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Non-Compete Agreements and Separation Agreements – Are They Incompatible?

*By Helena Oroz**

Does a separation agreement nullify an earlier covenant not to compete? It depends. In *Try Hours, Inc. v. Douville*, 2013 WL 139584 (January 11, 2013), the Ohio Sixth District Court of Appeals recently held that a one year non-compete agreement was not superseded by a separation agreement between the two parties. Try Hours, a national trucking company focused on the expedited freight industry, was the plaintiff-employer in the case. Try Hours hired the defendant, Bryan Douville ("Douville"), in 2010 as its director of operations. Douville signed an employment agreement that contained a non-compete and non-solicitation clause. The clause provided that Douville could not work for any company within the United States in direct competition with Try Hours for a period of one year after his employment with Try Hours ended. Finding Douville was not a good fit for the organization, Try Hours terminated his employment in October 2011.

At the time of Douville's discharge, the parties entered into a separation agreement that included an integration clause. The integration clause stated that the separation agreement constituted the entire agreement between the parties and that "no prior or subsequent oral Agreements, representations or understandings shall be binding upon the parties and such shall be null and void and shall have no effect." Douville, believing that the separation agreement freed him from his obligation to abide by the non-compete agreement, began work at a competitor.

Try Hours brought suit alleging that Douville violated the non-compete agreement, and sought a preliminary injunction to enjoin Douville from working for the competitor. The trial court granted Try Hours' motion for preliminary injunction. On appeal Douville asserted: (1) the separation agreement effectively nullified the original employment agreement; (2) that the grant of the preliminary injunction was error; and (3) that the duration and scope of the injunction was unreasonable.

The court first determined the separation agreement did not supersede the employment agreement between the parties. Douville argued that the integration clause contained within the separation agreement was ambiguous as to whether the separation agreement was meant to supersede the employment agreement. The court found the separation agreement merely limited the rights of Douville to bring a claim against Try Hours stemming from his employment. Furthermore, the court found that the integration clause only excluded oral agreements. Therefore, the court reasoned that since the non-compete clause was a written agreement it should not be superseded by the separation agreement's reference to "subsequent oral Agreements."

The court then looked to determine whether a preliminary injunction should have been granted in favor of Try Hours. Try Hours argued that the competitive nature of the freight trucking industry required that its sensitive company information be kept confidential. It asserted that information such as the company's drivers' names, customer list, pricing information, and quality and service scores was crucial to Try Hours' performance and was therefore

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PUBLIC SECTOR EMPLOYERS: "Which Hat Is He Wearing?"

*By Jonathan J. Downes**

Everyone knows the First Amendment protects free speech, but no right is absolute. Public employee speech is no different.

The First Amendment protects a public employee's speech if he or she speaks as a citizen about matters of public interest. When that public employee speaks in his or her official capacity regarding his or her official duties or matters not of public interest, that employee is not insulated from discipline. Does this same rule apply to a public employee who is also a union official criticizing or challenging decisions or policy of an employer?

The U.S. Court of Appeals for the Ninth Circuit (which covers much of the west coast) recently decided how First Amendment free speech protections apply to a union "no-confidence vote." The case is *Ellins v. City of Sierra Madre*, 710 F. 3d 1049 (9th Cir. 2013).

John Ellins, a police officer for the City of Sierra Madre, California, led a no-confidence vote of the police officers' union against the Chief of Police, Marilyn Diaz in 2008. According to Ellins, the union initiated the vote due to Diaz's "lack of leadership, wasting of citizens' tax dollars, hypocrisy, expensive paranoia, and damaging inability to conduct her job."

In 2009, Ellins submitted an application to Diaz for a certification that, under the City's Memorandum of Understanding with the police officers' union, would have entitled him to a five percent raise. When Diaz delayed approving his application, Ellins filed suit, claiming that the failure to process his application was in retaliation for his exercise of free expression and association and his union activities related to the "no confidence" vote.

The district court ruled in favor of the City and Diaz, holding that Ellins had not established a claim of First Amendment retaliation. In addition to failing to establish the other elements of his claim, Ellins failed to establish that he spoke as a private citizen in leading the no-confidence vote.

The Ninth Circuit reversed on this issue, rejecting the City's position that Ellins conducted the no-confidence vote as a police officer, not as a citizen. The Court found that Ellins' conduct was in his capacity as a union representative, noting that there is an "inherent institutional conflict of interest between an employer and its employees' union." Therefore, the Court held that a reasonable jury could find that Ellins' speech, made as a representative and president of the police union, was made in his capacity as a private citizen.

The Court also concluded that the concerns raised by the no-confidence vote addressed the Chief's leadership and other department-wide matters. The Court found that "these departmental problems were of inherent interest to the public because they could affect the ability of the Sierra Madre police force to attract and retain officers."

The takeaway for public employers, especially safety forces: review policies regarding speech or conduct of employees to ensure clear, enforceable standards on public comments by employees when they are performing their official duties.

**Jonathan J. Downes, an OSBA certified specialist in labor and employment law, practices in the firm's Columbus, Ohio office and has extensive experience representing public sector employers. If you have any questions about the above or any other union/employee issue, contact Jonathan (jjd@zrlaw.com) at 614.224.4411.*

FIRE YOU? OK!...I Think

*By B. Jason Rossiter**

The prevalence of social media increases by the minute. Every day millions of people login to their Facebook, Twitter, LinkedIn, and other social networking accounts and post their thoughts to the world. Sometimes, these broadcasted postings include an employee's disdain for his or her job or, in many cases, his or her boss.

The increase in social media activity by employees has led to the development of new programs and applications designed to track such activity, including "FireMe!" FireMe! is a new Twitter application developed to alert users of the likelihood of termination as a result of what they post. FireMe! was developed by Ricardo Kawase, a PhD student in Hannover, Germany, with the goal of raising awareness about the danger of public online data. FireMe! scans a user's Twitter accounts for keywords such as "kill," "boss," and "job," as well as any combination of foul language to identify problematic tweets concerning the workplace. It also notifies users about tweets that may jeopardize the user's employment.

Employers may be tempted to utilize this or similar applications to identify employees tweeting about the workplace. If an employer knows an employee's twitter account name, they can log onto the FireMe! website, enter the employee's twitter account, and a ranking will appear, indicating how "likely" that Twitter user is to be fired for the content of their tweets.

Employers beware, though. The National Labor Relations Board ("NLRB") already has held on numerous occasions that Section 7 of the National Labor Relations Act ("NLRA") protects employee postings on the internet. The NLRA protects employees in "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management," even if that action takes place online. The NLRB has taken the position that, in general, so long as an employee's online posting is related to the terms and conditions of his or her employment, it is considered protected speech and the employee cannot be fired for it. The NLRB also has routinely struck down employer policies prohibiting employee statements that could damage the company, defame any individual, or damage any person's reputation. However, online postings of threats of violence against co-workers, supervisors, or company property generally are not protected and an employer typically may terminate an employee for such conduct.

Ultimately, the determination of whether a social media post constitutes protected activity under the NLRA requires an individualized inquiry. The slightest difference in wording can mean the difference between a lawful and an unlawful termination. As social media continues to play a larger role in employees' lives, enterprising individuals and companies will continue to develop tools such as the FireMe! application. However, employers should cautiously decide whether to utilize such tools. In addition, employers may want to consider using such tools for constructive purposes. Employees may take to Twitter and other social media outlets to vent workplace-related frustrations of which an employer is simply unaware. Employers can then take steps to remedy these issues, leading to a happier and more productive workplace.

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

DO THE MATH: Unpaid Interns Don't Equal Free Labor | *By David R. Vance**

According to the National Association of Colleges and Employers, 55% of students in 2012 graduated with some internship experience on their resume. While unpaid internships can benefit students and employers, employers must ensure any such internship comply with both federal and state wage and hour laws. Failure to do so may result in a lawsuit with a potentially large damage award.

In 2010, the Deputy Wage and Hour Administrator for the United States Department of Labor ("DOL") told the *New York Times*, "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law." Since then, unpaid interns have filed numerous class action lawsuits claiming that the companies for which they interned violated the Fair Labor Standards Act ("FLSA") by failing to pay them for their work.

The FLSA does not specifically contain an exception for student interns. Rather, the DOL has provided a small exception for "trainees," and has recognized that student interns may qualify as trainees. If an intern is considered a "trainee" under the FLSA, employers are not required to pay the intern minimum wage or overtime. In order to constitute a trainee, unpaid interns must satisfy the six factors set out by the United States Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

After *Walling*, the DOL released Fact Sheet number 71 which applies the six factors to unpaid interns. According to the DOL, if all of the following requirements are met, the intern does not constitute an employee under federal law:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under close supervision;
- The employer that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, the employer's operations may even be impeded;
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

While many courts look to these factors to determine whether an unpaid internship is proper, the United States Court of Appeals for the Sixth Circuit, which covers Ohio, does not. Instead, the 6th Circuit uses the "primary benefit test" articulated in *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. Tenn. 2011). The primary benefit test determines "whether an employment relationship exists in the context of a training or learning situation [by ascertaining] which party derives the primary benefit from the relationship. *Solis* at 529. According to the Sixth Circuit, if an employer derives the primary benefit, then an employment relationship exists, and the FLSA and other pertinent laws apply.

Unpaid internships at non-profit organizations are generally permissible because the FLSA includes exceptions for volunteers who perform services for state or local government agencies and those who volunteer at food banks. The Wage and Hour Division of the DOL also has recognized other exceptions for interns working at religious, charitable, civic or humanitarian non-profit organizations who freely volunteer their time without any expectation of compensation.

To help ensure compliance with the FLSA, employers should have interns sign a written agreement when their internship commences. This agreement should make clear that the intern is not entitled to wages or a permanent position upon completion of the program. Companies also should rotate interns through different departments, have specific goals for interns, and closely supervise interns so that the experience is truly educational.

Employers and students alike can benefit from internship programs. However, employers must carefully navigate through FLSA and DOL rules and regulations (as well as applicable state laws) to ensure that a mutually beneficial experience does not become a very costly lawsuit.

**David R. Vance practices in all areas of employment law and has extensive experience representing employers in wage and hour matters as well as advising employers about internship programs. If you have any questions about the FLSA or wage and hour issues affecting your workplace, contact David (drv@zrlaw.com) at 216.696.4441.*

ENOUGH IS ENOUGH: How Much Time Must an Employer Give an Employee as a Form of a Reasonable Accommodation Under the ADA?

*By Emily A. Smith**

An employee ventures into his or her manager's office and requests medical leave for a disability. The employee produces a note from his or her doctor that supports the employee's request, so the employer grants the employee's request for leave. The employee's leave expires and the employee subsequently submits another request. The employer once again grants the employee's request. This scene replays itself over again and again and again, like a scene out of Groundhog Day. The employer is left stranded, wondering "When is enough, enough?"

The Americans with Disabilities Act ("ADA") does not mandate that employers grant employees indefinite leaves of absence. However, the ADA provides employers little assistance in determining how much leave is reasonable in situations like the one described above. Are employers' hands tied when an employee makes repeated requests for leave?

The Eleventh Circuit recently provided some clarity in *Santandreu v. Miami Dade County*, 2013 U.S. App. LEXIS 5542 (11th Cir. 2013). In this case, Juan Santandreu alleged that his employer failed to provide reasonable accommodations for his disability. Santandreu worked as an engineer in the Miami Dade County Water and Sewer Department ("Miami Dade"). He went out on medical leave in January 2006 due to an "illness." Santandreu then requested four extensions of his leave, each request coming just as the previous request was set to expire. In all, Santandreu requested, and Miami Dade granted, leave from January 2006 through May 4, 2007.

On May 1, 2007, Miami Dade sent Santandreu a letter advising him that he was to return to work on May 5, 2007. He did not return to work but advised Miami Dade on May 15, 2007, that his leave of absence should be extended until July 25, 2007. Miami Dade informed Santandreu he had exhausted all available leave and would be terminated if he did not return to work. Miami Dade subsequently sent Santandreu a Disciplinary Action Report ("DAR"), and Santandreu voluntarily resigned in lieu of receiving or opposing the DAR. Santandreu then attempted to rescind his resignation, and Miami Dade denied his request.

Santandreu filed suit against Miami Dade, claiming disability discrimination and retaliation in violation of the ADA. At trial, Miami Dade moved for judgment as a matter of law. The trial court granted the motion, finding that Santandreu had failed to show that additional leave would have enabled him to return to work in a reasonably definite period of time. The trial court also found that the DAR did not constitute retaliation because Santandreu had voluntarily resigned before the DAR became part of his record.

On appeal, the Eleventh Circuit affirmed the decision of the trial court. The court first rejected Santandreu's argument that Miami Dade should have provided additional leave or transferred him to a vacant position. The court noted that Santandreu bore the burden of identifying an accommodation and demonstrating that the accommodation allowed him to perform the essential functions of his job. It further noted that the ADA does not require an employer to provide leave for an indefinite period of time when an employee is uncertain about the duration of his leave. The court found that Santandreu never demonstrated he could return to work within a reasonable time. Even after fifteen months of leave, he did not know when his doctor would allow him to resume working. Therefore, because Santandreu could not show that he could perform the essential functions of his job in the reasonably immediate future, his request for additional leave was not a request for a reasonable accommodation. For similar reasons, the court found that Miami Dade was not required to transfer Santandreu to another position. Since his medical condition prevented him from performing any work, he was not qualified for any alternate position.

Finally, the court found that Miami Dade did not retaliate against Santandreu by issuing him the DAR, because Santandreu voluntarily resigned in lieu of accepting or responding to the DAR. As such, the court found that Santandreu did not suffer an adverse employment action.

While this case does not establish a bright-line test that can be used by employers to determine when an employee's requests for leave become unreasonable, it does provide some guidance. This case reaffirms that the employee bears the burden of showing a reasonably definite return-to-work date on which the employee will be able to perform the tasks required of him or her upon the employee's return.

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THE DUKES OF HAZZARD: OSHA and Workplace Bullying

*By Scott Coghlan**

Earlier this year the Occupational Safety and Health Administration ("OSHA") and the Department of Labor ("DOL") filed suit against an employer for terminating an employee who reported workplace violence. OSHA argued that the employee's discharge was tantamount to discharging an employee for complaining about unsafe work conditions. The fact that the alleged unsafe working conditions involved an employee's fear of workplace violence made this case unusual.

The employee worked for Duane Thomas Marine Construction and its owner, Duane Thomas ("Thomas"). The employee claimed Thomas engaged in workplace violence and created hostile working conditions on several occasions between 2009 and 2011. Thomas allegedly was abusive, made inappropriate sexual comments, yelled, screamed, and withheld the employee's paycheck.

The employee worked directly for and reported to Thomas. The employee claimed that Thomas' verbal, mental, and emotional abuse in the workplace had forced her and a coworker to walk off the job. The next day, Thomas requested that the employee (and her coworker) return to work in exchange for Thomas' promise to stop any workplace bullying or abuse. However, the employee alleged that the workplace bullying and abuse continued despite Thomas' repeated promises to cease such behavior.

In February 2011, the employee filed a whistleblower complaint with OSHA. After filing this complaint, she alleged that Thomas retaliated against her due to her complaints. Thomas, upon receiving notice of the employee's OSHA complaint, denied the employee remote access to files, and ultimately discharged the employee. After the employee's discharge, the OSHA investigation found merit to the employee's complaint.

This suit seems to indicate a shift in OSHA's focus from addressing traditional workplace hazards toward protecting the overall health and well-being of employees. The General Duty clause of the Occupational Safety and Health Act of 1970 ("OSH Act") requires "each employer to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 USCS § 654(a)(1). OSHA has typically used the General Duty clause to enforce safety standards relating to industrial hazards such as high noise levels, chemical exposure, or electrical hazards. However, this case involves one of the first – if not *the* first – OSHA lawsuit against an employer for workplace bullying.

Historically, OSHA used the General Duty clause to cite hazards not yet addressed by a specific standard. Therefore, it makes sense that OSHA is now trying to combat workplace bullying through this clause because no specific provision in the OSH Act currently prevents bullying in the workplace. However, in order prevail on a general duty clause violation, OSHA must prove four basic elements: (1) the existence of an alleged condition or practice at the employer's workplace, (2) risk, presented by the alleged condition or practice, of event likely to cause death or serious physical harm, (3) employer or industry knowledge that the condition or practice is hazardous and exists or potentially exists at the employer's workplace, and (4) a feasible method by which the employer could have eliminated or materially reduced the alleged hazardous condition or practice.

Importantly, the OSH Act does not require that an employee's concerns about workplace safety be valid. The alleged atmosphere of abuse and bullying caused by the employer and owner in this case may or may not have actually presented a valid safety hazard. Regardless, the OSH Act makes it unlawful for an employer to terminate an employee for complaining about a workplace safety concern. Employers must be wary not to retaliate against an employee who complains about workplace bullying, violence, or abuse, as it appears OSHA may subject them to a whistleblowing action.

In addition to liability under federal law, employees may also bring civil actions against employers under state law for workplace bullying. A number of theories of liability exist such as negligent hiring, supervision and retention, respondeat superior and failure to warn.

In order to combat workplace bullying and its legal implications, employers should consider workplace violence policies, which include reporting mechanisms for employees to report workplace violence or threats of violence. Employers should also conduct robust investigations of any and all complaints. Finally, employers can limit liability by fully investigating a potential new

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Non-Compete Agreements and Separation Agreements – Are They Incompatible?

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confidential. Try Hours was especially protective of its drivers' information, arguing that the demand for quality expedited freight truck drivers far exceeded the actual number of such drivers. The court agreed with Try Hours and found that this sensitive information was indeed confidential, especially in light of the fact that Douville's job at PFM included securing truck drivers to haul expedited freight, which placed him in direct competition with Try Hours.

Douville argued that the injunction placed an undue hardship on him as it prevented him from procuring employment in an industry in which he had worked for 11 years. The court, however, determined that the "direct competition" language of the non-compete agreement limited his ability to work in the freight industry only. The court reasoned that while Douville would experience some hardship throughout the duration of the injunction, he must demonstrate more. The court noted that Douville was still free to seek employment with any trucking company not engaged in the expedited freight business. The court also determined that the non-compete agreement's provision prohibiting Douville from working for any expedited freight trucking company across the United States was appropriate as the trucking industry is a multistate industry. Finally, the court determined that the one year duration of the restriction period was a reasonable amount of time. As such, the court reaffirmed Try Hours' injunction.

This case presents two important lessons for employers. First, employers should craft carefully separation agreements that do not accidentally supersede any prior non-compete or other agreements. Second, employers should draft non-compete agreements narrowly (in both scope and duration) and consider the degree of hardship to the employee. Both of these concepts will help employers achieve their objectives as to departing employees.

**Helena Oroz practices in all areas of employment litigation and has extensive experience helping employers draft, enforce, and otherwise advise clients about non-compete agreements. For more information about this ever changing area, please contact Helena (hot@zrlaw.com) at 216.696.4441.*

The Dukes of Hazzard: OSHA and Workplace Bullying

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hire's references for any patterns or signs of past violent behavior or improper work conduct.

**Scott Coghlan, the chair of the firms' Workers' Compensation Group, has extensive experience in all aspects of OSHA and workers' compensation. For more information about OSHA compliance, please contact Scott (sc@zrlaw.com) at 216.696.4441.*

Enough is Enough: How Much Time Must an Employer Give an Employee as a Form of a Reasonable Accommodation Under the ADA?

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An employer who is faced with a situation like that in Santandreu should err on the side of caution when denying a request for leave. If the employee's request for leave is reasonable in length and the employee will be able to perform the essential tasks required of him or her at the end of the period of leave, the leave should be granted. However, if the employee continuously requests time off, and has given no indication of returning to work, the employer may carefully consider discharging the employee so long as other reasonable accommodations, such as a transfer, are given serious consideration. Employers also should engage in the interactive process with the employee to ensure that they understand the employee's condition and whether a reasonable accommodation exists in order to avoid liability under the ADA.

**Emily A. Smith practices at the firm's Columbus, Ohio office in all areas of employment litigation. Emily has extensive experience in resolving ADA claims and helping employers create and implement medical leave policies and procedures. For more information about ADA compliance, or any other labor and employment issue, please contact Emily (eas@zrlaw.com) at 614.224.4411.*

Z&R Shorts

State Law Update

On May 2, 2013, Maryland governor Martin O'Malley signed Senate Bill 4, making Maryland the ninth state to "ban the box," removing questions about criminal history from state job applicants and postponing such questions until later in the hiring process. Maryland's "ban the box" law applies to state applications and prohibits authorities in the judicial, legislative and executive branches of the Maryland State Government from inquiring into an applicant's criminal history until after the applicant has been interviewed. This law, however, does not prohibit notifications to applicants that certain previous convictions may disqualify an applicant from consideration.

On May 21, 2013, Washington governor Jay Inslee signed Senate Bill 5211 into law, making Washington the latest state to ban employers from requiring or requesting that applicants and current employees disclose their username and password to their personal social media accounts. The law also prohibits an employer from requiring or coercing an applicant or current employee to add a person to the list of contacts or followers associated with the individual's personal social networking account. However, this new law does not apply to a social network or intranet the employer uses to facilitate work-related information exchange.

On May 25, 2013, Nevada governor Brian Sandoval signed Senate Bill 127 into law, making Nevada the tenth state to prohibit employers from using credit information for employment purposes. The new law will become effective on October 1, 2013. This law prohibits employers from requiring or requesting an applicant or employee to submit credit information as a condition of employment. Employers also may not use or refer to credit information when making employment decisions. The law also prohibits an employer from refusing to hire an applicant or taking an adverse employment action against an employee who refuses to divulge credit information or who has filed a complaint or lawsuit under this law.

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Zashin & Rich Continues its Columbus Expansion

Zashin & Rich is pleased to announce the addition of **Jonathan Downes** to its Employment and Labor Group in its Columbus office. Jonathan Downes brings more than thirty years of experience and expertise in representing employers in all aspects of labor and employment law. In 1990, Jonathan co-founded a Columbus labor and employment law firm where he successfully represented public and private employers in all aspects of labor relations and human resource management. In addition to negotiating over 500 labor contracts, Jonathan has represented employers in hundreds of arbitrations, organizing campaigns, and administrative hearings. Jonathan has also defended employers in state courts, appellate courts, the Ohio Supreme Court, and the United States Court of Appeals for the Sixth Circuit.

Wednesday, July 31, 2013 | 4:20 pm
Stephen Zashin will be part of a panel presenting "Disability and Leaves of Absence: How to Combat the Rise in FMLA & ADA Claims (and Manage the Interplay Between Both) and Increased Policy Targeting by the EEOC" at the American Conference Institute's *4th Annual Forum on Defending and Managing Employment Discrimination Litigation*. For more details, go to **AmericanConference.com/Discrimination**.

Wednesday, August 21, 2013 | 8:30 pm
George Crisci presents "Internal Investigations" and "Separation of Employment" at the National Business Institute's *Employment Laws Made Simple* in Akron, Ohio. For more details, go to **www.nbi-sems.com**.

Thursday, September 12, 2013
Jonathan Downes presents "Employment Law Update for Local Government" for the Ohio Government Finance Officers Association Annual Conference at the Hilton Columbus at Easton. For more details, go to **www.ohgfoa.com**.

Wednesday, November 13 2013
Jonathan Downes presents "Managing the Discipline Process" for the Ohio Association of Chiefs of Police at the Richfield BCII Facility. For more details, go to **www.oacp.org**.