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Changes to Ohio's Menacing, Stalking, and Protection Order Laws Help Employers Defend Against Threats of Workplace Violence

By David R. Vance*

Pursuant to recent legislation, Ohio employers now have an added defense to help prevent workplace violence: the ability to file for a protection order based upon an individual's threats against the company or its employees. This change in the law provides employers an important tool to help protect employees and customers.

Ohio's updated menacing, stalking, and protection order laws, which went into effect in September 2014, fixed a void that left employers in a compromised position when facing threats of workplace violence. Ohio's prior menacing, aggravated menacing, and menacing by stalking laws prohibited individuals from knowingly causing another person (i.e., the victim) to believe that they would harm the victim (or their property, unborn child, or family member). The amended language now states that the victim's belief that the offender will cause them harm may be based on the offender's words or conduct directed at or identifying the victim's employer.

In addition to the amendments to the menacing and stalking laws, the legislature added a provision (Ohio Revised Code § 2903.215) that allows employers of two or more alleged victims of a violation of Ohio's menacing, aggravated menacing, or menacing by stalking laws to file a motion for a temporary protection order. In instances where a criminal proceeding against the offender is pending and the offender's threat(s) or conduct identified the employer or was directed at the employer, the employer may file a motion for a temporary protection order in the already pending criminal proceeding. Additionally, in cases involving menacing by stalking, even when no criminal proceeding is pending, employers may file a petition for a civil protection order if the offender's pattern of conduct identified the employer or was directed at the employer.

The changes to the laws arose in part out of concerns following an incident involving a Cincinnati-area company. After a former employee made threats to go on a shooting spree on the company's premises, the former employee was charged with menacing. Eventually, the charge was dropped because the threats were directed generally at the company and not at specific employees. Under previous Ohio law, the company was without recourse to seek a protection order against the former employee.

The changes in the laws address the seriousness and reality of threats of workplace violence and provide needed legal recourse to employers faced with difficult and potentially deadly scenarios. Previously, employers would have to rely on the individuals targeted by a threat to seek a protection order against the offender. Now, employers have the ability to take legal action without relying on their employees, who may be hesitant or fearful of initiating legal action against an offender.

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Train on Your Own Time: Firefighters Not Entitled to Overtime Pay for Hours Spent Training

By Jonathan J. Downes*

The U.S. Court of Appeals for the Sixth Circuit, which covers Kentucky, Michigan, Ohio, and Tennessee, recently concluded a city did not have to pay firefighters for hours spent in paramedic training. *Misewicz v. City of Memphis, Tenn.*, 771 F.3d 332 (6th Cir. 2014). The city required firefighters to obtain paramedic certification but did not compensate them for the training time. Rejecting the firefighters' arguments that the time constituted "hours worked" under the Fair Labor Standards Act ("FLSA"), the court found this time fell under an FLSA exception.

Generally, the FLSA requires employers to pay their employees a minimum wage for all hours worked and pay overtime for hours worked in excess of forty hours in a work week. Time spent attending employer-sponsored training programs is typically considered compensable as hours worked. However, U.S. Department of Labor ("DOL") regulations provide two exceptions. First, under Code of Federal Regulations Section 787.27, employers do not have to count "[a]ttendance at lectures, meetings, training programs and similar activities" as working time if: (1) attendance is outside the employee's regular working hours; (2) attendance is in fact voluntary; (3) the training is not directly related to the employee's job; and (4) the employee does not perform any productive work while at the training. In addition, pursuant to Code of Federal Regulations Section 553.226(b), training time for employees of state and local governments is not compensable if it occurs (1) outside regular working hours (2) at specialized or follow-up training (3) that is required for certification purposes of private and public sector employees whether by a particular governmental jurisdiction or by law.

In *Misewicz*, the case turned on whether the firefighters' training time fell under the Section 553.226(b) exception. Specifically, the Sixth Circuit focused on whether the training was "required by law for certification." Tennessee law does not require firefighters to be certified paramedics. However, Tennessee does require all employees performing paramedic-level care to obtain paramedic certification. Here, the city required all firefighters to obtain that paramedic certification within three years of employment.

The key issue was whether the exception's "required by law for certification" requirement should focus on the employees' job description or actual duties performed. The firefighters argued that the court should make its determination based on the employees' job description which included duties that required state law certification. According to the firefighters, since the applicable job description was for fire recruits, state law did not require paramedic certification and the city should have to pay for their training time. The city argued the determination should hinge on whether state law required certification for the duties the employees actually performed. Once certified, firefighters spent one-half of their shift performing paramedic duties and responded to emergency medical services incidents much more frequently than fire suppression incidents.

Ultimately, the *Misewicz* Court ruled in the city's favor: whether the training is "required by law for certification" hinges on whether the employer actually hired the employee to perform duties that require state certification, determined by whether the employer asks the employee to regularly perform those duties after training. Since the city hired the firefighters to perform both firefighting and paramedic duties, the exception applied. Therefore, the city did not violate the FLSA by failing to pay the firefighters for their paramedic training.

This is the first Sixth Circuit decision to interpret the FLSA "hours worked" Section 553.226(b) training exception. The Court rejected the argument that the city had to meet both "hours worked" training exceptions to escape liability under the FLSA. Therefore, employers do not have to compensate employees for training time if the employee training meets the Section 553.226(b) exception alone.

Public employers should review any compensation provided for training time. If employers pay for training necessary to obtain certification required by, for example, the Ohio Revised Code, the employer may not have to pay employees for that time. However, public employers must also remember to consider whether the employees utilize that certification in their day-to-day job. Employers should contact counsel with any questions about this "hours worked" training exception or the *Misewicz* decision.

***Jonathan J. Downes**, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience advising public entities and employers. For more information about the *Misewicz* decision or the FLSA applied to public employers, please contact Jonathan (jjd@zrlaw.com) at 614.224.4411.

Paid Sick Days Ahead for All? The Healthy Families Act Reappears… Again

By Helena Oroz*

As the white fluffy stuff turns into hard, dirty, slowly melting stuff in cities and towns across our fair region, summer 2014 still seems like a distant memory . . . but one hot topic from our *Summer ELQ* remains hot as can be: paid sick leave.

Currently, three states – Connecticut, California, and Massachusetts – mandate paid sick leave, as well as a growing number of cities. Paid sick leave proponents got quite a boost from President Obama's State of the Union Address on January 20, 2015, which was chock full of graphics, including one that showed thirty-two other countries are apparently more civilized than the United States when it comes to paid maternity leave. (http://www.whitehouse.gov/sotu at 17:50). The graphic was on a split-screen with the President during the following portion of his speech:

> Today, we are the only advanced country on Earth that doesn't guarantee paid sick leave or paid maternity leave to our workers. Forty-three million workers have no paid sick leave. Forty-three million. Think about that. And that forces too many parents to make the gut-wrenching choice between a paycheck and a sick kid at home. So I'll be taking new action to help states adopt paid leave laws of their own. And since paid sick leave won where it was on the ballot last November, let's put it to a vote right here in Washington. Send me a bill that gives every worker in America the opportunity to earn seven days of paid sick leave. It's the right thing to do.

That bill, the Healthy Families Act, was previously introduced in the House of Representatives and the Senate in March 2013 but stalled in committee. In a joint statement issued January 14, 2015, Senator Patty Murray (D-WA) and Representative Rosa DeLauro (D-CT) promised to reintroduce the bill in the coming weeks. On February 12, 2015, they kept that promise. The bill (H.R. 932/S. 497) requires:

- employers with 15 or more employees for each working day during 20 or more workweeks a year to permit each employee to earn at least **one hour of paid sick time for every 30 hours worked**, up to a maximum of 56 hours (seven days) of paid sick time in a calendar year.
- small employers (those with fewer than 15 employees) who opt out of proving paid sick time to provide at least **56 hours of unpaid sick time** in a calendar year to each employee.
- employers to allow employees to use the time to: (1) meet their own medical needs; (2) care for the medical needs of certain family members (including a domestic partner or the domestic partner's parent or child); or (3) seek medical attention, assist a related person, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking.

The Act would vest investigative and enforcement authority in the Secretary of Labor, but also authorize civil actions for damages by employees against employers who violate the Act.

As expected, proponents of the bill argue that it is critical to help working families and to fill gaps left by the Family and Medical Leave Act and other leave laws. Opponents focus on potentially untenable costs, especially to small businesses, and the possibility of employee abuse.

Considering the current composition of the U.S. Congress, it also seems likely that this one-size-fits-all proposition will stall once more, so why all the commotion? Perhaps more important than the outcome of the bill is the momentum built around this issue. Even more states and cities are enacting or considering their own paid leave laws, just as President Obama has called on them to do, including the following:

- Tacoma, Washington City Council voted on January 27, 2015 to require businesses in the city to provide their employees with at least three days of paid sick leave beginning in 2016.
- Philadelphia, Pennsylvania Mayor Michael Nutter signed mandatory paid sick leave into law on February 12, 2015, requiring employers with ten or more employees to permit each employee to earn at least one hour of paid sick leave for every 40 hours worked, effective in 90 days.
- State-wide mandatory paid sick time legislation requiring all employers to provide seven paid sick days per year is currently pending in Oregon (introduced prior to the State of the Union address).

STAY TUNED.

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What Goes Around: Another Cold and Flu Season Comes to a Close

By Patrick M. Watts*

Last year, as hospitals treated patients with the Ebola virus in the United States for the first time, many people worried about the spread of the dangerous virus. In particular, employers may have wondered how to accommodate employees affected by the virus or isolation periods intended to prevent spreading the illness. Should an individual be exposed to the Ebola virus, local and state public health authorities will likely monitor that person for signs of the virus and may recommend or require isolation during the virus' 21-day incubation period. For more specific information, the Centers for Disease Control and Prevention ("CDC") provides comprehensive information on preventing the spread of Ebola on its website. Thankfully, the Ebola virus has not spread in the United States. However, the annual cold and flu season remains a threat to employee health and employer productivity.

EMPLOYERS CAN BENEFIT FROM UNDERSTANDING EMPLOYMENT LAWS ADDRESSING EMPLOYEE LEAVES DUE TO ILLNESS.

As cold and flu season comes to a close, employers can benefit from understanding employment laws addressing employee leaves due to illness. Cold and flu season can take a toll on employers, as illness affects employees' attendance and productivity. Some reports tally the cost of lost productivity at up to seven billion dollars or 111 million missed work days. The flu also poses a serious threat to those with compromised immune systems, such as the elderly, those with cancer, and pregnant women. The contagious nature of the flu means that it can spread through offices quickly thanks to shared surfaces and human contact. Moreover, the CDC has stated that the flu vaccine appears to be less effective this year because of mutations to the current strain; so, even people who received the vaccine still may fall ill with the flu.

The two main employment-related laws implicated by cold and flu season are the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"). The ADA prohibits employers from discriminating against individuals in the workplace based on a disability or a perceived disability. The ADA applies when an employer makes disability-related inquiries of employees or requires medical examinations. A disability-related inquiry is one that is likely to elicit information about an individual's disability (e.g., asking about a compromised immune system). The ADA prohibits disability-related inquiries and medical examinations unless they are job-related and consistent with business necessity. This occurs when an employer has a reasonable belief that an individual's ability to perform essential job functions is impaired or that the individual is a direct threat to cause harm due to a medical condition. Except in the case of a severe flu pandemic (determined by the World Health Organization, Department of Health and Human Services, and CDC), neither of these exceptions apply in the case of common cold or flu, so employers should be careful about requiring medical examinations (including taking employee temperatures) and in wording inquiries regarding employee health. The ADA also prohibits employers from excluding individuals from the workplace based on a disability or perceived disability, so if an employer chooses to require ill employees to stay at home, it should apply the policy consistently.

By contrast, the FMLA allows up to 12 weeks of leave for serious medical conditions for employees who have worked at least 1,250 hours in a 12 month period for a covered employer. Typically, the FMLA does not cover colds or the flu unless it is severe or complications from the illness arise. The FMLA applies if the sick individual has been incapacitated for at least three full calendar days and either: (1) sees a doctor two or more times within 30 days; or (2) consults with a doctor and receives a regimen of continuing care (i.e., a prescription for medicine). Close family members of sick individuals also may qualify for FMLA leave to provide care for a parent, spouse, or child. Some employers may wish to prevent the spread of illness by accommodating sick employees with the option to work from home. However, employers ought to keep in mind that employees on FMLA leave cannot be required to work, even remotely, during leave.

While Ohio does not require employers to provide paid sick days to employees, some states mandate a certain number of

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NLRB Pulls a Fast One: Final "Quickie" Election Rules for Union Elections Adopted

By George S. Crisci*

After a prior failed attempt beginning in 2011 to "modernize" its rules governing union elections, the National Labor Relations Board ("NLRB") recently adopted its final rules, which will make it significantly more difficult for employers to run an effective campaign against unionization. The rules, which have been published in the Federal Register, go into effect on April 15, 2015.

These "quickie" election rules amend the NLRB's representation case procedures and, in most cases, will reduce the time between the filing of an election petition and the election date. As a result, the employer's timeframe to educate its employees on the realities of union representation is limited.

Many of the critical changes limit the circumstances under which pre-election hearings will be held. For example, disputes regarding individuals' ineligibility to vote (e.g., due to supervisor status) generally will not be resolved before the election. This bypassing of important legal issues potentially creates a "lose-lose" situation for employers. Employers may face liability for treating employees as supervisors during a campaign if the NLRB decides later those employees are not supervisors under the National Labor Relations Act ("NLRA"). Similarly, employers may face liability if these employees participate in the campaign and the NLRB decides later that they are supervisors under the NLRA and that their involvement in the campaign constitutes "supervisor interference" with the election and grounds for holding a new election.

Important changes resulting from the new rules include the following:

- Within two business days of receiving the petition for an election, employers must post a Notice of Petition for Election.
- Pre-election hearings generally will be scheduled to be held eight days after service of the hearing notice.
- Non-petitioning parties (e.g., employers or rival unions) must submit Statements of Positions one business day before the pre-election hearing identifying issues with the petition. Failure to identify an issue generally precludes litigation on the issue.
- Along with the Statement of Position, employers must submit a preliminary list of prospective voters, identifying their job classifications, shifts, and work locations.
- Issues for pre-election hearings generally will be limited to ones that are necessary to determine whether an election should be held.
- Other issues, including voter eligibility (e.g., supervisor status), often will be resolved after the election.
- In cases where a pre-election hearing is held, parties are no longer automatically entitled to file post-hearing briefs. Instead, the NLRB's regional director has discretion to decide whether to allow post-hearing briefs.
- Elections are no longer automatically delayed pending the outcome of a party's request for review of the regional director's decision following a pre-election hearing. Elections only will be stayed when ordered by the NLRB.
- Employers must provide a final list of eligible voters (referred to as an "Excelsior List"), which now must include personal email addresses and phone numbers (if available to the employer) and must be submitted to the regional director within two days (formerly seven days) of the approval of an election agreement or the direction of an election.
- Petitions for an election can now be filed electronically.

Since their adoption, the new election rules have become the subject of legal and congressional challenges. In two lawsuits, a number of pro-employer organizations have asked the U.S. District Courts for the District of Columbia and the Western District of Texas to strike down the new rules. Both lawsuits assert that the NLRB's new rules violate the NLRA and the Administrative Procedure Act. The lawsuit pending before the U.S. District Court for the District of Columbia also asserts that the new rules violate employer free speech and due process rights under the U.S. Constitution. In addition to these legal challenges, the Senate and the House recently passed a "joint resolution of disapproval" of the new rules under the Congressional Review Act in an attempt to block the NLRB's implementation of the rules. The resolution now heads to the President, who is expected to veto it. Zashin & Rich will provide periodic updates on the impact of these challenges on the enforceability of the NLRB's new election rules as they proceed.

Overall, the NLRB's new election rules change long-standing procedures governing the election process and reduce pre-election litigation (and the time associated with such

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litigation), while likely increasing post-election litigation. Employers subject to a union election should familiarize themselves with these changes to avoid making any procedural errors during the election process.

EMPLOYERS MUST UNDERSTAND THE IMPACT THAT THE NEW RULES WILL HAVE ON THEIR ABILITY TO RUN AN EFFECTIVE CAMPAIGN AGAINST UNIONIZATION.

Employers must understand the impact that the new rules will have on their ability to run an effective campaign against unionization. Following the filing of a petition for an election, the time an employer has to lawfully educate employees on the perils of unionization is critical to countering the union's efforts, which typically have been underway for months prior to an employer's receipt of an NLRB petition. As the NLRB's new election rules will greatly reduce the employer's Post-Petition Campaign time, employers should develop strategies to avoid, anticipate, or counter unionization efforts **before** a union files a petition. In doing so, employers must be cautious and ensure that they are protecting their interests and not violating the NLRA. Employers no longer can afford to be surprised by the filing of an election petition because the very short timeline to conduct an election provides little opportunity to recover from such lack of knowledge. Once the NLRB's quickie election rules take effect, non-unionized employers will have to implement an on-going, legitimate union-avoidance campaign to keep pace with union and NLRB efforts to unionize their workforce.

*__George S. Crisci__, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of private and public sector labor relations. For more information about the NLRB's new election rules or labor and employment law, please contact George (gsc@zrlaw.com) at 216.696.4441.

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EMPLOYERS SHOULD TAKE ALL THREATS OF WORKPLACE VIOLENCE SERIOUSLY.

Employers should take all threats of workplace violence seriously and should seek guidance immediately upon learning of a threat. To help ensure the safety of their employees and customers, it is crucial that employers address threats in a timely manner and take necessary action, which may include seeking a protection order.

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Cold and Flu | Continued from page 4

paid sick days each year. Employers who wish to restrict or prevent the spread of a virus around the workplace have several options. Allowing employees who feel under the weather to work remotely may keep other employees from catching a contagious illness. Minimizing meetings and conferences also reduces the chances of employees coming into contact with individuals with the cold or flu. Finally, practicing simple hygiene habits, such as encouraging hand washing, covering one's mouth when coughing or sneezing, and disinfecting frequently-used surfaces like telephones or door handles can help prevent the spread of germs. For more on the cold and flu, the Department of Health and Human Services, CDC and World Health Organization all provide comprehensive information on the prevention and treatment of the cold and flu on their websites.

*__Patrick M. Watts__, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. For more information about the Americans with Disabilities Act, the Family and Medical Leave Act or other questions related to employee leave, please contact Patrick (pmw@zrlaw.com) at 216.696.4441.

Z&R SHORTS

Upcoming Speaking Engagements

Wednesday, April 1, 2015, 10:00am

Drew C. Piersall presents *"The Intersection of the Americans with Disabilities Act, the Family and Medical Leave Act and Workers' Compensation: Managing Disabilities"* at 10:00 a.m. at the Ohio County Home Association's annual conference to be held at the Salt Fork Lodge and Conference Center in Cambridge, Ohio.

Wednesday, April 8, 2015, 9:30am

Jonathan Downes presents *"Social Media"* at the JFSHRA – HR Bootcamp for Supervisors beginning at 9:30 a.m. at the Union County JFS Building.

Thursday, April 16, 2015

Jonathan J. Downes presents *"Social Media Challenges for Law Enforcement and Public Employers"* for the Miami Valley Risk Management Association in Mason, Ohio. See mvrma.com for details.

Monday, April 20, 2015, 9:00am

George Crisci presents *"Determining Worker Eligibility for Unemployment Benefits"* at the Unemployment Compensation from A to Z, which begins at 9:00 a.m. at the Doubletree Hotel in Independence, Ohio. To register, go to http://www.nbi-sems.com.

Wednesday, May 6, 2015

Jonathan Downes and **Drew Piersall** present *"Social Media – Employment Law Issues"* and *"The Intersection of the Americans with Disabilities Act, the Family and Medical Leave Act and Workers' Compensation: Managing Disabilities"* at the 2015 OJFSDA Annual Training Conference at the Hyatt Regency Columbus on High Street.

Friday, May 8, 2015, 11:15am

Jonathan Downes conducts *Legal Update* at the Ohio Association of Public Safety Directors Annual Conference at 11:15 a.m. at the Reynoldsburg Police Department.

Monday, June 8, 2015

Patrick Watts presents at the Lake, Geauga, Ashtabula SHRM Annual Conference.

Z&R SHORTS

Congratulations!

Zashin & Rich is pleased to announce

that the Ohio State Bar Association recently certified **Helena Oroz** and **David Vance** as specialists in Labor and Employment Law.

Zashin & Rich is proud to announce

that it has been named to the **BTI Client Service A-Team 2015**. Zashin & Rich received special recognition in "Best at Handles Problems" and "Best at Provides Value for the Dollar." Additionally, BTI recognized **Stephen Zashin**, the head of the firm's Labor and Employment Groups, as one of only 29 labor and employment "Client Service All-Star" attorneys in the country.

CONGRATULATIONS 2015 Best Lawyers

Z&R is happy to announce the following Z&R Labor and Employment Group lawyers have been selected for inclusion in **Best Lawyers in America 2015**

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 S. Zashin
Labor Law – Management