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Notes from the Editor



The first few months of 2008 have been an especially busy time for federal and state lawmakers engaging in policymaking decisions that impact the way in which you manage your workforce. First, as described by Jan Hensel, the United States Congress and Department of Labor issued revisions to and new rules governing the Family and Medical Leave Act. All employers with 50 or more employees in a 75-mile radius should pay close attention to the new requirements and regulations. Additionally, the Florida legislature recently enacted a law regarding firearms in the workplace. Details about that law are provided here in an article by Lynn Gross. And in Ohio, a private citizens' group continues its efforts to pass a law that would require all employers with 25 or more workers to provide employees with seven paid days of sick leave each year. Look for additional information regarding this proposed law in the next issue of Workfor\$e.

In addition to keeping up to speed on ever-changing employment laws and regulations, day-to-day personnel management remains critical. With the upcoming summer break from school, many employers may be considering hiring youth to supplement their workforce. An article by Jerry Chattman and Kara Beverly provides guidance on the employment of minors. Finally, Hans Nilges explains the interesting dynamics between protecting trade secrets and disclosing known safety hazards, as required by the Occupational Safety and Health Act, in an article that is particularly germane for employers engaged in the manufacture of chemical products.

As always, please do not hesitate to contact any member of BDB's employment and workers' compensation practice group for additional information or assistance with any of these issues.

Amanda L. Walls
Editor of the Workfor\$e

FEATURE ARTICLES

DOL Proposes Revisions to FMLA Regulations

By: Jan E. Hensel

On February 18, 2008, the Department of Labor announced a Notice of Proposed Rulemaking (NPRM) proposing revisions to the regulations implementing the Family and Medical Leave Act ("FMLA.") Furthermore, the National Defense Authorization Act for FY 2008 amended the FMLA to provide leave for eligible employees for two additional reasons: to care for injured service members or for

any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty. The provisions of the amendments providing for FMLA leave to care for a covered service member became effective on January 28, 2008, when the law was enacted. The provisions of the amendment providing for FMLA

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leave due to a qualifying exigency arising out of a covered family member's active duty status are not effective until the Secretary of Labor issues regulations defining "qualifying exigencies." The NPRM includes a description of the relevant family military leave provisions and seeks comments on subjects and issues that should be considered in the final regulations.

Some of the important proposed changes to the FMLA regulations are highlighted below:

- The two visits to a health care provider required to meet the definition of "continuous treatment" must occur within 30 days of the beginning of the incapacity.
- The "periodic" visits to a health care provider required for a chronic health condition must occur at least twice or more a year.
- Time spent in a light-duty position for a workers' compensation injury does not count as FMLA leave.
- Employees can voluntarily waive FMLA claims that have already arisen, and thus employers and employees can voluntarily settle past claims without DOL approval.
- The distinction between an attendance bonus and a performance bonus is clarified; an employer can disqualify an employee from a bonus or award predicated on the achievement of a goal where the employee fails to achieve the goal as a result of an FMLA absence.
- Employers who do not include notice of FMLA rights in an employee handbook must distribute a copy of the notice of FMLA rights at least annually.
- Once the employee gives notice of the need for leave, the employer must notify the employee whether leave is still available within the 12 month period.
- When designating leave as FMLA leave, the employer must inform the employee of the number of hours, days, or weeks that will be designated as FMLA leave.
- The employer must advise the employee every 30 days that leave has been designated and protected under the FMLA and the amount of leave so designated, if the employee took FMLA leave within that period.
- The time period in which an employer must designate the leave as FMLA leave is extended to five days.
- If 30 days notice is not practicable, notice of foreseeable leave must be given the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after working hours.)
- To meet their notice obligations, employees must provide notice to their employers of the need for unforeseeable FMLA leave before the start of their shifts in all but the most extraordinary circumstances.
- The information needed for complete and sufficient certification is clarified, as are the employer's obligations if the certification does not meet these requirements. Simply calling in saying that the employee or the family member is "sick" is not sufficient notice of the need for FMLA leave.
- An employee's consent is no longer required for an employer to contact the health care provider for the purpose of authenticating the certification.
- If HIPAA procedures are followed, the employer may directly contact the employee's medical provider to obtain clarification of the certification.
- Recertification may be requested every six months in circumstances where the original certification indicates that the condition will last for an extended period of time.

The proposed revisions are extensive. While they address many of the issues that employers have faced in administering the FMLA, many significant issues will be left unresolved if the regulations are implemented as proposed. Final rules are expected sometime this summer. BDB recommends that you plan now to review and amend your FMLA policies accordingly.



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Florida's "Bring Your Guns to Work" Law Passes

By: Lynn A. Gross

Florida employers, sit down before you read this! Beginning on July 1, 2008, your employees, customers, and invitees may bring firearms onto your property so long as they have a permit and keep the weapons locked in a vehicle. There is also a new class protected from discrimination at work in Florida--individuals who lawfully possess firearms or exercise their right to self-defense.

Florida has enacted House Bill 305, the Preservation & Protection of the Right to Keep & Bear Arms in Motor Vehicles Act of 2008. It applies to most public and private employers in Florida. The basic terms are:

- Employers cannot prohibit customers, employees, or invitees possessing legally owned and lawfully possessed firearms locked inside a private motor vehicle from entering and remaining in the employer's parking lot.
- Employers cannot make a verbal or written inquiry or a search of customers, employees, or invitees regarding whether they have a firearm locked inside a private motor vehicle. Searches for firearms may only be made by on-duty law enforcement in accordance with constitutional due process requirements.
- Employers cannot condition employment upon the fact that an employee holds or does not hold a permit to carry a firearm or an agreement that the employee or prospective employee will not keep a legal firearm locked inside a private motor vehicle.
- Employers may not terminate or otherwise discriminate against an employee, or expel a customer or invitee, for "exercising his or her constitutional right to keep and bear arms or for exercising the right of self-defense so long as a firearm is never exhibited on company property for any reason other than lawful defenses purposes."

Most private and public employers must comply with this law but there are a few exceptions, including schools, correctional institutions, nuclear power plants, national defense, aerospace, homeland security, and manufacturers that use combustible or explosive materials. Employers may still prohibit employees from possessing a firearm in an employer-owned/leased vehicle.

What does this mean for Florida employers? Employers that have a Weapons-Free Workplace policy or Non-Violence policy that includes a prohibition on bringing weapons onto company property will need to revise such policies. Many employers also have policies permitting searches of employees' personal property on company property, including employee vehicles parked on company property. Such searches still are valid for certain purposes, such as investigations for theft or drugs, but not to search for firearms. Moreover, if a valid search for another reason reveals a lawfully possessed firearm, the employer must not take adverse action against the employee because of the lawfully possessed firearm. Employers should revise search policies and practices. Employers also should revise their discrimination policies and practices to include the new protected class of gun owners and those who defend themselves. This is also a good time for employers to reassess their workplace security and safety practices. If an employer hears a threat that an employee is going to his or her car to retrieve a gun, how will it be handled? Despite this law, employers still have a general duty under the Occupational Safety and Health Act ("OSHA") to provide a safe workplace.

Please feel free to contact a member of our Florida Employment Group for assistance in complying with this new law.



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Ohio Requirements for the Employment of Minors

By: Gerald B. Chattman and Kara D. Beverly

With the summer fast approaching, employers may be looking to add student employees to their payrolls. Here are a few important things to keep in mind:

The minimum working age in Ohio is 14 years old. Ohio Revised Code 4109.02 and 4109.03 require minors of compulsory school age to present an age and schooling certificate to the employer prior to employment and the employer must thoroughly review it. However, minors aged 16 and 17 do not need to present such certifications if they are employed during the summer vacation months in nonagricultural or nonhazardous employment.

Ohio also regulates the hours of employment that a minor can work during the summer months as well and O.R.C. 4109.07 sets forth the restrictions. Specifically, when school is not in session, no person under 16 years of age may be employed: (1) before 7 a.m.; (2) after 9 p.m. from the first day of June to the first day of September or after 7 p.m. at any other time; and (3) for more than 40 hours per week.

Employers must be sure to execute written agreements as to the wages for minor employees. Employers must keep a complete list of all minors employed by the employer, as well as an abstract summarizing the provisions of O.R.C. 4109. The director of commerce will provide the abstract to the employer. Both the list of minors and the abstract must be displayed in a conspicuous place on the employer's premises.

Employers that violate O.R.C. 4109 can be found guilty of a minor misdemeanor or a misdemeanor of the

third degree, so it is imperative for employers to acquire the necessary documentation from minors they intend to hire and to comply with the other requirements of O.R.C. 4109.

Ohio regulates the hours of employment that a minor under the age of 16 can work during the summer months. O.R.C. 4109.07 sets forth the restrictions. When school is not in session, no person under the age of 16 can work: (1) before 7 a.m.; (2) after 9 p.m. from the first day of June to the first day of September or after 7 p.m. at any other time; and (3) for more than 40 hours per week.



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Kudos

Brett L. Miller (Columbus) and **Susan C. Rodgers (Akron)** were elected to serve on the Firm's Board of Managers. The Board of Managers, with input from all offices and practice groups, develops and implements the Firm's short term and long term strategic plans, and directs all the business affairs of the Firm, including setting policies, attorney hiring and compensation, and operations.

Hans A. Nilges (Canton) wrote an article entitled, "The Enforceability of Physician Non-Competes," for the *Akron/Canton M.D. News* January-February 2008 issue.

I. Jeffrey Pheterson (West Palm Beach) has been named Managing Partner of the Firm's West Palm Beach, Florida office. Pheterson has practiced law for over 30 years in Florida. His primary area of focus is labor & employment law, but he also engages in legal counseling and, if required, litigation concerning a variety of matters including executive contract concerns, local governmental issues, business negotiations, healthcare law, and complex civil litigation.

Understanding Your Disclosure Rights and Responsibilities When Hazardous Chemicals Are Also Trade Secrets

By: Hans A. Nilges

Imagine your company has developed a new chemical products that is sure to storm the market and generate huge revenues for the company. Legal counsel determines that the formula to this new product is best protected as a trade secret. However, some of the chemicals in the formula are hazardous, requiring you to prepare a Material Safety Data Sheet (MSDS) disclosing the identity of those chemicals. Now, are you trapped between OSHA's MSDS disclosure requirements and your trade secret protection strategies?

What Is A Trade Secret?

Nearly everything is potentially subject to trade secret protection, provided that it is actually protected as a secret and the owner derives economic value from it remaining a secret. To determine if you have a trade secret, it is important consider a number of factors, such as the amount of time and effort expended to develop the information, how difficult it would be to reproduce or reverse engineer the information, the extent to which the information is known in your industry, and the value you gain from the information. Courts particularly consider two key factors:

- (1) whether the secret is generally known or readily ascertainable outside the business; and
- (2) whether substantial measures have been taken to ensure non-disclosure of the secret (e.g., non-disclosure agreements for all with access to the secret, keeping documents relating to the secret under lock and key, permitting access to the secret only on a "need-to-know" basis).

OSHA Does Not Generally Require Disclosure Of Trade Secrets.

The general rule of trade secrets is that "if you show it, you blow it." If the secret is ever disclosed, even if only on a MSDS, it can automatically and instantly lose its trade secret status. Fortunately, under most circumstances, OSHA does not require you to hand over your trade secrets to your competitors through MSDS disclosure.

Where trade secret protection is claimed, you generally do not need to disclose the trade secret chemical's specific identity. This is true even if the chemical claimed as a trade secret is hazardous, and therefore would have to be disclosed absent trade secret status. This protection does not, however, relieve you of obligations to report the properties and effects of the chemical, including, if applicable, its Permissible Exposure Limit (PEL) or Threshold Limit Value (TLV).

Disclosure Is Required Under Certain Circumstances. OSHA only requires disclosure under certain circumstances.

1. Medical Emergencies.

You must immediately disclose the trade secret chemical's identity to health care professionals when a physician or nurse, in their sole discretion, determines that a medical emergency exists. After the emergency has passed, all those had access to the trade secret information may be required to sign a confidentiality agreement, which can help prevent trade secret status from being lost.

2. Non-Emergency Disclosures.

Disclosure is also required in certain non-emergency situations to employees, health professionals, or to an employee's union representative, where there is a health or safety need for the information. Disclosure of the specific chemical identity under such circumstances may be expressly conditioned on all parties agreeing to sign a confidentiality agreement.

In non-emergency situations, you may deny a request for access to the identity of a trade secret chemical if you determine that alternative information will address the articulated health or safety need. In doing so, you must be careful to make the denial must be in writing, within thirty (30) days of the request, including specific evidence supporting the claim that the specific chemical identity is a trade secret, and explaining in detail how the alternative information will satisfy the health or safety need without revealing the specific chemical identity.

Knowing Your Rights And Responsibilities Will Protect Your Trade Secrets Without Running Afoul Of OSHA.

Trade secrets are a valuable asset of your business. Failing to comply with your OSHA obligations can result in significant fines and associated litigation costs. Thus, to both protect your assets, and avoid unnecessary costs, you must know the law and carefully walk the narrow line between your MSDS disclosure obligations and your trade secret protection rights.



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May 13

Legal Updates

Christine M. Faranda (Cleveland)

Heath, Ohio

Sponsored by: Disability Management Employer Coalition (DMEC) Ohio Chapter

June 2008

Criminal Background Checks

Workplace Investigations

Jan E. Hensel and Thomas W. Hess (Columbus)

Columbus, Ohio

Sponsored by: Ohio Health Care Association Human Resource Conference

June 2

Ohio Self Insurance Procedures and Policies

Robert C. Meyer (Canton)

Alpharetta, Georgia

Sponsored by: ADP Totalsource Management Team

June 6

The New Age of Corporate Governance for Nonprofit Organizations

Gerald B. Chattman (Cleveland)

Cleveland, Ohio

Sponsored by: National Business Institute

June 19

"Repeat Offenders" (Claimants with Multiple Claims)

Robert C. Meyer (Canton)

Columbus, Ohio

Sponsored by: Ohio Self Insured Association Convention

June 27

Workers' Compensation Update

Kristina M. Harless (Canton)

Cleveland, Ohio

Sponsored by: Lorman Education Services

August 8, 2008

Workers' Compensation Update

Robert C. Meyer (Canton)

Sponsored by: Lorman Education Seminars

Cuyahoga Falls, Ohio

August 20

Workers' Compensation Update

Robert C. Meyer (Canton)

Cleveland, Ohio

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