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EMPLOYMENT LAW QUARTERLY

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New Ohio Law Allows Employers to Reduce Employee Hours to Avoid Layoffs

*By Emily A. Smith**

On July 11, 2013, Ohio Governor John Kasich signed a law allowing employers seeking to cut costs to reduce temporarily all employees' hours by 10 to 50 percent. The law became effective immediately. Touted by supporters as a win-win for both employers and employees, the state-approved layoff prevention program (called SharedWork Ohio) allows employees to keep their health and retirement benefits, as well as seek unemployment compensation for up to half of their missing wages. Employers will benefit by avoiding higher unemployment compensation taxes and the costs associated with training new workers.

SharedWork Ohio, which is similar to state-approved programs in 25 other states, will be funded by the federal government for the next two years. Thereafter, costs associated with the program will be funded through the unemployment compensation system.

Employers wanting to participate in the program must submit a plan to the director of the Ohio Department of Job and Family Services, including (among other things) a certification that the aggregate reduction in the number of hours worked by employees is in lieu of layoffs. Seasonal or temporary employees are not eligible for the program.

Whether employers with unionized employees must bargain over the implementation of the shared work programs remains uncertain. Ohio's shared work program does not require union approval for employers' shared work plans, which makes Ohio unique among most other states with shared work programs. Although SharedWork Ohio garnered bipartisan support generally, liberal supporters were in favor of a union sign-off, but conservative supporters were not. Employers with unionized employees are advised to seek advice from legal counsel as they develop and implement any shared work program.

**Emily A. Smith practices in all areas of employment law and regularly navigates employers through the nuances of Ohio employment laws and programs like SharedWork Ohio. If you believe your organization would benefit from SharedWork Ohio, contact Emily at 614-224-4411 or eas@zrlaw.com for more information.*

Ohio Follows Suit in Making Class Actions Harder to Certify

*By Stephen S. Zashin**

Recently, the Ohio Supreme Court made it more difficult for plaintiffs bringing class action lawsuits in Ohio state courts. In *Stammco, LLC v. United Tel. Co. of Ohio*, 2013 Ohio 3019, the Court ruled that Ohio Rule of Civil Procedure 23 requires a "rigorous analysis" at the class certification stage. The Court also stated this analysis may "include probing the underlying merits of the plaintiffs claim." However, this in-depth probe should only be used "for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23."

Ohio Civil Rule 23, which is nearly identical to the corresponding federal rule, lists the requirements of maintaining a class action suit. The Court's recent decision in the *Stammco* case ended an eight year legal battle in which the plaintiffs alleged the defendant engaged in "cramming," which is the unauthorized addition of third party charges to telephone bills. Plaintiffs sought class certification under Ohio Rule of Civil Procedure 23(B)(3). In refusing to certify the proposed class, the Ohio Supreme Court found that "the need for individualized determinations is dispositive in that the class did not comport with Civ. R. 23." The Court also found that remanding the issue to the trial court "merely to reach an inevitable result" would be unproductive and unnecessarily delay the eight-year-old litigation.

In *Stammco*, the Ohio Supreme Court relied heavily on two recent United States Supreme Court decisions: *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) and *Amgen v. Connecticut Retirement Plans & Trust Funds*, 133 S.Ct. 1184 (2013). *Dukes* was an employment discrimination case in which the United States Supreme Court denied certification of a class of workers in part because individualized proceedings would be required to determine the amount of back pay due some class members. In *Amgen*, a pharmaceutical company misrepresented the safety of its products to the Food and Drug Administration. Connecticut Retirement Plans filed suit seeking to certify a class of shareholders. In certifying the class, the United States Supreme Court clarified that the consideration of the underlying merits at the certification stage is not unfettered. The Court stated, "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" Relying on these cases, the Ohio Supreme Court denied class certification in *Stammco* because the case would require "individualized determinations as to each member of the class…making certification of a class inappropriate under Civ.R. 23(B)(3)."

Taken together, these three decisions are likely to reduce the number of class action suits at both the state and federal levels that will successfully get past the certification stage. The Ohio and United States Supreme Courts have made it clear that cases that require individualized determinations are likely not appropriate for class action litigation. In addition, trial courts must conduct a more in-depth analysis of class action suits at the certification phase. While the *Stammco* decision is helpful for Ohio employers, they still must remain vigilant of potential class actions.

**Stephen S. Zashin, an OSBA Certified Specialist in Labor and Employment Law, is the head of the firm's labor and employment group. Stephen's practice encompasses all areas of labor and employment law, and he works extensively in defending class and collective actions. For more information about this article or any other employment matter, please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

Right to Remain Silent: The Do's and Do Not's of Internal Investigations

**By Jonathan J. Downes*

The Ohio Supreme Court recently expanded the United States Supreme Court's finding in *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, the New Jersey Attorney General questioned police officers about a suspected traffic ticket fixing scheme. The investigation was not criminal in nature, but officers were hesitant to cooperate, fearing that their comments would be self-incriminating. The officers were told that if they refused to cooperate with the investigation, they could be removed from office. Ultimately, the officers complied with the investigation and some were subsequently prosecuted for "conspiracy to obstruct the administration of traffic laws." The Supreme Court found that the officers' statements made during the initial investigation were coerced. As such, they were inadmissible in the officers' criminal prosecution. The Court reasoned that allowing the coerced statements into evidence would violate the officers' Fifth Amendment right against self-incrimination. The *Garrity* warning applies to all public employees.

The Ohio Supreme Court recently faced a similar situation in *Ohio v. Graham*, 2013 Ohio 2114, 2013 Ohio LEXIS 1348 (May 29, 2013). Relying on *Garrity*, the Ohio Supreme Court held that statements obtained from a public employee under threat of job loss are unconstitutionally coerced and inadmissible in subsequent criminal proceedings. In *Graham*, the Office of the Inspector General questioned several Ohio Division of Wildlife ("DOW") administrators about the punishment of another DOW worker. The DOW worker at issue had illegally allowed a DOW worker from South Carolina to register a hunting license to his address at a reduced price. When DOW administrators learned of the infraction, they addressed the employee's discipline internally rather than informing the authorities as required by protocol. The Ohio Division of Natural Resources learned of this decision, and the Inspector General investigated. Unlike the investigation in *Garrity*, the investigators never told the administrators that they could face suspension or removal from office for refusing to comply. However, each administrator received a "Notice of Investigatory Interview" which stated that refusal to comply with the investigation could lead to suspension or termination. The Court determined that: (1) the administrators subjectively believed they could be terminated for refusing to comply with the organization; and (2) their belief was objectively reasonable. Accordingly, the Court found that the administrators' statements made during the investigation were inadmissible in subsequent criminal proceedings against them.

So where does this leave public employers that are looking to undertake an internal investigation? First, employers should remember that statements obtained from a public employee under threat of job loss are inadmissible in subsequent criminal proceedings. However, a public employer may still compel a public employee's cooperation in a job-related investigation so long as the employee is not asked to surrender the privilege against self-incrimination. Therefore, employers should not attempt to bypass *Garrity* by issuing a notice to employees as in *Graham*. Finally, employers should also incorporate information about internal investigations into their employee handbook.

Contact us for policies or forms for *Garrity* notices, a simple but critical step in internal investigations.

**Jonathan J. Downes, is AV rated by Martindale Hubbell and is 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, including conducting internal investigations. If you have any questions about the above or any other union/employee issue, contact Jonathan (jjd@zrlaw.com) at 614.224.4411.*

Disorderly Conduct: EEOC Cracks Down on Employers' Use of Applicants' Criminal Histories

*By: Ami J. Patel**

An employer may consider an individual's criminal record when making employment decisions. However, the Equal Employment Opportunity Commission ("EEOC") has found that exclusions based on such records may disparately impact minorities. Two employers' screening policies have recently fallen under scrutiny. The EEOC filed suit against Dollar General and BMW on behalf of former and prospective African-American employees, alleging that both companies utilized screening procedures that disproportionately impacted African-Americans.

First, the EEOC filed a nationwide lawsuit against Dollar General on behalf of African-American applicants. The lawsuit challenged Dollar General's practice of conditioning all job offers on criminal background checks. Between 2004 and 2007, 10% of African-American applicants were discharged after they failed Dollar General's background check (compared to 7% of non-African-American applicants). The EEOC based its lawsuit on charges of discrimination by two rejected applicants. One of the rejected applicants was denied employment after Dollar General discovered that she had a six year-old conviction for possession of a controlled substance. Dollar General revoked her job offer pursuant to its practice of disqualifying applicants for this type of conviction within the last ten years. The second rejected applicant was refused employment after a felony conviction turned up on Dollar General's background check. The EEOC claimed that the applicant's background check results were inaccurate and that Dollar General failed to address the applicants' protests.

The EEOC also filed suit against BMW alleging the company's use of criminal background checks disproportionately precluded African-Americans from jobs and was neither job-related nor consistent with business necessity. BMW terminated eighty-eight employees after it discovered they had prior convictions. Eighty percent of those terminated were African-Americans. The employees originally bypassed BMW's screening process because they were employed by UTi Integrated Logistics Inc. ("UTi"), which used a less stringent screening procedure than BMW. BMW contracted with UTi to place UTi employees at various BMW locations. BMW ended its relationship with UTi but allowed the UTi employees to apply with BMW's new contractor. BMW's new contractor screened these employees for prior arrests and convictions according to BMW's policy. BMW's policy excluded applicants convicted of broad categories of crimes, including assault, domestic abuse, various drugs and weapons crimes, any crime of a violent nature, and criminal convictions involving theft, dishonesty, and moral turpitude. Eighty-eight employees failed the screening, and BMW directed the new contractor to apply BMW's criminal conviction policy and not hire these individuals. The EEOC brought suit on behalf of sixty-nine African-American employees not rehired pursuant to BMW's policy, alleging that BMW discriminatorily failed to distinguish between felony and misdemeanor convictions. The EEOC also found that BMW's policy acted as a blanket exclusion without any individualized assessment of the nature and gravity of the crimes, the ages of the convictions, or the nature of the employees' positions. These cases are both still pending in their respective courts.

However, other courts have recently cast doubt on the EEOC's efforts to restrict employers' use of criminal-background checks in hiring. In *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. August 9, 2013), the United States District Court for the District of Maryland dismissed a lawsuit filed by the EEOC. The EEOC claimed that Freeman, a corporate events service provider, had "unlawfully

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relied upon credit and criminal background checks that caused a disparate impact against African-American, Hispanic, and male job applicants." The Court flatly rejected this argument, stating "[i]ndeed, the higher rate might cause one to fear that any use of criminal history information would be in violation of Title VII. However, this is simply not the case. Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States. As Freeman points out, even the EEOC conducts criminal background investigations as a condition of employment for all positions, and conducts credit background checks on approximately 90 percent of its positions."

Confusing the issue further, the EEOC Enforcement Guidelines on the Consideration of Arrest and Conviction Records in Employment Decisions, released in 2012, establish recommended screening practices for employers. The guidelines draw from the Eighth Circuit's decision in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158, 1160 (8th Cir. 1977). Green established that employers utilizing background checks should consider three factors when analyzing criminal records: (1) the nature gravity of the crime; (2) the time elapsed between when the crime was committed and the employee's work application; and (3) the nature of the job. *Green*, 549 F.2d at 1160. The EEOC also recommends that convictions should be related to the job sought by an applicant and that the employer's decision be consistent with business necessity.

The ambiguity surrounding the EEOC's recommendations creates a dilemma for employers. On one hand, if employers do not follow the EEOC's recommendations by providing an individualized assessment for screened employees, they risk an EEOC lawsuit. On the other hand, if employers hire an employee with a criminal history and that employee commits a crime while at work, the employer risks being sued for negligent hiring or retention.

Employers should conduct an individualized assessment for potential employees who fail background checks. Employers should avoid "blanket" exclusionary policies and ensure that criminal background policies are tailored to the specific job at issue and have a reasonable time limit. Employers also should allow individuals to explain past convictions and be careful to distinguish between arrests and convictions. An employer also should never make an employment determination based on an arrest, but rather, the conduct underlying the arrest (if it would make that individual unfit for the specific position).

So long as this issue remains in flux, employers must tread carefully when using criminal background checks as part of the hiring process. While the *Freeman* decision provides employers hope, the EEOC has and likely will continue to heavily scrutinize employers' use of criminal background checks for potential new hires, possibly leaving employers vulnerable to costly and time-consuming litigation.

**Ami J. Patel practices in all areas of employment litigation. She has extensive experience helping employers navigate the EEOC's policies and procedures, as well as related employment issues. For more information about this ever changing area, please contact Ami (ajp@zrlaw.com) at 216.696.4441.*

Road to Riches: Paying Employees Who Work While Commuting

*By Michele L. Jakubs**

Smart phones, laptops, tablets, and other mobile devices have made it easier for employees to work outside of the office. Employees may use these devices to work during their morning and evening commutes. Unbeknownst to many employers, however, work done during a commute may be compensable under the Fair Labor Standards Act ("FLSA").

Employers generally must pay their nonexempt employees no less than the federal or state minimum wage, whichever is higher, for each hour worked. Employers must also pay their non-exempt employees one-and-one-half times their regular rate for hours worked in excess of forty in a workweek. Typically normal travel between home and work is not considered work time. This general rule, however, only applies if the employee performs no work during his or her commute.

Should the employee work during his or her commute, the time from the point he or she starts working becomes work time. In addition, an employer must pay for an employee's commuting time if that time is being used primarily for the employer's benefit, not the employee's. For example, if the employee is required to pick up work supplies, some or all of this travel time may be compensable.

If an employee performs work outside of normal working hours, and does not receive compensation for those hours worked, an employer also may be liable for unpaid wages. Courts routinely find that employer policies prohibiting employees from performing unauthorized work, including during their commute, do not prevent this liability.

There are several ways employers can reduce their potential wage and hour liability. Employers should institute policies prohibiting unauthorized work, regularly remind employees of those policies and discipline those employees who violate the policies. Employers should also take away employer-owned mobile devices if employees use them to perform unauthorized work.

Further, employers may not be liable for work done in cases where they had no actual or constructive knowledge that an employee worked off the clock. For example, one employer was found not liable for time an employee spent working at lunch when the employee admitted she did not follow the employer's procedures for reporting such time. *White v. Baptist Memorial Health Care Corp.*, 2012 WL 5392621 (6th Cir. 2012). Employers should be aware that an employee's use of company provided cell phones, tablets, or other mobile devices strengthens the likelihood that the employer actually knew work occurred.

Another potential hurdle employers face occurs when an employee performs additional work after returning home. For example, is an employee's commute time compensable under a continuous working theory when the employee performs services for the employer after returning home at the end of the day? According to some courts, the answer is no, so long as the employer gave the employee enough flexibility to schedule his day. In *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352 (2nd Cir. 2011), the employee was a retail specialist whose main job was to ensure that Black & Decker ("B&D") products were properly stocked, priced, and displayed in stores. B&D expected him to spend between five and eight hours per day completing these tasks. B&D also provided the employee with a PDA to record his entry and exit at stores. When the employee synced his PDA with B&D's server, the PDA automatically communicated the employee's hours. The employee also performed job-related tasks, such as responding to emails, late at night from his home office. He filed suit, claiming that B&D should have compensated him for his commute home since he was required to continue working after he arrived home. The court disagreed, holding that the employee had flexibility to complete his daily responsibilities so he was not working continuously.

Finally, with the advent of improved technology, many employers now permit employees to "telecommute." While telecommuting employees generally work from home or another off-site location, it is sometimes necessary for these employees to commute into the office for meetings. If a telecommuting employee attends a meeting during the day, the travel time likely constitutes working time because the employee presumably already started working that day at his/her remote location. However, if the meeting is scheduled for first thing in the morning and is the employee's first job related activity, the employee's time spent commuting to the office likely is not compensable.

Employers must remain vigilant of the need to compensate employees for all work performed. If an employee works during his or her commute, that time is generally compensable and the employer must pay the employee for that time. Employers should have clear policies and procedures

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Obesity is a Disease: from the A.M.A.'s Lips to the EEOC's Ears?

*By Helena Oroz**

Weight loss is somewhat of an obsession in this country. With the likes of New Jersey Governor Chris Christie, Oprah Winfrey, and even former President Bill Clinton talking about their own weight loss experiences, the national conversation about being overweight and losing weight is as animated as ever, among famous folks and regular Joes alike.

Discussing obesity (defined by the U.S. Centers for Disease Control and Prevention as having a body mass index of 30 or higher[1]), however, seems to make people uncomfortable – even, strangely enough, some doctors who may fail to counsel their patients about it. This is one reason many in the medical community are applauding the American Medical Association's designation last Tuesday of obesity as a disease requiring treatment and prevention.

"Recognizing obesity as a disease will help change the way the medical community tackles this complex issue that affects approximately one in three Americans," according to A.M.A. board member Patrice Harris, M.D.[2] Those who laud the A.M.A.'s decision agree that it may help people in a variety of ways, from changing the way insurance companies reimburse for obesity drugs and treatments to changing the way society views obesity.

Of course, designating one third of Americans as diseased is not going to sit well with everyone (even those who are supposed to benefit from the change). And even though the A.M.A.'s decision carries no legal authority, it does carry influence, so employers have legitimate concerns about how their responsibilities under the Americans with Disabilities Act ("ADA") may change as a result.

After all, the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") has already massively broadened the scope of the ADA's protections, and per the U.S. Equal Employment Opportunity Commission ("EEOC"), the determination of disability should not require extensive analysis. If the AMA says obesity is a disease, EEOC Guidance on how to accommodate individuals with this condition may not be far behind.

**Helena Oroz practices in all areas of employment litigation and has extensive experience helping employers comply with the ADAAA. For more information about this ever changing area, please contact Helena (hot@zrlaw.com) at 216.696.4441.*

[1] In general, the U.S. Centers for Disease Control and Prevention (CDC) considers an adult with a body mass index (BMI) of 30 or higher obese; an adult with a BMI between 25 and 29.9 is considered overweight. Centers for Disease Control and Prevention: **http://www.cdc.gov/obesity/ adult/defining.html**

[2] AMA Press Release: **http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm**

Road to Riches: Paying Employees Who Work While Commuting

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addressing unauthorized work and should require mandatory reporting of any work performed outside of normal working hours. Strict compliance with these policies will go a long way in helping employers avoid liability.

**Michele L. Jakubs, an OSBA certified specialist in labor and employment law, practices in all areas of employment law and has extensive experience representing employers in wage and hour matters. If you have any questions about the FLSA or wage and hour issues affecting your workplace, contact Michele (mlj@zrlaw.com) at 216-696-4441.*

Z&R Shorts

Zashin & Rich is pleased to announce the addition of Todd Ellsworth to the firm's Employment and Labor Group in its Cleveland office.
Prior to joining Z&R, Todd served as a member of the U.S. Navy. He has represented private and public employers in all areas of labor and employment law and has wide-ranging experience representing employers in collective bargaining negotiations, before state and federal administrative agencies, and state and federal courts. Todd also has broad experience in advising and representing public sector clients concerning Ohio's Sunshine Laws, specifically public records.

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- George S. Crisci – Employment Law Management, Labor Law – Management, and Litigation – Labor and Employment
- Jon M. Dileno – Employment Law – Management
- Jonathan J. Downes – Employment Law – Management and Labor Law -- Management
- Stephen Zashin – Labor Law – Management

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Thursday, September 12, 2013
Jonathan Downes presents "Workforce Reduction, Layoffs, and Job Abolishments" for the Ohio Government Finance Officers Association Annual Conference at the Hilton Columbus at Easton. For more details, go to **www.ohgfoa.com**.

Thursday, October 2, 2013
Stephen Zashin will be co-presenting "A Peek Behind the Curtain: Discovery Tacticts" at the 50th Annual Midwest Labor and Employment Law Seminar. For more details, go to **www.ohiobar.org**.

Thursday, October 17, 2013
Jonathan Downes presents "Terminating Employees Without Getting Sued" for the South Central Ohio Human Resource Association. For more details, go to **scohrc.com/**.

Thursday, November 7, 2013
George Crisci will be part of a panel presenting "It's Always 1983 in the American Workplace" for the ABA Labor and Employment Section's Annual CLE meeting. For more details, go to **www.americanbar.org**.

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**.

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