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JOB TARGETING PREVENTION

By David S Farkas

It's no secret that union contractors have a hard time competing with merit shop contractors. (There's a reason why the United States construction industry today is less than 20% union). Merit shop contractors generally enjoy more employment opportunities than union contractors, thus enabling them to grow and thrive. Faced with such a reality, union contractors have been forced to employ creative strategies, including the notorious "job targeting" programs.

Job targeting programs, also known as "market recovery" funds, collect fees from union members for the purpose of providing subsidies to union contractors on projects where they face competition from merit shop contractors. While this practice has been found lawful in many circumstances, it has been found to be illegal in many cases where the federal government provides the funds for the project. The reason for the distinction is because of a somewhat obscure clause in the Davis-Bacon Act, which requires employees on federally funded construction projects to be paid the "prevailing wage," but "without subsequent rebate on any account." Almost 15 years ago, the U.S. Department of Labor ruled that this clause made it unlawful to force union members working on Davis-Bacon projects (i.e. most federally funded projects) to give up part of their wages for job targeting programs.

Courts examining this ruling have held that it makes no difference whether the

job targeting subsidies are paid out on public or private projects. As long as the money for such programs are collected, even partially, from dues or assessments, the law has been violated.

Despite the prohibition, many union job targeting programs have continued to collect funds, owing to the failure of the Department of Labor to enforce the law. Certainly, the Department of Labor's tedious complaint and investigation procedures have not been helpful. However, the National Labor Relations Board, backed up by recent court decisions, has declared that the collecting of funds from members working on Davis-Bacon jobs

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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.

OHIO EMPLOYERS BREATHING A LITTLE EASIER

By Marie A. Novak

In 1999 the Ohio Supreme Court opened a Pandora's box with the issuance of its decision of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* *Scott-Pontzer* created an insurance minefield for employers, allowing uninsured and underinsured motorist coverage (UM/UIM) issued to a corporation to compensate employees for injuries sustained even when not in the course and scope of their employment. As if *Scott-Pontzer* was not enough, a multitude of other cases were then issued by the Ohio Supreme Court and lower courts expanding the decision to include injuries sustained to family members of such employees as well.

The results of *Scott-Pontzer* were devastating and widespread. It seemed that any business with an auto liability policy was susceptible to succumbing to the *Scott-Pontzer* wrath. Many employers that had assumed that they had effectively waived UM/UIM were caught off guard

when they learned that their waivers were ineffective. In effect, employers were being punished for a situation they could never have predicted or insured against.

This all ended in early November when the Ohio Supreme Court reversed itself, holding that its earlier decision was wrong and impractical, and was creating chaos in the courts. But the recent decision stands for more than a reversal of the incomprehensible *Scott-Pontzer* decision. Rather, the court announced three important principles with regard to insurance law in the State of Ohio: (1) a policy of insurance that names a corporation as an insured for UM/UIM covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment; (2) where a policy designates a corporation as a named insured, the designation of "family members" of the named insured does not extend coverage

to a family member of an employee of the corporation, unless that employee is also a named insured; and (3) when a court decides whether a claimant is insured under a policy, ambiguities are construed in favor of the policyholder, not the claimant.

It is hoped that the recent decision will end the UM/UIM insurance debate concerning employees acting out of the course and scope of their employment, once and for all. It seems that the Ohio Supreme Court has finally realized that oftentimes their efforts to protect employees merely succeeded in injuring employers!

Marie and the rest of the Workers' Compensation group take an aggressive stance in protecting employer's rights. Give them a call to learn more about your rights as an employer under the law.

BEWARE OF THE CONSEQUENCES OF BONUSES

By Lynn P. Schonberg

It's hard to believe that another year is coming to an end. Although bonuses can be distributed at any time, it is at this time of the year that many businesses begin to confront the issue of year-end bonuses. In determining what, if any, bonuses will be distributed, all businesses must keep in mind the laws regulating bonuses for non-exempt, or hourly, employees. The following information is relevant for bonuses distributed at any time during the year.

In general, bonuses are additional payments that employees may receive over and above their ordinary regular earnings. In some instances the bonus payments are in the nature of gifts from the employer while in others the payments are so intertwined with the employee's regular compensation that they are a part of it.

Employers must carefully analyze bonus payments under the provisions of the

federal law known as the Fair Labor Standards Act (FLSA), which requires the inclusion of certain types in the employee's total compensation and permits the exclusion of others. If the bonus payment is of the type that is required to be included in the employee's total compensation, it will cause an increase in the regular hourly rate of pay and a resulting increase in total compensation during workweeks in which overtime hours are worked.

Generally, whether or not a bonus must be taken into consideration when figuring an employee's overtime pay under the FLSA depends upon its purpose and its nature. There are two types of bonuses under the FLSA. The first type is bonuses that are designed to encourage increased efforts on the part of employees. These bonuses must be included in overtime pay calculations. Examples include attendance bonuses, production bonuses

(both individual and group), bonuses for quality and accuracy of work, efficiency bonuses, bonuses for the highest number of overtime hours worked, and length-of-service bonuses.

The second type of bonus includes rewards for past services rendered by employees which are not devised until after the services have been rendered. These bonuses may be excluded from overtime pay calculations. Examples include Christmas bonuses, gift bonuses, bonuses wholly within the employer's discretion, profit-sharing bonuses paid pursuant to profit-sharing plans and trusts, and bonuses based on a percent of an employee's total wages.

In order to be discretionary, an end-of-the-year bonus must meet four specific conditions to justify an exclusion from overtime payments:

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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)

March 18, 2004 – Performing the HR Self-Audit

A little preventative maintenance can go a long way. This is true not only for the physical assets of your business, but for your personnel practices as well. This session will give you the skills and practical pointers to assess your HR practices and procedures and to identify those areas that may negatively impact your bottom line.

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.

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 RBS clients and HRDU Members)

January 15, 2004 – Components of an HR Department in a Small Business or Department

A review and update of the HR functions that a small business needs to perform including the hiring process, record-keeping, payroll, disciplinary action, job descriptions and evaluations and more.

HUMAN RESOURCES *continued*

February 12, 2004 – The Hiring Practices of the Most Successful Companies

A review of some of the hiring practices that make companies like Disney great! Companies who hire carefully save money in lawsuits, increase productivity and morale. This class will give a brief review of those practices.

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.

SUPREME COURT HOLDS THAT EMPLOYERS MAY NOT TERMINATE EMPLOYEES WHILE THEY ARE OFF WORK DUE TO A WORK-RELATED INJURY

By David T. Andrews

For years, Ohio courts have held that an employer has a right to apply its leave of absence policies to all employees, whether the employee was injured away from work or at work. In other words, if an employee was injured at work and exhausted the company's leave of absence policy, it was not a violation of Ohio's workers' compensation laws to terminate that employee if the employee was still unable to return to work at the end of the leave of absence.

A new unanimous Ohio Supreme Court ruling issued October 22, 2003 now makes it unlawful to do so. The court held that "employees who are temporarily and totally disabled as a result of their work-related injuries have a right not only to the compensation provided in the [Workers' Compensation] Act, but also to whatever period of absence from work is deemed medically necessary to complete their recovery or stabilize their injuries." Thus, it is now unlawful to terminate an employee who is receiving temporary total disability benefits under Ohio's workers' compensation system. This raises some interesting new questions for employers.

Does this mean that employees who are injured at work receive preferential treatment over employees who have non-work-related injuries or illnesses?

Yes. The court's ruling clearly says that leave of absence policies that apply to all other employees do not apply to employees who are injured at work, so long as the employee is collecting temporary total disability benefits.

Should I continue to apply the Family and Medical Leave Act to workers' compensation absences?

Yes. Employers should continue to count days missed for work-related serious

health conditions for purposes of the Family and Medical Leave Act. However, once the 12 weeks of FMLA has been exhausted, a company may not terminate the employee's employment if the employee is still receiving temporary total disability compensation.

Under this ruling, what incentive does an employee have to return quickly from an injury?

Very little. Under the court's decision, so long as a treating physician and the Bureau of Workers' Compensation continue to allow the employee to receive temporary total compensation, the employee's job must be protected. Now, more than ever, aggressive medical and claims management must be emphasized to ensure that the employee recovers as quickly as possible.

Can an employer still penalize an employee if they fail to complete forms for a leave of absence or fail to notify the employer as to the length of the leave of absence?

No. The court said that so long as the employer is on notice of the employee's condition and status "it would be patently illogical to hold that the temporarily and totally disabled employee does not need the employer's permission to be absent from work, only then to turn around and allow the employee to be fired for failing to ask for such permission."

This decision is a sharp departure from numerous decisions of other courts in this state. However, it is now the law of the land. We strongly encourage you to review any potential discharge of a workers' compensation claimant with Lynn Schonberg, David Andrews, or Ryan Neumeier of Ross, Brittain & Schonberg.

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.

***Job Targeting Prevention
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not only violates the Davis-Bacon Act, but also violates the National Labor Relations Act.

It is not difficult to file an unfair labor practice charge regarding such job targeting programs. All that is needed are the following:

- Evidence of a job targeting program sponsored by a particular union. Such information can often be found on LM-2 Disclosure Forms that unions are required to file with the Department of Labor.
- Evidence that funds for the program have been derived, in part, from wages paid to union members under the Davis-Bacon Act. It is usually a matter of public record if a project is being funded by federal funds.

- Evidence that funds from the program are being paid to employers. Such evidence can also be gathered on an informal basis, including the use of anecdotes.

As some of our readers may know, Ross, Brittain & Schonberg has been active in ensuring that state prevailing wage laws are enforced equally for union and merit shop contractors. The foregoing presents another opportunity, in the federal arena, for the merit shop industry to demonstrate its growing clout.

RB&S has experienced attorneys ready to assist you with your labor concerns. Please contact Alan Ross or David Farkas for more information.

***Beware Of The Consequences Of Bonuses
continued from page 2***

- (1) The employer must retain discretion as to payment. This condition is not met where an employer announces in June that it intends to pay a bonus in December.
- (2) The employer must retain discretion as to amount. Where employees are told they will receive a monthly bonus computed on the basis of 1 cent for each item sold whenever company finances permit, the employer has abandoned discretion with regard to the amount of the bonus.
- (3) The employer must retain discretion with regard to the bonus until near the end of the period that it covers. Accordingly, if an employer decides to give its employees a year-end bonus, it should not be announced until the end of the year.
- (4) The bonus must not be paid pursuant to any prior contract, agreement or promise. If a contract, agreement or promise exists, it will be presumed that the employer announced the bonus to employees in advance in order to obtain the desired results.

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