FIRM NEWS:

ALAN ROSS SELECTED AS AN OHIO "SUPER LAWYER"

Managing Partner Alan Ross, head of the RB&S labor division, recently received a pleasant surprise when he learned he had been selected as one of Ohio's "Super Lawyers" for 2004. The selection was made by a magazine called, appropriately enough, *Ohio Super Lawyers*. The magazine mailed out more than 33,000 ballots to attorneys across the state, asking them to name attorneys that they thought were deserving of this distinction in a wide variety of practice categories. Caution was used to ensure that same-firm votes were eliminated, as were "you vote for me, I'll vote for you" arrangements.

While accolades are always nice, they are particularly gratifying when they are made by peers who work and interact with you on a constant basis, and frequently on the opposing side of the table. Congratulations to Alan on this notable achievement!

LYNN SCHONBERG RECOGNIZED AS SPECIALIST IN LABOR AND EMPLOYMENT

It is with great pride that we announce the recognition of Lynn Schonberg as a certified specialist in Labor and Employment by the Ohio State Bar Association. Lynn, who heads the firm's employment law practice, was notified of this distinction after passing a rigorous exam, and letters of endorsement were sent to the state bar on her behalf from a wide variety of legal practitioners, including judges and practicing attorneys.

With this achievement, Lynn joins Brian Brittain, who heads the firm's Workers' Compensation group, in the small circle of lawyers recognized by the Bar as being experts in their field. Congratulations Lynn!

New Rules Tighten Financial Reporting continued from page 1

makes available a fully tested version of its software, whichever is later."

RB&S has long taken advantage of the LM-2 forms required of the unions, and will certainly be looking forward to analyzing the new data required. The LM-2s can be a very useful and important tool in organizing campaigns, as it enables employees to see whether their would-be unions have accurately portrayed the benefits of union membership, the solvency of the union, and how their union dues and initiation fees would actually be spent. It also allows employees to see the compensation union officials receive, as well as their benefits package. It has long been our feeling that employees should have access to these forms if they are to make a knowledgeable and informed decision in organizing campaigns.

RB&S has experienced labor attorneys standing by to assist you in all aspects of labor-management relations. Speak to Alan Ross or David Farkas for more information.

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30th Edition!

practice limited to representation of management in all aspects of: labor law ▲ employment relations ▲ workers' compensation

I S S U E 3 0

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LABOR: NEW RULES TIGHTEN FINANCIAL REPORTING REGULATIONS FOR UNIONS

By David S Farkas

On January 22, 2004, Judge Kessler of the U.S. District Court for the District of Columbia ruled that the Labor Department's newly revised regulations requiring unions to file more detailed annual financial reports were valid under federal law, but the rules would not be able to take effect until July 1 at the earliest. The ruling was reassuring for merit shop employers and other supporters of the new requirements, as earlier the same judge had issued a preliminary injunction barring the new rules from taking effect, holding that an analysis of the new laws would likely show them to be "arbitrary and capricious" and thus invalid. With this recent ruling, the court dismissed allegations that the regulations were overly burdensome or unreasonable, and allowed the requirements to stand.

The new regulations are intended to require more transparency and financial integrity from labor unions by restructuring the financial disclosure forms, or LM-2s, that unions are required to file annually. Victoria Lipnic, the Assistant Secretary for the Department of Labor's Employment Standards Administration, said that "despite the increasing complexity and activity of labor unions over the years, the form used to disclose their financial information to members has remained virtually unchanged in the last 40 years." The revised LM-2 will for the first time provide union members or interested individuals with detailed information about the financial activities of the unions. The new rules will allow readers of the LM-2 to identify major receipts and disbursements of the union, and importantly, they will also require the unions to set forth in detail the financial transactions of "joint trusts" and other subsidiaries managed by the unions.

The unions did receive a temporary consolation in that the planned January 1 effective date was held to be arbitrary and capricious "because it gives those unions that use a fiscal year beginning January 1 less than two months to develop new accounting systems, purchase new computers and software, and train their staff, in order to comply with the new reporting rules." The court ordered the Department of Labor not to apply the new rules until "July 1 or 90 days after the Department

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This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

EMPLOYMENT: "I'M SORRY, YOU'RE JUST NOT OLD ENOUGH"

By Ryan Neumeyer

As most employers are aware, the Age Discrimination in Employment Act (ADEA) protects employees who are over the age of forty from age discrimination. Complying with this law can sometimes be confusing, especially when it comes to termination or the allocation of benefits. Yet in a recent decision of the United States Supreme Court, the reach of the law was drastically reduced. The Court held, in a 6-3 decision, that younger employees cannot sue when their employers provide greater benefits to older workers then to younger employees. Thus, while the law affords full protection of those over forty, discrimination against the relatively young is outside the ADEA's protection.

In *General Dynamic Land Systems, Inc. v. Cline*, a collective bargaining agreement (CBA) between General Dynamics and a union eliminated the company's obligation to provide health benefits to those workers who would retire when the CBA was put into effect, except as to those workers who were at least 50 years old. The workers at General Dynamic who were over 40 but under 50 at the time the new CBA was to go into effect claimed that the CBA would violate the law, as the agreement discriminated against them simply because of their age.

The Supreme Court disagreed with the workers and held that because the CBA discriminated against younger workers in favor of older workers — as opposed to the reverse — there was no violation. While one can question the ethical concept of permitting "discrimination" for some but not for others, this case does represent a small victory for employers who attempt to help their older workers by providing greater benefits.

If you have any questions about this recent decision or the ADEA in general, we can help! Call Lynn Schonberg, David Andrews or Ryan Neumeyer for assistance.

EMPLOYMENT: PICTURE THIS: NO CAMERA PHONES ALLOWED!

By David S Farkas

Sometimes it seems you just can't get away from technology. In a recent newsletter (Issue # 28), we spoke of an employer's need to be vigilant regarding obscene spam in the workplace. Another newsletter (Issue # 27) spoke of the pitfalls of using video equipment in a union organizing campaign. Yet just when you think you've got everything under control, something else pops up to haunt you – camera phones.

The problems with such devices have been in the news most recently in connection with gyms and health clubs. The owners of these establishments are concerned that a small hand-held camera phone can be quietly snuck into a changing area, which can soon lead to embarrassing pictures being displayed all over the Internet. However, it is not just health clubs that need to be wary. Camera phones can easily be used to photograph classified company information, and the same phones can then be used to send the information electronically to corporate competitors. Such phones can also be used by vigilante employees to photograph product testing on animals that the employee finds distasteful, or testing in general that he finds insufficient. Finally, a camera phone can be used to take embarrassing photos at an office party or get-together, and then used for harassment or ridicule.

In a recent interview, Wayne Madsen, a senior fellow of the Electronic Privacy Information Center in Washington, D.C., said that while employers will likely want to make sure employees do not bring the devices into restrooms or business development areas, a "blanket-banning may be an overreaction." He further noted that there are no state or federal laws that regulate camera phone use.

Yet it appears to us that Madsen may be oversimplifying the matter. While it is true that no specific laws have been legislated to regulate camera phone use, courts have said explicitly that there exists a cause of action for invasion of privacy in the employment context, sometimes called intrusion upon seclusion. It does not seem to be so much of a stretch to envision a court granting an award to a complaining party based upon pictures taken via camera phone. Indeed, a blanket prohibition might be just what the doctor ordered. Clients of RB&S have already been advised to implement email policies — perhaps an all-purpose "digital issues" policy might be better?

Some are not so sure. If current trends continue, the camera phone could go from being just an expensive accessory to a standard part of an average cell phone. Indeed, it was not that long ago that cell phones were considered toys of the rich, and yet they are today considered commonplace. Were the camera phone to continue to grow in popularity, a ban on camera phones might be tantamount to a ban on cell phones generally. Employees might balk at a policy prohibiting *all* cell phones, regardless of function.

At any rate, the potential legal ramifications of cell phones are still unexplored territory. We will be watching this issue closely, as we do all areas of employment law, and we will be certain to inform our clients of the latest developments.

Concerned about employee privacy? You know who to call!

EMPLOYMENT LAW BREAKFAST BRIEFINGS

Presented by Lynn Schonberg & David Andrews, in conjunction with Jane Plank of HR Department Unlimited

Location: 6000 Freedom Square Drive, Independence
In the Ground Floor Amphitheatre

Time: 8:30 a.m. to 10:30 a.m.

Registration: Please contact Melody at (216) 447-1551 for information, or register online at www.rbslaw.com
(No cost to RB&S clients and HRDU Members)

June 17, 2004 – The Bermuda Triangle of Employment Law: The Intersection of the ADA, FMLA and Workers' Compensation

No area of employment law causes more confusion for employers than complying with all of the various laws that apply to leave of absence and return to work issues. When your employee needs time off due to a medical reason and then is ready to return to work, you must balance your legal obligations under these complicated and sometimes conflicting laws. This session will help you navigate these uncharted waters.

September 9, 2004 – Strategies in Severing the Employment Relationship

As hard as you may try, there are times when an employee just does not work out. Ensuring the employee has an adequate opportunity to address performance problems, knowing when to end the employment relationship, communicating that decision to the employee and managing workforce reaction are critical to your company's productivity. This session will prepare you for these most difficult workplace decisions.

December 16, 2004 – HR Legal Update – What's Next for Employers?

What will the Courts, Congress and the General Assembly come up with next? We don't know for sure, but we can guarantee there will be significant changes and new issues to confront employers. This year-end review will bring you up to date on all the employment law related changes of 2004.

RB&S ATTORNEY SPEAKING ENGAGEMENTS

Lynn Schonberg has been engaged for the following seminars and/or conferences in Cleveland:

Ohio Wage and Law Update on April 21 for National Business Institute.
Payroll Management in Ohio on June 8 for Lorman Educational Services.
Fundamental Issues in Ohio Human Resources Law on July 8 for National Business Institute.

Please contact Lynn Schonberg at (216) 447-1551 for more information.

HUMAN RESOURCES

Presented by Jane Plank of HR Department Unlimited

Location: 6000 Freedom Square Drive, Independence
In the Ground Floor Amphitheatre

Time: 8:30 a.m. to 10:30 a.m.

Registration: Please contact Jane at (330) 414-2220 for more information, or email her at HRDU@aol.com.
(No cost to RB&S clients and HRDU Members)

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HUMAN RESOURCES *continued*

April 8, 2004 – Compensation Overview

A review of techniques for setting salaries, benchmarking, compensation systems, and variable pay. This session is intended to spark ideas for updating compensation to better match the business environment.

May 13, 2004 – Basic Job Description Components and Development

An overview of the required and helpful components in a job description along with some strategies to develop job descriptions. Included will be a review of the way job descriptions are used to improve communication and meet other business needs.

July 8, 2004 – Employee Relations

This session covers strategies like Alternate Dispute Resolution, employee participation and empowerment, attitude surveys, improving morale, suggestion programs, and recognition.

August 12, 2004 – Orientation, Training, and Mentoring Employees Effectively

An overview of the process of involving employees in the decision-making process, so as to improve office morale and employee cooperation.

October 14, 2004 – Overview of Front Line Supervision

This class covers what front line supervisors need to know and do including a brief review of the legal components, employee relations, joining the management team and performing supervisory duties.

November 11, 2004 – Effective Communication Systems

Turnover data shows that ineffective communication often causes employees to leave their jobs and to be unhappy at work. This class will be a discussion on a variety of systems and techniques for improving communication at work.

ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC conducts an ongoing series of safety training for employers, including the popular OSHA 10-Hour and OSHA 30-Hour classes. All training participants must register one week in advance with Jennifer at (440) 717-0389.

These programs and more are offered at a special discounted rate for ABC members. Please call Jennifer for more information.

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

WORKERS' COMPENSATION RESOURCE NETWORK

WCRN, our self-insured group, will be hosting a meeting on May 25, 2004 at the Embassy Suites in Independence, Ohio. All self-insured employers are welcome to attend. The program begins at 10:00 a.m., and the cost of $35 includes lunch and materials. The program will be varied, including a presentation by the Self-Insured Dept. of the BWC.

Please contact Rick Walters at (216) 447-1551 for more information.

WORKERS' COMPENSATION: HORSEPLAY IN THE WORKPLACE: AN OHIO WORKERS' COMPENSATION PERSPECTIVE

By Christopher R. Debski

Webster's Dictionary defines "horseplay" as rowdy or unruly behavior, something you don't like to see in your workplace. Yet despite the strictest prohibitions, workplace horseplay remains a common occurrence. Blame it on the work environment or just plain human nature, but injury due to horseplay can be very problematic for employers on many different levels. Not only are there issues of employee discipline and possible termination, there is the risk for employer liability and resulting compensation. Every so often employers should be reminded of the current status of Ohio workers' compensation law on the issue of workplace horseplay, and what proactive measures are available to be taken.

Unfortunately for employers, Ohio has "no fault" workers' compensation law, i.e., employee carelessness is not a bar to receiving compensation. However, Ohio courts have carved out exceptions to this seemingly blanket liability. First and foremost, there is a focus on the "causal connection" of an injured worker's employment with the injury. As far back as 1934, the Ohio Supreme Court has addressed "sportive play" in the workplace and held that the strength of this connection is based on a close examination of the employment activities, its conditions, and its environments. This is a fact-driven, case-by-case analysis commonly referred to as a "totality of the circumstances" test. As part of every employer investigation, there are the basic questions of who, what, when, where, how, and why. Written documentation and witness testimony surrounding the accident will help establish or disprove any causal connection.

Second, and more specifically, the Ohio Supreme Court has consistently held that injury due to horseplay *instigated* and engaged in by the injured employee while on duty is not causally connected with the injured worker's employment and thus not covered by the Ohio Workers' Compensation Act. The flip-side, however, is that injury by horseplay is compensable when the injured worker is found not to have instigated or engaged in such activity, but was merely attending to his duties (i.e., an innocent bystander). Likewise, injuries by horseplay commonly carried on by employees with the knowledge and consent or acquiescence of the employer are compensable. Again, this is a fact-driven case-by-case analysis.

As an employer, what can you do in the face of workplace horseplay? Primarily, strict written prohibitions of employee misconduct should be available and consistently enforced. Also, you should get in the habit of thoroughly investigating and documenting any employee violations so that it might be used as evidence in any subsequent workers' compensation claims. Remember, failing to address even the most minor instances of horseplay could possibly be construed as employer acquiescence. As with most issues in workers' compensation law, employers who are vigilant and proactive when dealing with horseplay are the most successful in limiting their liability.

RB&S doesn't horse around when it comes to saving you money on your workers' comp premiums! Chris and the rest of the Workers' Comp. group are standing by for all your questions and concerns.

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 with which self-insured employers are faced. 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 Megan Geist at (216) 447-1551 x165 for additional information and membership details.