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

EMPLOYMENT LAW QUARTERLY

Volume XVI, Issue i
Winter 2014

In this issue:

Public Sector Alert: Tenth District Court of Appeals Lays the Groundwork for Disparate Impact Age Discrimination Claims Based On "Anti-Double Dipping" Policies

*By Todd M. Ellsworth**

For those of us who remember the television show *Seinfeld*, it is hard to forget the episode where George dips his chip, takes a bite, and then dips the same chip again. Just as George broke acceptable community standards, taxpayers often feel public employees do the same when they retire and then get rehired by their same employers. In doing so, the employee receives pay and benefits in addition to retirement benefits for performing the same or similar duties. The process, known as "double dipping," has a long history in Ohio's public sector. Public employers like retired rehires, or "double dippers," because they get the same experience at a generally lower personnel cost. Retired rehires like the practice because of the obvious financial benefits. The benefits of "double dipping" are not as readily apparent to the general public, and paying someone twice for the same job is not a common practice in the private sector.

In response to growing public concern, some public agencies have attempted to prohibit "double dipping." Ohio's Tenth District Court of Appeals recently weighed in on the matter in *Warden v. Ohio Department of Natural Resources*, 2014-Ohio-35 (10th Dist. Ct. App. January 9, 2014).

In *Warden*, the Court found that the policy prohibiting "double dipping" did not constitute a direct cause of action for age discrimination. In addition, and although the Court held that Warden failed to properly plead or litigate a disparate impact claim, the Court addressed whether the employee established that the "anti-double dipping" policy had an adverse effect on older workers. That is, while the policy was facially neutral, did it have an adverse effect on workers aged forty and older. While the Court concluded that no statistical significance existed because the sample size was too small, the Court made it clear that an employee could establish such a claim if the employee could demonstrate sufficient statistical disparities. It is noteworthy that the Ohio Supreme Court has not yet addressed whether such policies could have a disparate impact on older workers. As a result, public sector employers should carefully consider these recent developments if they are considering implementing such a policy.

***Todd M. Ellsworth** practices in all areas of labor and employment law. He has extensive experience counseling public sector employers on state and federal discrimination claims. For more information about "double dipping" policies, please contact Todd (tme@zrlaw.com) at 216.696.4441.*

Boxed In: What Can Employers Ask on Job Applications?

*By Andrew J. Cleves**

Recently, a movement has spread across the country to "Ban the Box" on job applications. The "Box" refers to a square that, when marked, indicates an individual has a criminal background. A growing number of cities and states have prohibited this question on job applications. Proponents argue such inquiries often automatically disqualify applicants and increase chances of recidivism. For employers, "Ban the Box" laws pose an increased burden on the job application and screening process.

Hawaii became the first state to "Ban the Box" in 1998. Currently, ten states (California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Maryland, Minnesota, New Mexico, and Rhode Island) have some form of a "Ban the Box" law. Of those, five (California, Illinois, Maryland, Minnesota, and Rhode Island) passed "Ban the Box" laws or regulations in 2013 and four more have made these changes since 2009. On a more local scale, over fifty cities, including Chicago, Cleveland, and Cincinnati, have adopted some form of "Ban the Box" practices. In addition, the EEOC recommended banning the box on job applications as a best practice in a 2012 enforcement guidance. Some private employers, like Target, have removed such questions from job applications.

While many states and local governments have these measures in place, the laws or regulations and their subsequent effect on employers vary significantly. For many states, such as Connecticut and Maryland, the "Ban the Box" prohibition only applies to state employees. However, in places like Minnesota, the law applies to public and private employers alike. Even where these laws affect private employers, exceptions exist and the restrictions may be lifted at some point in the application process. Often, employers may inquire into an applicant's criminal background after 1) the applicant was selected for an initial interview, 2) the applicant had an initial interview, or 3) the employer made a conditional job offer. In some instances, if an employer learns of an applicant's criminal background and does not make a job offer, the employer must show the background was not tied to the employment decision.

Though "Ban the Box" efforts have grown, Ohio does not have such a law. In July 2013, Ohio legislators introduced House Bill 235 that would prohibit public and private employers from asking whether "the applicant has been convicted of or plead guilty to a felony." However, as of January 2014, the bill had not moved past the Commerce, Labor and Technology Committee. While there is no statewide law, Lucas and Stark Counties and Cleveland, Cincinnati and Canton have "Ban the Box" measures in place. These measures only apply to public employers.

Employers need to understand what, if any, "Ban the Box" restrictions apply in the states, cities, and counties they do business. Employers also should carefully watch for "Ban the Box" developments.

***Andrew J. Cleves** practices in all areas of labor and employment law. If you have questions about state or local "Ban the Box" laws and regulations or other hiring concerns, please contact Andrew (ajc@zrlaw.com) at 216.696.4441.*

Collateral Damage: the Effect of Criminal Convictions on Employment Applications

*By David P. Frantz**

Criminal convictions impact much more than the sentence and possible fines associated with the underlying offense. Convictions or guilty pleas may automatically bar individuals from consideration for certain jobs. For example, Ohio Revised Code 173.38(C)(3) and (F) prevent applicants convicted of certain crimes from working in a direct-care position with a community based, long-term-care provider. The Ohio legislature recently addressed the secondary impact of a criminal conviction, dubbed a collateral sanction, when Ohio Revised Code 2953.25 went into effect in September 2012. The law created Certificates of Qualification for Employment (CQE). CQEs lift the automatic bar(s) of the collateral sanction(s) and essentially give the qualifying individual a stamp of rehabilitation. The law then directs employers to consider these applicants on a case-by-case basis.

Though CQEs may sound daunting for employers, the Ohio legislature created a rigorous application process and granted employers certain protections. To apply, an individual must first wait either six months (misdemeanors) or one year (felonies) after the individual has been released from all sanctions related to the offense. Then, the individual must submit a detailed application to the Division of Parole and Community Services. Next, the local court of common pleas may take sixty days to review, gather additional information, and approve or deny the application. To grant an application, the court must find a) the CQE would materially help the individual find a job, b) the individual substantially needs the CQE to stay out of trouble, and c) granting the CQE would not pose a safety risk. Even then, the law prohibits courts from granting CQEs in some circumstances. For example, courts cannot grant CQEs to remove license denials or suspensions for health care professionals convicted of sexual battery or improper distribution of controlled substances.

Furthermore, the law grants substantive protections to employers who hire CQE holders. For general negligence lawsuits, the employer may submit the CQE as evidence that the employer took due care in hiring or retaining the CQE holder. For negligent hiring lawsuits, Ohio Revised Code 2953.25 grants the employer immunity. The employer may invoke these protections if the employer knew the individual held the CQE at the time of hire.

Employers should be wary of retaining CQE-holders who commit additional crimes after obtaining employment though. The law limits employer protection where a CQE holder is a) hired, b) "subsequently demonstrates dangerousness or is convicted of or pleads guilty to a felony," and c) thereafter retains employment. In those cases, the employer may be liable for retaining the employee. The party bringing the claim must prove that a decision-maker knew of the transgression and willfully retained the employee. Furthermore, once someone obtains a CQE, the law presumptively revokes it if the person later commits or pleads guilty to a felony.

Despite the fact that county courts began accepting CQE applications in March 2013, only 40 had been filed in Cuyahoga County as of mid-December 2013. Of those 40, the courts granted 17 applications, rejected three, and have not made decisions on the remaining 20. As CQEs become more prevalent, it is likely your organization may soon receive an application with one. Given their infancy, to the extent you have questions about CQEs, you should contact your legal counsel.

***David P. Frantz** *practices in all areas of employment law. If you have questions about CQEs or hiring policies, please contact David (dpf@zrlaw.com) at 216.696.4441.*

Employer Provided Healthcare Insurance Costs Increasing for Smokers and Overweight Employees

*By Patrick J. Hoban**

As if there was not enough controversy surrounding the rollout of the Patient Protection and Affordable Care Act (ACA), many employees who smoke or are overweight may discover that their healthcare costs will increase. Consistent with a growing trend among employers to incentivize (or punish depending on your point of view) employees to live healthier lifestyles, ACA contains provisions allowing employers to charge employees who smoke or are overweight higher health insurance premiums.

ACA encourages employers to utilize "participatory wellness programs." Examples of these programs include reimbursements for employee gym memberships and rewarding employees for attending health seminars or for completing health risk assessments. In addition to these participatory programs, employers can also implement "health-contingent wellness programs," which reward employees who are able to meet specified goals or health-related requirements. These programs fall into two categories: (i) "activity-only" programs that reward employees who participate in specific activities (e.g., an exercise or diet plan); and (ii) "outcome-based" programs for employees who maintain healthy choices or goals (e.g., not smoking).

The "reward" for employees who utilize the health-contingent wellness programs can be up to 30 percent of the cost of health coverage for non-tobacco use related programs and up to 50 percent of the cost of health coverage for programs aimed at tobacco use prevention and cessation. Alternatively, employees who fail to participate in these health-contingent wellness programs can get charged up to 30 to 50 percent more for their health insurance premiums than their healthier, non-smoking coworkers.

Independent of the provisions of ACA, some employers have implemented policies under which they will not hire smokers. For example, employers have adopted non-smoking policies for new hires and require job applicants to take a urine test to detect the presence of nicotine in their systems. If an applicant tests positive for nicotine, he or she will not be hired but may re-apply after a 90-day waiting period. Employers considering a similar policy for new hires must beware as all states do not permit these policies. The following states and the District of Columbia prohibit employers from making hiring decisions or employment decisions, including demotions, suspensions, and terminations, based on whether the applicable individual smokes: California, Connecticut, Illinois, Indiana (excludes religious employers), Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Virginia (applies to state employees only), West Virginia, Wisconsin, and Wyoming. States with similar laws that do not apply to hiring decisions but prevent employers from terminating employees for tobacco use during non-work hours include: Colorado, South Dakota, and Tennessee.

With the advent of ACA and as society continues to become more health conscious in general, many employers may find themselves having to make health-care related decisions that they have not faced in the past. ACA encourages employers to implement wellness programs that can serve both as a carrot and a stick to incentivize employees to make healthier lifestyle choices. However, employers must ensure that these wellness programs – like all employer policies and programs – are not discriminatory and do not violate laws like the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and corresponding state laws.

***Patrick J. Hoban** practices in all areas of labor and employment law. He has extensive experience counseling employers on employee wellness programs and ACA. For more information about these topics or any other labor and employment needs, please contact Patrick (pjh@zrlaw.com) at 216.696.4441.*

The Department of Labor's Crackdown on Out-of-Date Employee Handbook is a Costly Reminder to Regularly Update Employee Handbooks

*By Ami J. Patel**

An otherwise run-of-the-mill Family and Medical Leave Act (FMLA) violation claim made to the Department of Labor's (DOL) Wage and Hour Division by a restaurant employee recently snowballed into a full-blown DOL investigation into the restaurant chain's employee handbook. Pursuant to an agreement with the DOL, the restaurant must change its leave policy to comply with the FMLA and pay back wages owed to the individual employee. As a result of the publicity of the investigation and agreement, the restaurant chain could face increased exposure to claims by employees alleging FMLA violations under the company's old policies. This crackdown should serve as a lesson and warning to employers using out-of-date handbooks that a single claim can lead to a major headache and unexpected liability.

Employee handbooks implicate a number of employment related laws and can lead to investigations by and proceedings before various federal and state administrative agencies. Employee handbook compliance is complex and requires regular updating. Taking the time to regularly update a handbook is a far better alternative than the potential consequences of using a non-compliant one.

The DOL's investigation of the restaurant chain's employee handbook focused on its FMLA policy. Under the FMLA, eligible employees who work for covered employers are entitled to take a maximum of 12 weeks of leave in a 12 month period for specified reasons. Among other things, in order for an employee to be eligible for FMLA leave, the employee must have worked for the employer for at least 12 months. However, contrary to what the subject handbook stated, those 12 months of employment do not need to be consecutive. The policy also did not include information on the FMLA's family military leave provisions or intermittent and reduced-schedule leave.

Employee handbooks should aid employers in avoiding or prevailing in litigation. In order to maintain an employee handbook's usefulness and minimize liability, employers need to ensure that their employee handbooks are up-to-date and compliant with ever changing laws and regulations. All it takes is one claim by one employee to open a can of worms that can lead to other claims and substantial costs.

__Ami J. Patel__ practices in all areas of labor and employment law. She has extensive experience counseling employers on FLMA compliance and handbook issues. For more information about these topics or your other labor and employment needs, please contact Ami (ajp@zrlaw.com) at 216.696.4441.

Z&R Shorts

March 27, 2014
Stephen Zashin will present *"Brainy FMLA: Advanced Instruction for FMLA Whiz Kids"* at the "Administering the Family and Medical Leave Act in Ohio" seminar at the Holiday Inn Cleveland South in Independence, Ohio. More information: **www.lorman.com/ID393028**

March 31, 2014
Jonathan Downes will discuss mediation at the SERB Academy. For more information contact Tammy Johnson at *tjohnson@serb.state.oh.us*.

April 17, 2014
Jonathan Downes will present *"The Nuts and Bolts of Bargaining, Bargaining Strategies, and Media Relations"* at the "Collective Bargaining for Public Safety Employees" seminar. More information: **www.lris.com**

April 29, 2014
Jonathan Downes will present *"Update on Employment Law Matters Affecting Law Enforcement"* and *"Collective Bargaining and Union Issues Update"* at the Ohio Association of Chiefs of Police (OACP) Chief's Annual Conference.

April 30, 2014
Jonathan Downes will present *"Employment Law Basics for Public Managers"* at the Miami Valley Risk Management Association meeting in Dayton, Ohio. More information: **www.mvrma.com**

May 2, 2014
Jonathan Downes will present *"Legal Update"* at the Ohio Association of Public Safety Directors Annual Conference, at the CCAO Conference Center in Columbus, Ohio.

May 14, 2014
Jonathan Downes will present *"Employee Issues from Social Media"* at the Ohio Jobs and Family Services Director's Association Meeting.

May 21, 2014
George Crisci will present *"Special Concerns when Dealing with Union Environments"* at the National Business Institute's "Employee Documentation, Discipline and Discharge" program in Akron, Ohio.

May 21, 2014
Jonathan Downes will present *"FMLA Issues and Update"* and *"Workplace Investigations"* at the Ohio Jobs and Family Services Director's Association Meeting at the Hyatt Regency Columbus.

May 22, 2014
Jonathan Downes will present *"Discipline of Public Employees"* at the Ohio Association of Chiefs of Police (OACP) meeting at the Reynoldsburg Police Department.

Zashin & Rich is pleased to announce the addition of Andrew Cleves to the firm's Employment and Labor Group in its Cleveland office.
Andrew's practice focuses on private and public sector labor relations and employment law. Prior to joining Zashin & Rich, Andrew represented public sector labor unions in Cincinnati. Andrew's experience includes advising clients in collective bargaining negotiations, contract arbitrations, and employment litigation. He has represented clients in state and federal court and before the Ohio State Employment Relations Board.

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/