013, Ohio's minimum wage will increase. The new wage will increase by $.15 per hour to $7.85 for non-tipped employees. The new minimum for tipped employees will be $3.93 per hour, plus tips, a wage increase of $.08 per hour.

There is also a slight change for companies that have to pay minimum wage. As of next year, the minimum wage will apply to businesses with annual gross receipts of $288,000, a $5,000 increase over this year. Companies with gross receipts under $288,000 must pay the federal minimum wage of $7.25 per hour. The federal rate also applies to 14- and 15-year-old employees.

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
www.twitter.com/@zrworkplacelaw/

Employment Law Quarterly is provided to the clients and friends of Zashin & Rich Co., L.P.A. This newsletter is not intended as a substitute for professional legal advice and its receipt does not constitute an attorney-client relationship. If you have any questions concerning any of these articles or any other employment law issues, please contact Stephen S. Zashin at 216.696.4441. For more information about Zashin & Rich Co., L.P.A., please visit us on the web at http://www.zrlaw.com. If you would like to receive the Employment Law Quarterly via e-mail, please send your request to ssz@zrlaw.com. ELQ Contributing Editors: David R. Vance and Jonathan D. Decker. Copyright© 2012 – All Rights Reserved Zashin & Rich Co., L.P.A.