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Employment Law & Workers' Compensation Year End Update

Several new developments occurred in 2009 relating to employment law and workers' compensation which employers now need to consider in their ongoing business and incorporate these developments into their current policies and procedures.

The Lilly Ledbetter Act - amended prior law and extends time period in which claims of unlawful discriminatory pay can be made. Pursuant to the Act, which is to be applied retroactively to May 27, 2007, unlawful discrimination will occur when: 1) a discriminatory compensation or practice is adopted; 2) an individual becomes subject to a discriminatory compensation decision of other practice; or 3) an individual is affected by application of a discriminatory compensation decision or other practice, in-

cluding each time wages, benefits or other compensation is paid. As such, a claim of discrimination can be renewed with the issuance of every paycheck.

GINA (Genetic Information Non-discrimination Act) - applies to all employers with 15 or more employees, became effective on November 21, 2009, and prohibits employers from discharging, refusing to hire or otherwise taking adverse employment action against applicants or employees based on their genetic information. It also prohibits employers from intentionally acquiring or disclosing genetic information about applicants and employees. GINA Title II requires employers to maintain any genetic information in its possession separate from employee personnel files in accordance with the medical confidentiality provisions of the ADA.

FMLA Amendments & Military Families - employees are now entitled to 12 weeks of unpaid FMLA leave for any qualifying exigency related to a spouse, son, daughter or parent of the employee who is on active military duty in the Armed Forces. In addition, there is an expansion of military care giver leave provisions of 26 weeks of unpaid leave in a single 12 month period to care for a service member who is undergoing medical treatment or rehabilitation for a serious injury or illness.

FMLA & FLSA Issues related to Flu Outbreak - The Wage & Hour Division of the Department of Labor (DOL) has posted information on its website indicating that FMLA does not cover leave taken by healthy employees to avoid getting the flu, leave taken by employees to stay at home with their healthy child when a school or daycare center has been closed due to flu

outbreak or absences of healthy non-exempt employees who miss work when the employer shuts down due to flu outbreak. Whether an employee having the flu or having to care for a family member with the flu qualifies as FMLA leave still needs to be assessed on a case-by-case determination.

The DOL notes further that FLSA (Fair Labor Standards Act) does not require an employer to pay non-exempt employees who miss work due to a flu outbreak shut down, subject to very limited exceptions. Exempt employees must receive their full salaries in which they performed any work without regard for number of days or hours worked. There is no exception to this rule for flu outbreak shut down initiated by the employer. FLSA does not prohibit employers from requiring an employee to work from home during flu outbreak shut down.

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Nursing Home/Long-Term Care Litigation Issues in 2009

The number of nursing home/long-term care cases has consistently increased over the past several years. To highlight the issues frequently addressed, we present this summary of the top nursing home/long-term care litigation issues in 2009:

Protecting Quality Assurance and Peer Review Documents

The current peer review statutes, R.C. 2305.252, R.C. 2305.253 and R.C. 2305.24, manifest the Ohio legislature's intent to provide a complete shield to the discovery of any information used in the course

of a peer review committee's proceedings.

Despite the intentions of the General Assembly, recent Ohio case law has raised concerns regarding the safeguard protecting the discovery of information used in the course of a peer review committee's pro-

ceedings. For example:

Huntsman v. Aultman Hosp. (2008): A plaintiff interested in obtaining information used by a peer review committee must seek that information from the original creator of the document and not from the records of the committee's proceedings. A

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Hiring Requirements - Federal government has recently taken action which will affect all employers and their hiring practices. U.S. Citizenship and Immigration Services (USCIS) have revised Form I-9 used to verify employment eligibility. This revised form limits acceptable documents that can be used for identity verification. The new form must be used for new employees. U.S. Immigration and Customs Enforcement (ICE) is increasing the number of audits for inspection of Form I-9 compliance and intends to file criminal charges against employers suspected of hiring un-

documented workers.

Ohio Workers' Compensation - BWC released a progress update of rate reform indicating that more than half of Ohio's private employers will share in a premium reduction of \$139 million. As part of rate reform steps, however, BWC also recently voted to reduce the maximum discount for group-rated employers to 51%, effective July 1, 2010, which will result in a rise of workers' compensation costs for many employers who participate in group rating programs. BWC continues to implement rate reform and anti-

pates at least one more rate change in the near future.

The Supreme Court of Ohio in 2009 issued rulings in several workers' compensation cases holding that refusal of a job offer is sufficient to deny temporary total disability compensation (*State ex rel. Sebring v. ICO*, 2009-Ohio-5258); that refusal of the Industrial Commission of Ohio to find employee fraud is not subject to appeal pursuant to R.C. §4123.512 (*Benton v. Hamilton Cty. Educ. Center*, 2009-Ohio-4969); that a teacher who elects to prorate her salary over

12 months is entitled to either temporary total disability or her salary in the summer (*State ex rel. Glenn v. ICO*, 2009-Ohio-3227); and that a self-insured employer is not entitled to reimbursement when an action is dismissed pursuant to a settlement agreement in which the plaintiff was determined not entitled to participate in the workers' compensation fund (*State ex rel. Dillard Dept. Store v. Ryan*, 2009-Ohio-2683).

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person may testify or produce evidence regarding patient care that is within his or her personal knowledge.

Manley v. Heather Hill, Inc. (2007): In order to invoke the peer review privilege, a defendant must establish that the documents being sought were incident reports or written statements prepared by or for the use of a peer review committee. At a bare minimum, the party claiming the privilege must prove to the trial court the existence of such a peer review committee and that the committee investigated the incident in question.

Flynn v. Univ. Hosp., Inc. (2007): If an incident report is prepared for legal counsel with the specific purpose of notifying counsel of possible claims, the attorney-client privilege can be invoked. Therefore, even if the peer review privilege would fail in a specific case, the attorney-client privilege may still apply.

Giusti v. Akron Gen. Med. Ctr. (2008): R.C. 2305.252 protects several classes of people

from testifying in civil lawsuits, including those who attend meetings or serve as members of a peer review committee, those who work for or on behalf of the committee and those who provide information to the committee. A qualifying deponent cannot be asked to reveal: (1) his testimony before the peer review committee; (2) information he provided to the committee; or (3) opinions he formed as a result of the committee's activities.

A nursing home/long-term care facility should seek legal counsel to: (1) establish a peer review committee; (2) establish that the documents being sought were prepared by or for the use of the peer review committee; and (3) create a written policy in which it is clearly stated that incident reports are prepared for legal counsel in anticipation of litigation and then provide each incident report to legal counsel.

Nursing Home Arbitration Agreements are Enforceable

The Ohio Supreme Court re-

cently ruled that a voluntary arbitration agreement, one which is not a precondition to a resident's admission, is enforceable even if it waives the right to trial, punitive damages and attorney fees.

In *Hayes v. Oakridge Home* (2009), 122 Ohio St. 3d 63, the Ohio Supreme Court held that an arbitration agreement voluntarily executed by a nursing-home resident upon her admission, and not as a precondition to admission, was not unconscionable solely by virtue of the resident's age. The Court further held that an arbitration agreement that waives the right to trial and the right to seek punitive damages and attorney fees is also enforceable.

The *Hayes* case has significant implications for the nursing home/long-term care industry. A valid and enforceable arbitration agreement, properly explained and implemented, may avoid a jury trial with disposition of the dispute through the arbitration process. With *Hayes*, nursing home facilities and owners have an opportunity to

fairly and economically resolve nursing home malpractice disputes without resorting to the jury system.

Request an Order Bifurcating Plaintiff's Claims for Compensatory Damages and Punitive Damages

If a plaintiff asserts claims for punitive damages against a nursing home/long-term care facility defendant, pursuant to R.C. 2315.21(B)(1), the defendant is entitled to move the court for an order bifurcating plaintiff's claims for compensatory damages and punitive damages.

A finding against the nursing home/long-term care facility defendant for compensatory damages does not automatically entitle plaintiff to punitive damages. Rather, Ohio law requires that punitive damages are not recoverable from a defendant in question in a tort action unless: (1) the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or

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master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate; and (2) the trier of fact has returned a verdict awarding compensatory damages. R.C. 2315.21 (B)(1).

R.C. 2315.21(B)(1) requires a court to bifurcate a plaintiff's claims for compensatory and punitive damages. Plaintiff is not permitted to present any evidence that relates to the issue of punitive damages until a jury returns a verdict against the defendant awarding compensatory damages and until the court makes a determination that plaintiff has presented evidence demonstrating malice, aggravated or egregious fraud as to permit the jury to consider the issue of punitive damages. To permit plaintiff to elicit evidence related to the issue of punitive damages would conflict with the clear language of the statute and irreparably prejudice the defendant at the time of trial.

For these reasons, nursing

home/long-term health care facility defendants should request that a court issue an order bifurcating plaintiff's claim for compensatory damages and punitive damages as required under Ohio law pursuant to R.C. 2315.21(B)(1).

Write-Offs and Adjustments Are Typically Admissible to Show "Reasonableness" of Medical Bills

At trial, admission of a plaintiff's medical bills into evidence is provided for in R.C. 2317.421. However, R.C. 2317.421 does not conclusively establish the reasonableness of the medical bills - it is a question for the jury. Based on *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, courts should allow nursing home/long-term care defendants to introduce evidence of the original amount of all medical bills, the amount of any write-offs and any amount paid by Medicare or Medicaid to aid the jury in determining the reasonableness of the medical bills introduced by plaintiff at trial.

In a tort action in Ohio, a defen-

dant is barred from introducing evidence of insurance payments to a plaintiff; this is known as the collateral source rule. *Robinson* held that the Collateral Source Rule did not bar evidence of amounts written-off by medical care providers since those write-offs were not benefits. The *Robinson* Court explained that the collateral-source rule does not apply to write-offs of expenses that are never paid.

Moreover, in 2008, the United States District Court for the Northern District, Western Division, reached a similar decision in *Schlegel v. Song*, 547 F.Supp.2d 792. The court agreed with the holding in *Robinson*, noting that it is clear the General Assembly intended to limit the Collateral Source Rule in Ohio. *Id.*, at ¶16. The court also agreed with the decision in *Robinson* that a jury can consider the original amount of the medical bills and the amounts written off. *Id.*, at ¶17.

For these reasons, nursing home/long-term care facility

defendants should be allowed to introduce admissible evidence under *Robinson*, *Schlegel* and R.C. 2315.20 as to the actual amount of plaintiff's medical bills, the amount of any write-offs and the amount paid by Medicare or Medicaid in order to aid the jury in determining the reasonableness of plaintiff's medical bills. However, many of the courts of Common Pleas and several Appellate districts will not allow a defendant to introduce into evidence write-offs and actual payments made. This issue is currently before the Ohio Supreme Court and 2010 should bring some closure to this hotly disputed issue.



By Jennifer R. Becker, Esq.

Insurance Companies Can Just Say "No" When They Receive A Medical Provider's Assignment of Rights

A question frequently asked by insurance adjusters who are about to settle a personal injury claim is whether they have to honor an assignment of rights from a medical provider who provided medical treatment to a tort claimant. Typically, the assignment of rights is from a chiropractor's office which provided medical treatment to a person injured in an automobile or slip and fall accident. Based on the Ohio Supreme Court's July 23, 2009, ruling in *West Broad Chiropractic v. American Family Insurance* (2009), 122 Ohio St. 3d 496, an insurance company may disregard and refuse to honor the assignment

of rights from the medical provider.

In *West Broad*, a chiropractor sued an insurance company for a declaration that the chiropractor's patient's assignment of rights against the insurer's insured was enforceable and that the insurance company had to pay the chiropractor for the patient's treatment. The insurance company disregarded the chiropractor's written assignment and distributed the settlement proceeds to the automobile tort claimant without making any payment or honoring the chiropractor's assignment of rights. The Ohio Supreme

Court, relying on O.R.C. 3929.06 (which prohibits direct causes of action against an insurance company until a judgment is rendered), held that the written assignment was unenforceable and that the chiropractor was prohibited from bringing a direct action against the insurance company.

The Ohio Supreme Court went on to add that although the medical provider had no direct cause of action against the insurance company, the medical provider would have a direct cause of action against the tort claimant for payment of the medical services. Thus, when

an insurance company receives a medical provider's assignment of rights, they can just say "no" and refuse to honor the assignment.



By Andrew M. Wargo, Esq.

Current Issues in Labor Law

One of the hottest legal issues today among government entities is the Project Labor Agreement or PLA. A project labor agreement is a contract negotiated between a construction owner, or its designated general contractor or construction manager, and a group of labor unions, usually the local building trades council, which requires the project be awarded only to contractors who agree to:

Recognize the unions as the representatives of all employees on the job;

Use the union hiring hall to obtain all or almost all of the workers;

Require all workers on the job to pay union representation fees, dues and/or assessments;

Pay into union benefit trusts even if the contractor has other benefit plans in place;

Obey the union's work rules, job classifications and arbitration procedures.

There are many pros and cons regarding PLAs. See [Project Labor Agreements in New York State: In the Public Interest](#); Fred B. Kotler, J.D. Associate Director Construction Industry Program School of Industrial and Labor Relations Cornell University March 2009; [Project Labor Agreements and Public Construction Costs in New York State](#); Paul Bachman, MSIE David G. Tuerck, PhD Beacon

Hill Institute at Suffolk University April 2008; [The Project Labor Agreement for the Iowa Events Center: An Unnecessary Burden on the Workers, Businesses, and Taxpayers of Iowa](#); Public Interest Institute Staff Mt. Pleasant, IA March 2006.

Those in favor of PLAs contend they eliminate the need to negotiate separate labor agreements with each contractor which can be quite burdensome, especially with large construction projects. PLAs also set up a process of conflict resolution to deal with job disputes. They establish uniform standards for working hours, overtime, holidays, grievance procedures, drug testing and dispute resolutions. Many argue the PLAs ensure "on time" and "on budget" completion of projects because they contain "no strike" clauses and keep labor costs predictable. All workers are paid the "prevailing wage." Furthermore, those in favor of PLAs state they provide the best assurance of employing the best local talent because they utilize local hiring halls. Hiring halls promote both union and non-union workers and allow non-union construction craft workers opportunities to work on projects they otherwise may not have had the opportunity to work on.

Those against PLAs argue that they require contractors to

grant union officials monopoly bargaining privileges over all workers, force workers to pay union dues, require contractors to pay above-market prices and lock out non-union contractors, even if they bid lower. This results in cost overruns and higher construction costs for taxpayers. Many believe these types of agreements encourage corruption through union financial support of political campaigns. Despite what PLA supporters say, those against them argue that union hiring halls favor union workers and cripple MBE programs.

Perhaps the greatest impediment to attracting contractors and employees to a construction project is a requirement that contractors make contributions to union pension plans for their employees. Such a requirement is an impediment as it subjects employers to withdrawal liability that often is quite substantial. Additionally, most union pension plans have vesting periods that are longer than the duration of most projects. Few non-union employees will work on any specific construction project for as long as these vesting periods.

Legislation regarding PLAs has been mixed and varied from state to state. The Supreme Court of Ohio in *Ohio State Building & Construction Trades Council v. Cuyahoga County Board of Commissioners*, 98 Ohio St. 3d 214 (2002)

determined that PLAs do not violate public bidding statutes, the National Labor Relations Act, the Employee Retirement Income Security Act or the First Amendment right of freedom to associate.

Under PLAs, employees in some states are permitted to refrain from joining a union or to pay reduced dues. Ohio is not included among these states. It also should be noted that forced membership on one project does not necessarily apply to any future projects.

On a national scale, President Obama issued an Executive Order this past February that stated that executive agencies may, on a project by project basis, institute PLAs. The order addresses "large scale" construction projects. It overturned another order that was issued by President George W. Bush that prohibited federal agencies and other entities that receive federal aid for construction projects from using PLAs.



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