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EMPLOYMENT: HIGHLIGHTS OF THE NEW
STATEWIDE SMOKING BAN

By Jerry P. Cline

By now you undoubtedly have heard about the statewide smoking ban that took effect on December 7, 2006. With some limited exceptions, smoking is now prohibited in all public places and places of employment in the state of Ohio. While the law was effective December 7, the Ohio Department of Health (ODH) has six months, or until June 7, to adopt enforcement regulations. Although the ODH cannot levy any fines until the enforcement regulations are in place, this implementation period is not a grace period, and the ODH will follow up on all notices of potential violations with a letter reminding businesses of their obligations under the new law.

Proprietors of a public place or place of employment must comply with the new law by posting no-smoking signs at all entrances to the building. These signs are required to have the approved toll-free complaint number 1-866-559-OHIO (6446). Proprietors must also remove all ashtrays and other receptacles used for disposing of smoking materials from any area where smoking is now prohibited.

Of course, the new law includes several exemptions. For example, smoking is not prohibited in private residences, designated hotel and motel rooms, family-owned and operated places of employment in which all employees are related to the owner, designated and separately ventilated smoking rooms in nursing homes, retail tobacco stores, outdoor patios and private clubs.

However, each of these exemptions has its own set of rules that must be followed in order to allow smoking. For example, smoking is allowed on outdoor patios of public places and places of employment. However, while smoking is banned on outdoor patios that have a roof and three sides, it is allowed on outdoor patios with no roof but with four walls. Furthermore, all outdoor patios must be physically separated from an enclosed area. If windows and doors form any part of the partition between an enclosed area and an outdoor patio, they must be closed. If the windows and doors do not prevent smoke from entering an enclosed area, the outdoor patio will be considered an extension of the enclosed area and smoking will be prohibited.

Smoking is not prohibited in private residences, except during the hours of operation as a child or adult care facility, or for operation of a business by someone other than the resident. Hotels and motels may designate sleeping rooms as smoking rooms, but no more than twenty percent of sleeping rooms may be so designated.

Smoking is allowed in retail tobacco stores. A "retail tobacco store" means a retail establishment that derives 80% or more of its gross revenue from the sale of cigars, cigarettes, pipes and other smoking-related devices and accessories. To ensure compliance with the new law, retail tobacco stores must annually file with the Ohio Department of Health an affidavit stating the percentage of gross income that was

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EMPLOYMENT: NEW LAW CLARIFIES MINIMUM WAGE AMENDMENT

By Jerry P. Cline

Last November Ohio voters passed Issue Two, the Ohio Fair Minimum Wage Amendment, which went into effect on January 1, 2007. The Amendment's many sweeping changes include a minimum wage increase from \$5.15 to \$6.85 per hour, with annual increases thereafter based upon inflation as established by the Consumer Price Index. However, the ambiguous language of many of the Amendment's provisions raised serious concerns among Ohio employers. To allay these concerns, on January 2 Governor Taft signed into law HB 690 which clarifies these ambiguities.

For instance, the Amendment requires employers to establish and maintain detailed payroll records for a period of three years, including an employee's "hours worked for each day worked." In essence, the new Amendment appeared to require employers to keep track of this information for both hourly *and salaried* employees. However, HB 690 further clarifies this by not requiring the employer to maintain these records for salaried employees who are exempt from overtime, such as executive, administrative and professional employees and outside salespeople.

Other provisions raised serious privacy concerns. Under the Amendment, employees may request payroll information to ensure conformity with the new law. However, the Amendment, as written,

left open the possibility for employees to request wage information on any other employee, including salaried members of management. Under HB 690, the payroll information that must be disclosed is limited to the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the *specific employee* who has requested that specific employee's own information, and does not include this information for any other employee of the employer. HB 690 also allows an employer to require that an employee provide a written and notarized request for such information and provides employer immunity from any civil liability that may incur from the release of employee payroll information.

Furthermore, HB 690 clarified the Amendment's provisions regarding contact information. An employer must, at the time of hire, provide an employee with the employer's name, address, telephone number and other contact information, such as the employer's Web site, email address, fax number and/or the contact information for the employer's statutory agent. The employer must update this contact information within 60 days of any change. However, the employer may provide the changed information by using any of its usual methods of communicating with its employees, including but not limited to listing the change on the employer's

Web site, internal computer network or a company bulletin board where it commonly posts employee communications or by inclusion in the employees' paychecks.

Finally, not all employees are covered under the new Amendment. For instance, the state may issue licenses to employers authorizing payment of a wage below that required by the new Amendment to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment. Employees of a solely family-owned and operated business are also not included within the coverage of the new Amendment.

Barring a referendum challenge, HB 690 will become effective on or about April 3, 2007. Keep in mind that the effective date of the Amendment raising the minimum wage was January 1. While HB 690 will not become law until April, we recommend that you begin following its provisions immediately.

Please contact Lynn Schonberg or Jerry Cline with any questions concerning the new minimum wage amendment, HB 690 or any other employment-related matter.

EMPLOYMENT: HIGHLIGHTS OF THE NEW STATEWIDE SMOKING BAN CONT'D FROM FRONT COVER

derived from the sale of such products. Retail tobacco stores that began operation or relocated after December 7 are subject to additional restrictions.

However, be forewarned – any bar or restaurant that attempts to "redefine" itself as a "retail tobacco store" will be unable to do so, as the new law specifically excludes as "retail tobacco stores" tobacco departments of larger commercial

establishments, any establishment with a liquor permit, and any restaurant.

Finally, we recommend that you strictly adhere to the smoking ban despite the fact that the ODH cannot yet enforce the new law. The ODH will be following up on all smoking-related complaints during this implementation period and will be keeping track of violators. Rest assured, violations during this period will come back to haunt

you should you run afoul of the smoking ban after the enforcement regulations are in place.

Questions about the new smoking ban? Please contact Lynn Schonberg or Jerry Cline for more information on how to protect your place of business from unwanted fines.

WORKERS' COMPENSATION: SUPREME COURT OF OHIO EXPANDS REACH OF "VOLUNTARY ABANDONMENT" DEFENSE

By Anthony A. Baucio

Under Ohio workers' compensation law, a claimant's voluntary departure from his employment will act to preclude temporary total disability compensation. In 1995, the Supreme Court of Ohio expanded on this premise and held that the firing of a claimant for a violation of a written work rule may constitute a voluntary abandonment of a former position of employment. The Court held that although a discharge is generally not consented to, it is often a consequence of prohibited behavior that a claimant willingly undertook, thus taking on a voluntary character. Since 1995, employers have successfully argued "voluntary abandonment" when a claimant violates a written work rule and is then subsequently terminated, usually in claims involving unexcused post-injury absences and post-injury positive drug screens. In these specific cases, employers have been able to limit the amount of temporary total disability compensation a claimant may receive, thereby effectively managing an otherwise problematic claim.

A recent decision by the Supreme Court of Ohio has expanded the reach of the "voluntary abandonment" defense in favor of employers and has many predicting a fundamental change in the basic "no-fault" principle inherent in workers' compensation law. In the case before the Supreme Court, a claimant was severely burned while cleaning a pressure cooker at his place of employment, a fast-food restaurant. During orientation, the claimant received an employee handbook that specifically discussed safety rules pertaining to the cleaning of the pressure cooker. The handbook also discussed "critical violations" that would warrant immediate termination. One such "critical violation" was a violation of health, security or safety guidelines that could cause illness or injury. The pressure cooker itself also had a warning label affixed to the top concerning proper cleaning procedures.

Despite these warnings, the claimant improperly cleaned the pressure cooker and was reprimanded on one occasion prior to his injury. On the date of his injury, the claimant's co-workers again saw the claimant improperly cleaning the cooker. The claimant ignored the instructions and warnings of his co-workers, which then resulted in the claimant's burn injury. Two other individuals were also burned in the accident. The claimant subsequently filed a workers' compensation claim, which was allowed. The claimant then began receiving temporary total disability payments. The employer completed an accident investigation three months post-injury and determined that the claimant's unsafe cleaning practice and his failure to heed recognized safety procedures, express instructions and warnings were in violation of written work rules. As such, the claimant was terminated, effective immediately.

The employer then successfully argued before the Industrial Commission of Ohio that the claimant's temporary total disability compensation should be terminated as of the date he was fired. The employer contended that the claimant's termination for workplace misconduct constituted a voluntary abandonment of his employment. The Court of Appeals disagreed with the Commission, and the case came before the Supreme Court on the employer's appeal.

The claimant argued that because he was already disabled when the termination occurred, there can be no abandonment. To support this proposition, the claimant cited prior decisions holding that one can only abandon his employment if he has the physical capacity for that employment at the time of abandonment or removal. The Court disagreed, and held that the claimant's disability and the misconduct that precipitated the finding of voluntary abandonment occurred simultaneously, not sequentially. The Court noted that the date of disability onset preceded the date of

termination only because the employer conducted an investigation, rather than firing the claimant on the spot.

After dismissing the claimant's arguments pertaining to involuntary separation, the Court discussed the "elephant in the room," that is, the notion that workers' compensation was intended to remove any and all negligence and fault by an employee from the equation. The Court found that the particular facts of this case were not conducive to a further discussion of that proposition. The Court simply stated that the claimant had willfully ignored repeated warnings not to improperly clean the pressure cooker, yet wished to ascribe his behavior to simple negligence or inadvertence, which was inaccurate. As such, the Supreme Court reversed the Court of Appeals and held that the claimant voluntarily abandoned his employment, thereby forfeiting his right to continued temporary total disability compensation.

Although a huge victory for the employer, it is unclear how this decision will stand the test of time. The dissent in this case opined that workers' compensation laws do not permit the introduction of fault. Further, many lawyers and law professors worry that this decision could upset the delicate balance struck by workers' compensation laws. However, this decision clearly illustrates the importance of workplace safety and offers employers a defense when employees willfully and flagrantly ignore express instructions and warnings.

Did your employee "voluntarily abandon" his position of employment? Please contact Tony or any of the workers' compensation attorneys at RBS to discuss this potential defense or any other workers' compensation matter that's on your mind.

WORKERS' COMPENSATION: SUPREME COURT OF OHIO HAS THE FINAL SAY ON THE UNAUTHORIZED PRACTICE OF LAW

By Meredith L. Ullman

As many of you may recall, in December 2004, the Supreme Court of Ohio issued a verdict stating that non-lawyers who assist and represent parties in state workers' compensation claim proceedings are not considered to be engaged in the unauthorized practice of law. As you may also recall, this decision contained a qualifier limiting the holding. The qualifier mandated that non-lawyers must conform their activities to the guidelines adopted by the Ohio Industrial Commission in 2004. The Supreme Court then remanded the matter to the Board on the Unauthorized Practice of Law in order to reexamine non-lawyers' activities in light of the Industrial Commission's guidelines.

After reviewing the guidelines, the Board issued a report in December 2005 stating that in four areas, non-lawyers were performing functions that are restricted to attorneys. The Board stated that engaging in the following activities amounted to the unauthorized practice of law:

(1) making settlement offers and drafting settlement documents; (2) raising questions at hearings even without examining witnesses and claimant; (3) orally summarizing facts during hearings; and (4) advising employers regarding potential costs and benefits of appeals and other legal action in pending claims.

Of course, the Board did not have the final say in this matter. Following the Board's decision, the third-party administrator involved in the action challenged the recommendation to the Supreme Court of Ohio. The Supreme Court completely reversed the Board's decision on December 6, 2006, in essence stating the exact opposite. The Supreme Court held that non-lawyers may (1) make settlement offers and draft settlement documents; (2) communicate an employer's areas of concern to the hearing officer, who may then ask questions of witnesses; (3) present a list of facts/summary prepared by the client/employer; and (4) advise employers on the economic costs and benefits

of appeals and other legal actions for pending claims.

Currently this remains the status of non-lawyers and their standing before the Industrial Commission, but one should question the practicality of actually applying the Court's decision to everyday practice. Non-lawyers and third-party administrators do offer valuable administrative services to employers, but the new ruling put forth by the Supreme Court seems to leave more questions than answers in the non-lawyer's role in Ohio workers' compensation.

Fortunately this ruling has no impact on clients of Ross, Brittain & Schonberg, as our clients are always, without exception, represented by attorneys in the hearing room and in any matters that could be considered the practice of law. Contact Meredith or anyone on the RBS workers' comp team with any further questions or concerns.

ROSS,
BRITTAIN
&
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upcoming

[events]

SEMINARS & SPEAKING ENGAGEMENTS

RBS ATTORNEY SPEAKING ENGAGEMENTS

February 20 – Lynn Schonberg will be speaking on the topic of advanced employment law for the National Business Institute in Cleveland.

March 2 – Lynn Schonberg will be a featured speaker at the 2007 Labor and Employment Law Update for the National Business Institute in Cleveland.

For more information, please contact our receptionist at 216-447-1551.

ABC, NORTHERN OHIO CHAPTER SEMINARS

Fire Alarm with Paul Ponstingle

March 3, 10, 24 and 31 from 8:00 AM to 12:00 PM

Test date TBA in April

Cost is \$225.00 per person (ABC member) and \$300.00 (non-member)

Education Day – Know the Business of Your Business

March 7 from 9:00 AM to 4:00 PM

Cost is \$25.00 per person (ABC member) and \$50.00 (non-member)

Electrical Code “10 Hour” with Dennis Patalon

April 21 from 7:00 AM to 5:00 PM

Cost is \$150.00 per person (ABC member) and \$185.00 (non-member)

Location:

All Cleveland training will be held at the NOC-ABC Training Center,
9255 Market Place West, Broadview Heights, Ohio 44147.

For Perrysburg locations, call for details.

Contact Jennifer at ABC (440-717-0389) for more details.

You can also visit www.nocabc.com for updates on events and new course offerings.

SAFETY COURSES ARE AVAILABLE ONLINE THROUGH ABC!

Employees can take courses from any computer – at work, at home, or at the library.
This can result in significant savings to companies, in both time and travel costs!

self-insured

[corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues which self-insured employers face. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Brian Brittain at (216) 447-1551 for additional information and membership details.

HR DEPARTMENT UNLIMITED

Founded in 2002, HR Department Unlimited was conceived as an accessible HR resource for the friends of Ross, Brittain & Schonberg. Over time, this company has grown to include a comprehensive variety of services in the areas of human resources and training. Primary contacts at HRDU:

Nicholas Phillips, CEO and President

Nicholas has extensive HR experience, most specifically in the areas of training and development. He has led the development and deployment of training program initiatives for companies in a variety of industries. He has also devised and designed complete organizational training programs, in addition to a full-scale corporate university environment. Nicholas has also produced and instituted curricula in a broad range of areas. His work has been published in papers and numerous magazines including *Training Magazine*, *Construction Executive* and *Construction Business Owner*.

Michael Duchon, Senior Human Resource Consultant

Michael has extensive HR experience, most specifically in the areas of performance management, compensation, learning and organizational development, change management, employee relations and employment law. He has experience working in a wide variety of industries from technology and education to consumer products and manufacturing. Michael is an instructor at Kent State University in their Executive MBA program, and at Cleveland State University in their Management & Labor Relations Department.

Please contact Nicholas or Michael at (216) 520-1010 for more information. You can also obtain additional information at www.HRDUonline.com.