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Employers Struggle with "Bring Your Gun to Work" Laws

*By David R. Vance**

Given the recent number of large-scale acts of violence, many employers are concerned about workplace safety and limiting access to firearms on company property. In an effort to prevent workplace violence, employers have increased security and banned weapons. In many states, however, "bring your gun to work" laws limit employers from banning guns in their parking lots. Employers affected by these laws are responding in a number of ways, including lobbying for their rights to ban guns on company property and developing policies and procedures to help prevent incidents of workplace violence.

There are 22 states that currently have some form of a "bring your gun to work" law, which allow employers to ban guns in the workplace but prohibit employers from banning guns in the parking lot. Two states, Missouri and North Carolina, have laws that only apply to state employers. Seven states (Florida, Georgia, Indiana, Kansas, Maine, Mississippi, and Texas) have laws that apply to all employers, while 13 states (Alabama, Alaska, Arizona, Illinois, Kentucky, Louisiana, Minnesota, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, and Wisconsin) have laws that apply to all property owners.

While some argue that ready access to firearms makes workplaces safer, some employers believe the availability of guns in or near the workplace increases the odds of violent and potentially deadly incidents. Stressful events like terminations of employment occur on a regular basis. Ready access to a firearm in these situations arguably increases the possibility that an enraged or disgruntled individual may use a gun in an act of workplace violence. Therefore, many employers believe that "bring your gun to work" laws impede their ability to institute measures to minimize the risk of potentially deadly workplace incidents.

Employers in states that have no "bring your gun to work" law are free to ban employees from bringing guns onto their property, including the parking lots. Employers in states with "bring your gun to work" laws need to make sure that their policies do not violate these laws. In either situation, employers should consider implementing measures and policies, including updating or increasing security and employee training, which may reduce violence and increase safety in the workplace.

**David R. Vance practices in all areas of labor and employment law. He has extensive experience counseling employers as to workplace safety and related issues. For more information about this ever changing area of the law, please contact David (drv@zrlaw.com) at 216.696.4441.*

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

"Marriage" After *Windsor*: How to Resolve the Uncertainty Surrounding Same-Sex Marriage with Respect to Employment Benefits

*By Emily A. Smith**

The Supreme Court's decision in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) to strike down the definition of marriage in Section 3 of the Defense of Marriage Act ("DOMA") created uncertainty for employers. A number of laws and federal programs, including the Family and Medical Leave Act ("FMLA"), relied on DOMA's definition of marriage as that between a man and woman. After the Supreme Court held that definition to be unconstitutional, it was, and in some cases continues to be, unclear how laws and programs that relied on DOMA's definition apply to same-sex spouses. Recently, the federal government and the Department of Labor ("DOL") in particular have started to address the uncertainty that resulted from the *Windsor* decision.

The FMLA is one of the major laws that relied upon DOMA's definition of marriage. Among other things, the FMLA allows eligible employees to take a leave of absence from employment to care for a family member that has a serious health condition. A spouse is a family member under the FMLA. While the FMLA defines a spouse as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides," 29 C.F.R. 825.102, the DOL stated in a 1998 opinion letter that a "spouse" could only be a member of the opposite sex. Thus, even if a same-sex couple was legally married in New York, they would have been denied FMLA leave because the federal government, under DOMA, did not recognize same-sex marriage.

After the *Windsor* decision struck down DOMA's definition of marriage, there were two possible ways to apply the FMLA (and similar statutes) to same-sex couples. The first approach is referred to as the "State of Residency" rule in which the federal government would merely adopt each state's definition of marriage when enforcing its programs in that state. For example, if a same-sex couple is married in New York, and they request FMLA leave for a sick spouse while they live in New York, the FMLA leave should be granted because New York recognizes same-sex marriage. The second approach is referred to as the "State of Celebration" rule. Under this rule, the federal government would adopt the spousal definition of the state in which the individual was married. For example, if a same-sex couple is married in New York and then subsequently moves to Ohio, the couple's marriage would still be viewed as legitimate by the federal government even though Ohio does not recognize same-sex marriage. Meanwhile, this same couple's marriage would not be recognized under the "State of Residency" rule because Ohio, the couple's state of residency, does not recognize same-sex marriage.

The DOL recently released two pieces of guidance that shed light on the application of two different federal laws to same-sex spouses. First, in Fact Sheet #28F, the DOL applied the "State of Residency" rule to the FMLA. The Fact Sheet contains a definition section under which "spouse" is defined as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, *including 'common law' marriage and same-sex marriage"* (emphasis added). Therefore, employers in states that recognize same-sex marriage must treat same-sex married couples the same as heterosexual married couples under the FMLA. Employees residing in states that do not recognize same-sex marriage are not eligible to receive FMLA leave for same-sex spouses even if they moved from a state that allows same-sex marriage.

Contrary to the approach taken under the FMLA, the DOL adopted the "State of Celebration" rule for employee benefit plans under the Employee Retirement Income Security Act ("ERISA"). In Technical Release No. 2013-04, the DOL stated that for ERISA purposes, the term "spouse" refers to "any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages." Therefore, under ERISA, same-sex married employees must be treated the same as heterosexual married couples even if the employee's state of residence

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Don't E-Smoke 'em If You Got 'em: E-Cigarettes in the Workplace

*By David Frantz**

With a majority of states having workplace smoking bans, you may have thought that the days of an employee kicking back in his or her office chair and taking a few puffs were a thing of the past. However, at least for the time being, this may not be the case. With the advent of e-cigarettes, some smokers may rejoice as workplace smoking bans struggle to keep up with advances in technology.

Ohio's smoking ban, which can be found at Ohio Revised Code Section 3794, generally prohibits "smoking" in any enclosed workplace or in areas directly adjacent to the entry or exit of a workplace. "Smoking" is defined as "inhaling, exhaling, burning, or carrying any lighted cigar, cigarette, pipe, or other lighted smoking device for burning tobacco or any other plant." Although the definition sounds comprehensive, it does not extend to e-cigarettes because they operate by vaporizing (not burning) liquid nicotine (not tobacco). Touted by the e-cigarette industry as a safer alternative to traditional cigarettes, these battery operated devices emit a relatively scentless vapor that looks similar to cigarette smoke.

States and employers have responded to e-cigarettes in a variety of manners. In January 2010, New Jersey amended its workplace smoking ban, the New Jersey Smoke Free Air Act, to ban e-cigarettes in the workplace. Other states have also passed laws restricting the sale of e-cigarettes to minors. A number of employers also started imposing penalties, in the form of fees and increased health insurance premiums, on employees who use e-cigarettes.

Employers wishing to prevent employees from using e-cigarettes in the workplace may ban their use, even in areas where state or local municipality smoking laws do not apply to e-cigarettes. Employers who do not mind e-cigarette use should make sure that such use does not violate their state's law or any local ordinances before permitting e-cigarette use in the workplace. Either way, as e-cigarettes become more popular, employers should be cognizant of the potential legal issues that they pose and plan accordingly, whether that be revising or instituting a new workplace smoking policy or seeking legal advice on applicable state and local laws.

**David Frantz practices in all areas of employment law. If you have questions about state or local smoking bans or workplace smoking policies, please contact David (dpf@zrlaw.com) at 216.696.4441.*

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does not recognize same-sex marriage.

In addition to the guidance from the DOL, the Internal Revenue Service ("IRS") recently announced that same-sex married couples may file joint federal tax returns in IRS Revenue Ruling 2013-17. In reaching this conclusion, the IRS applied the "State of Celebration" standard. As such, all same-sex married couples are entitled to file jointly, regardless of where they live, so long as they were married in a state that allows same-sex marriage.

In light of the uncertainty following the *Windsor* decision, employers should review their employment policies and practices to ensure – to the extent possible – that they are in compliance with the laws that were affected by the decision. While not binding on the courts, the DOL and the IRS have provided some guidance to employers. Employers should take a proactive approach in order to keep up to date with the latest developments and to avoid future liability.

**Emily A. Smith, a member of the firm's Columbus office, practices in all areas of employment law and has extensive experience helping employers comply with the FMLA. If you have questions about how the Windsor decision impacts your company, please contact Emily (eas@zrlaw.com) at 614.224.4441.*

FMLA Certification: Proactive Measures to Reduce Fraud and Abuse of FMLA Leave

*By Stephen Zashin**

Employee leaves of absence under the Family and Medical Leave Act ("FMLA") continue to increase, which in turn, increases an employer's vulnerability to claims related to such leave. Employers must carefully evaluate all employee requests for FMLA leave. The following practices and procedures may help employers effectively administer FMLA leave while also reducing FMLA leave abuse.

Require Employees that Request FMLA Leave to Obtain Medical Certification

The medical certification process can help employers avoid granting improper FMLA requests or denying legitimate ones. Employers who require certification must provide notice to an employee in the Rights and Responsibilities Notice provided to employees with their Eligibility Notice. Any employee requesting medical leave must provide his or her employer with a complete and sufficient medical certification if the employer requests it. The employee must pay all costs associated with the initial medical certification. A medical certification may include: health care provider contact information; the date the health condition commenced; detailed information about the condition; details about how the condition prevents the employee from performing the essential functions of his or her job; in cases where the employee is taking leave to care for a family member, information about the care that is needed; and for intermittent leave, information about the condition that calls for intermittent leave and details concerning the dates of leave or frequency of incapacity. If an employee who has requested leave fails to provide the requested certification, the employer may deny the employee's request.

Maintain Clear and Detailed Job Requirements and Keep Track of All Absences

Employers should maintain written job requirements and duties for each position at the company. When an employee requests FMLA leave, employers can attach these requirements to the certification forms that the employee submits to a health care provider. Health care providers use the job requirements to determine if the employee requesting leave can perform the essential functions of his or her job despite the condition. Employers should also track all employee absences. Work attendance statistics can be extremely helpful in detecting fraudulent leave requests. Employers can use this information during the certification process to verify with health care providers that an employee's absences are an expected result of the condition at issue.

Authenticate and Clarify any Ambiguities that Appear on an Employee's Certification

Occasionally, an employee will provide his or her employer with an incomplete or ambiguous medical certification. If so, the employer must provide the employee with written notice of any deficiencies and allow the employee to clarify ambiguities and correct deficiencies on the medical certification. Once an employee provides a complete certification, the employer can no longer request additional information from the employee's health care provider. However, there are certain avenues through which the employer can seek clarification or authentication of the certification from the employee's health care provider. Specifically, the employer may use: (1) a human resource professional; (2) a leave administrator; or (3) another health care provider to contact the issuing health care provider. It is critical that the employee's immediate supervisor or someone to whom the employee reports to or works with directly does not contact the health care provider.

Require Employees with Questionable Certificates to Obtain a Second Opinion

If the employer contacts the health care provider and still believes the employee's certification is unclear or invalid, the employer may require the employee to obtain a second medical certification from a different health care provider. The employer is responsible for choosing the second health care provider; however, this provider cannot be one the employer regularly utilizes. The employer bears the cost for the second medical certification. If inconsistencies arise between the first and second certification, the

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employer may request a third and final certification. The employer also must pay for the cost of this certification. Although second and third medical certifications come at a cost to employers, employers may request them if they believe the original certification is fraudulent or ambiguous.

Require Employees that Request Additional Leave to Get Recertified

Employers may require an employee on leave to obtain recertification before extending the employee's leave. Employers may request recertification of an employee every 30 days unless the employee suffers from a serious health condition that impairs his or her ability to perform job requirements for a period of time exceeding 30 days. If the certification indicates that the minimum duration is more than 30 days, the employer must wait until the minimum duration expires before requesting recertification. An employer may request recertification after a period of less than 30 days if: (1) the employee requests an extension of leave; (2) the employee's circumstances have changed since the previous certification; or (3) the employer has reason to believe that the previous medical certification was invalid. By requesting employee recertification, employers can help determine whether an employee's original issue still inhibits his or her job performance. Generally, employers must allow the employee at least 15 days to provide the recertification, but the employee bears the expense of the recertification.

Require Employees that are Returning to Work from FMLA Leave to Obtain a "Fitness for Duty" Certification

Requiring employees to obtain a fitness for duty certification can help prevent employees from injuring themselves or others in an accident caused by a premature return to work. Employers may request a fitness for duty certificate for the particular health condition precipitating the employee's need for leave only. Employers must provide notice to employees in their Designation Notices if they require employees to obtain fitness for duty certification before returning to work, and whether the certification must address an employee's ability to preform the essential functions of his or her job. Employers should provide written job descriptions or a list of the essential functions of the employee's position to employees with the Designation Notice. The employee is responsible for paying all costs associated with this certification. The employer may contact the health care provider to authenticate or clarify the certification in the same manner as the original medical certification. However, the employer may not request a second or third opinion. Also, if an employee's return to work is governed by a collective bargaining agreement, the employer should abide by such agreement before proceeding with a request for a fitness for duty certification.

It is important that employers draft, enforce, and provide employees with a copy of company leave of absence policies and procedures. Specifically, employers should notify employees of their rights under the FMLA and the proper procedures to request leave. Employers must display an FMLA information poster at the workplace. This information also must be available in the employee handbook, or if the employer does not have a handbook, must be distributed to employees when they are hired.

Handling FMLA leave requests is a complicated process that can lead to costly mistakes. Employers should contact counsel for advice and assistance in developing policies and procedures that will help reduce FMLA leave abuse and limit potential liability.

**Stephen Zashin, an OSBA Certified Specialist in Labor and Employment Law and a Best Lawyer in America (2014), is the head of the firm's Employment and Labor Group. Stephen's practice encompasses all areas of employment litigation. He has extensive experience helping employers navigate through FMLA leave administration, certification, and other employment issues. For more information about this ever changing area, please contact Stephen (ssz@zrlaw.com) at 216.696.4441.*

Clearing Away the Smoke: When a "Volunteer" is Really an "Employee" under the FLSA and FMLA

*By Jonathan Downes**

In a counter-intuitive decision, the Sixth Circuit Court of Appeals recently addressed the ambiguity under the Family and Medical Leave Act ("FMLA") as to when paid-volunteers should be considered employees. In *Mendel v. City of Gibraltar*, 727 F.3d 565 (2013), the court held that a city's paid-volunteer firefighters were employees for purposes of the FMLA. This decision impacts smaller cities and other political subdivisions that utilize paid-volunteer forces and previously thought these forces were not subject to the FMLA.

In order for an employer to be subject to claims under the FMLA, it must have 50 or more "employees" working within a 75 mile radius. Thanks to the rather imprecise definitions used in the Fair Labor Standards Act ("FLSA") – upon which the FMLA relies for its definitions of terms like "employ" and "employee" – the United States Supreme Court developed an "economic realities" test to determine who qualifies as an employee under the Acts. This test takes a case-by-case approach, weighing the circumstances of the business activity as a whole instead of relying on isolated factors.

In *Mendel*, a dispatcher for the city's police department claimed that he was terminated in violation of the FMLA. The city argued that its employees were not covered by the FMLA because the city only employed 41 people, not 50 as is necessary for the FMLA to apply. The city contended that its 20-35 paid-volunteer firefighters were not employees.

In determining whether the volunteer firefighters were employees, the court focused heavily on the amount of wages paid to the volunteer firefighters. Under the FLSA and the FMLA, volunteers for public agencies are excluded from the definition of "employee" if they are not paid or only receive a nominal fee for their services. The firefighters at issue in *Mendel* received $15 per hour for responding to calls and maintaining equipment while nearby communities paid full-time firefighters wages ranging from $14 to $17 per hour. In light of the "economic realities" of the situation, the court found that the "substantial compensation" paid to the volunteer firefighters was not a nominal fee, and as such, the firefighters were employees.

The court did not weigh other factors that would support a finding against employee status as heavily. For example, the volunteer firefighters were not required, whatsoever, to actually respond to any emergency calls, they had no consistent schedules or set shifts, they did not staff a fire station, and they maintained other employment. Despite the clear lack of control by the city over these volunteer firefighters, the court found that these factors were insufficient to overcome the fact that the city paid the firefighters substantial wages for their services.

In light of the *Mendel* decision, employers using paid-volunteer forces should reevaluate whether they are truly volunteers. If not, additional laws and regulations may apply to the employer when including its paid-volunteer forces as employees. Although courts will determine employee status on a case-by-case basis, this decision sheds light on the factors that the Sixth Circuit and other courts may emphasize in their determinations. Concerned employers should seek advice from legal counsel in determining potential liability under the FMLA, the FLSA, and other statutes.

**Jonathan Downes is an OSBA Certified Specialist in Employment and Labor Law and a Best Lawyer in America (2014). He has extensive experience developing policies for and advising municipalities and public entities. For more information about this article or general issues please contact Jonathan (jjd@zrlaw.com) at 614.224.4441.*

State Minimum Wage Increases for 2014

*By George S. Crisci**

The federal minimum wage will remain at $7.25 for non-tipped employees and $2.13 for tipped employees in 2014. The following states though are increasing their minimum wage as follows:

2014 STATE MINIMUM WAGE INCREASES				
State	**Non-tipped**	**Increase**	**Tipped**	**Increase**
Arizona	$7.90	$0.10	$4.90	$0.10
California†	$9.00	$1.00	N/A	N/A
Colorado††	$8.00	$0.22	$4.98	$0.22
Connecticut	$8.70	$0.45	(No change)	
Florida	$7.93	$0.14	$4.91	$0.14
Missouri	$7.50	$0.15	$3.75	$0.08
Montana	$7.90	$0.10	N/A	N/A
New Jersey	$8.25	$1.00	(No change)	
New York	$8.00	$0.75	(Varies by industry)	
Ohio*	$7.95	$0.10	$3.98	$0.05
Oregon	$9.10	$0.15	N/A	N/A
Rhode Island	$8.00	$0.25	(No change)	
Vermont	$8.73	$0.13	$4.23	$0.06
Washington	$9.32	$0.13	N/A	N/A

†Not effective until July 1, 2014.

††Currently proposed; final rules pending.

*Only applies to employers with annual gross receipts of more than $292,000.00.

**George S. Crisci, an OSBA Certified Specialist in Employment and Labor Law and a Best Lawyer in America (2014), has extensive knowledge of wage and hour laws. For more information about changes to the minimum wage or your labor and employment law needs, please contact George (gsc@zrlaw.com) at 216.696.4441.*

Z&R Shorts

Best Lawyers® Best Law Firms

Zashin & Rich Co., L.P.A. is pleased to announce that the firm's Employment and Labor Group has received **First Tier** ranking in **Employment Law – Management** in the Cleveland Region and **Labor Law – Management** in both the Cleveland and Columbus Regions by *U.S. News Best Lawyers®* "Best Law Firms" in 2014.

George Crisci, Jon Dileno, Jonathan Downes, and **Stephen Zashin** of the firm's Employment and Labor Group were all named Best Lawyers in America in 2014. The firm congratulates these four attorneys as well as all of its attorneys that contribute to the firm's labor and employment practice. The firm represents clients from publicly traded national corporations to small businesses in matters ranging from discrimination and harassment complaints to workers' compensation.

Since it was first published in 1983, Best Lawyers® has become universally regarded as the definitive guide to legal excellence. Because Best Lawyers® is based on an exhaustive peer-review survey in which more than 39,000 leading attorneys cast almost 3.1 million votes on the legal abilities of other lawyers in their practice areas, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in Best Lawyers® is considered a singular honor.

Zashin & Rich is pleased to announce the addition of David Frantz to the firm's Employment and Labor Group in its Cleveland office.

David's practice encompasses all areas of employment and labor law, including employment discrimination, retaliation, and labor relations. As a student at Case Western Reserve University School of Law, David served as an editor for the Case Western Reserve Law Review and received an award for excelling in the study of labor and employment law. Prior to joining Z&R, David externed with the United States Equal Employment Opportunity Commission and Judge Joan Synenberg at the Cuyahoga County Court of Common Pleas.

Sunday, February 2, 2014

Jonathan Downes presents *"Advance Techniques in Arbitration Matters"* at the Ohio Public Employers Labor Relations Association's Annual Training Conference. For more details, go to **www.ohpelra.org**.

Thursday, February 20, 2014

Stephen Zashin presents *"HR Issues"* before the American Payroll Association Greater Cleveland Chapter. For more details, go to **www.americanpayroll.org**.

Thursday, April 17, 2014

Jonathan Downes speaks at the Labor Relations Information Systems conference on *"Collective Bargaining for Public Safety Personnel"* in Las Vegas. For more details, go to **www.lris.com/lris-seminars/**.

Tuesday, April 29, 2014

Jonathan Downes presents *"Update on Employment and Labor Issues Affecting Law Enforcement"* and *"Collective Bargaining and Arbitration Decisions for Police Chiefs"* at the Ohio Association of Chiefs of Police annual Chiefs In-Service. For more details, go to **www.oacp.org/annualconf/chiefs.html.**

Wednesday, May 21, 2014

George Crisci speaks at the National Business Institute's Employee Documentation, Discipline, and Discharge seminar in Akron entitled, *"Special Concerns When Dealing with Union Environments."*

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