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ISSUE 36

Published Fourth Quarter 2005

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THE MIGHTY C-159 FORM: THE RECREATIONAL WAIVER

by Christopher R. Debski

So it's that time of year again, the company's annual football game, and the following thought crosses your mind: If Jim from Accounting runs into a linebacker and tears up his knee, will the company be looking at yet another expensive workers' compensation claim – one that will cause the company's premiums to skyrocket through the roof?!? The answer depends on whether a little known Ohio Bureau of Workers' Compensation form was executed prior to the employer-sponsored event. Yes, that's right. I'm talking about "The Mighty C-159 Form," also known as the "recreational waiver."

Under the Ohio Revised Code, agreements to waive an employee's rights to workers' compensation benefits are *generally* void, but there are some exceptions. The first gives blind employees the ability to expressly waive their entitlement to workers' compensation benefits (a discussion worthy of a separate article on its own). The second, more significant exception involves employer-sponsored recreation or fitness activities/events. The general rule is as follows: Injuries sustained while participating in an employer-sponsored recreation or fitness activity are compensable unless the employee signs a waiver (i.e., the C-159 form) of his rights to compensation before participating in the activity.

The requirements are simple: 1) participation in the employer-sponsored recreation or fitness activity must be voluntary; 2) the waiver must specifically list all the employer-sponsored activities and fitness programs for which the employee wishes to waive workers' compensation coverage; 3) the employee must sign and date the form prior to the date of injury, or, in an occupational disease claim, the date of disability; 4) the employer must retain the original executed form for its files and provide a copy to the employee; and 5) the employer should submit a copy to the BWC only if a claim is filed for an injury or occupational disease sustained in the employer-sponsored recreational activity or fitness program, and the employer contests the claim on the basis of the waiver.

There are two important limitations to this waiver, though: 1) the waiver is only valid for two calendar years; and 2) the waiver may not bar any workers' compensation claim filed for death benefits by the employee's dependents.

So remember, in preparing for your next company picnic or company football game, make sure you have signed C-159's on file. They could save you the headache of dealing with yet another workers' compensation claim and, more importantly, help keep your workers' compensation premiums down.

Interested in learning more about the C-159? Chris and the workers' comp team are standing by.

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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: WAGE AND HOUR OVERTIME REGULATIONS – ARE YOU PAYING TOO MUCH? *First in a two-part series*

by Nick A. Nykulak

In August of 2004, the U.S. Department of Labor revamped the overtime regulations established by the Federal Labor Standards Act (FLSA). The FLSA requires employees to be paid at least the federal minimum wage ($5.15 per hour) for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, exemptions to this general rule exist for many employees.

The Department of Labor regulations provide exemptions from both minimum wage and overtime pay for employees employed in positions considered to be primarily executive, administrative, or professional in nature. The regulations also provide an overtime exemption for people employed in outside sales or in certain computer-related fields. To qualify for an exemption, employees generally must meet certain tests regarding their job duties and be paid on a salaried basis at not less than $455 per week. An employee's job title will not determine their exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements set forth in the Department's regulations.

To qualify for the executive employee exemption, an employee's primary duty must be 1) managing an enterprise, or customarily recognized department or subdivision of the enterprise, and 2) directing the work of at least two or more other full-time employees or their equivalent. The employee must also have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. Management level employees usually fall under the executive exemption.

To qualify for the administrative employee exemption, the employee's *primary duty* must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and his primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Secretaries, paralegals, receptionists, and administrative assistants do not qualify as administrative positions.

To qualify for the learned professional employee exemption, the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; the advanced knowledge must be in a field of science or learning; and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. There also exists a creative professional exemption. To qualify for the creative professional employee exemption, the employee's

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WORKERS' COMPENSATION: EMOTIONAL DISTRESS ON THE JOBSITE

by Tony Baucco

Imagine, if you will, this unfortunate scenario: John is operating a tow motor in your warehouse when he accidentally runs over Jake. Jake is rushed to the hospital where he subsequently dies due to internal hemorrhaging.

John is understandably distraught over this ill-fated accident. He soon begins developing symptoms of anxiety and depression, although he has never suffered from these conditions in the past. His performance begins to suffer and he begins missing work occasionally. As such, he eventually seeks psychiatric assistance. His psychiatrist diagnoses him with anxiety, depression and post-traumatic stress disorder, all stemming from the incident described above.

John then files an application with the Bureau of Workers' Compensation, seeking compensation for his anxiety, depression and post-traumatic stress disorder. You immediately wonder if John's psychological conditions, arising from the compensable death of Jake, a third party, are compensable. This is clearly a situation where John's new psychological disability has been brought on by psychological or emotional stress stemming from Jake's unfortunate accident. Does John have a valid claim for compensation?

Traditionally, Ohio has refused to recognize claims for psychological disability caused by purely psychological or emotional stress. Furthermore, although the Ohio Supreme Court has argued that it is time for psychological injuries brought on by pure psychological stress to be deemed compensable, the General Assembly has remained unresponsive.

So, what's going to be with our friend John? The Ohio Supreme Court has indicated that under the Ohio Workers' Compensation Act, the General Assembly intended to limit claims for psychiatric conditions to situations where the conditions arise from an injury or occupational disease. However, as noted by the Supreme Court, the General Assembly does not specify who must be injured or who must sustain the occupational disease! The Supreme Court found that the Act was ambiguous with respect to psychiatric conditions arising from physical injuries sustained by third parties.

As such, after interpretation of the Act and consideration of numerous other factors, a divided Court held it was the intent of the legislature that the psychiatric condition of an employee arising from a compensable injury or occupational disease suffered by a third person be held compensable under the Ohio Workers' Compensation Act. This decision, the majority felt, was consistent with the compensatory objective and humanitarian nature of the Act.

Psychiatric and psychological claims resulting from mental stress can be quite complicated. If you have any questions regarding such claims, please contact Tony and the workers' comp team at RBS.

EMPLOYMENT LAW BREAKFAST BRIEFINGS

Presented by Lynn Schonberg & David Andrews, in conjunction with Nick Phillips 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 RBS clients and HRDU Members)

September 22, 2005 – Working with the Disabled Employee

"I need the company to buy an expensive machine to help me do my job." "I need to work from home three days a week so that I can deal with my disability." These dreaded requests leave many companies wondering how far they must go to comply with an employee's accommodation request. This session will cover the entire accommodation process, including which employees must be accommodated, to what extent a request for an accommodation must be granted and the employers' rights in the accommodation process.

December 1, 2005 – HR Legal Update – What's Next for Employers?

The only certainty in the laws governing employees is that there will be change. This annual year-end review will bring you up to date on all the employment law related developments of 2005.

RBS SPEAKING ENGAGEMENTS

David Andrews will be presenting a seminar at the Ohio Accounting Show called "The New Wage and Hour Regulations – One Year Later", sponsored by the Ohio Society of CPAs. The event will take place in Cleveland on September 21, and is designed for payroll professionals, CPAs, accountants, human resource managers, bookkeepers, controllers and CFOs.

For more information please call CPAnswers at 1-888-959-1212 or go to www.ohioscpa.com.

Both David Andrews and Jerry Cline will be speaking at a seminar sponsored by the Northern Ohio Area Chambers of Commerce (NOACC) entitled, "Workers' Compensation 101: Understanding the Key Elements of Risk Management" on September 29 at the Ground Floor Amphitheater at 6000 Freedom Square Drive. Registration begins at 8:00 a.m. David will lecture on employment law issues that relate to workers' compensation. Jerry will provide an overview of Ohio workers' compensation law. In addition, the event will feature an overview from a medical facility physician.

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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 in advance with Jennifer at (440) 717-0389.

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

ABC also offers seminars, apprenticeship, and training for a variety of crafts. Upcoming Cleveland-area courses offered for 2005 include the following:

- Electrical 10-hour Code (Approved by OCILB for ten hours of Continuing Education credits) generally held between 7:00 a.m. to 5:30 p.m.

There are also many courses offered in the general Northern Ohio area. A 30-hour OSHA training course will be offered in Findlay, Ohio, on September 19, 20, and 21. And on September 23, a class will be offered in fall protection, also in Findlay.

Many of these programs and more are offered at a special discounted rate for ABC members. Please call Jennifer for dates and more information.

SAFETY COURSES ARE NOW AVAILABLE ONLINE THROUGH ABC

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

SAVE THESE DATES!

September 29, networking social at the Bronze Boar, in Toledo, Ohio, at 6:00 p.m.

October 20, ABC annual Excellence in Construction awards banquet, at the Broadview Heights facility, at 6:00 p.m.

EMPLOYMENT: PREGNANT WITH MEANING

by David (Say Goodnight Alice) Farkas

Many of us have read the occasional story appearing in the "Odds 'N Ends" section of the newspaper where a woman gives birth, and is startled to learn that she had actually been pregnant the past nine months. "I just thought it was back pain," the surprised mother is usually quoted as saying. Well, this curious condition – non-pregnant pregnancy – has now been enshrined into law.

In 1999, a nurse named Suzanne Kocak was working for a hospital in Ohio, and resigned because of medical complications associated with her pregnancy. In 2000, and again in 2001, Kocak applied for work on a part-time basis with her old employer and was turned down both times. The hospital said that the nurse was turned down because she was "avidly disliked" by her peers, and was difficult to work with. Kocak actually admitted to these personality problems, but contended that her denial of employment was motivated by considerations in violation of the federal Pregnancy Discrimination Act (PDA) of 1978. Under this law, similar to other discrimination statutes, one is not allowed to discriminate against a job applicant if he or she is pregnant. The district court dismissed the lawsuit for the seemingly unimpeachable reason that Ms. Kocak was not pregnant at the time she applied for work, and was thus not covered by the PDA.

Yet on appeal, the Sixth Circuit found that the district court had erred in dismissing the lawsuit. The court, finding precedent in United States Supreme Court jurisprudence, held that Kocak was protected by the PDA on the basis of "potential pregnancy." The court found it notable that Kocak had been pregnant before, but explicitly declined to comment on whether a plaintiff who had never before been pregnant could assert a claim under the PDA. The logic employed by the court is highly dubious, at best, because the "potential" to fall within a protected class effectively includes the entire population within the class.

Justice prevailed in the end, when the hospital successfully offered "substantial evidence" that it would not have decided to hire Kocak even absent any illegal motive. But that it even made it all the way up to the Sixth Circuit, and that the Sixth Circuit allowed the claim to proceed, should cause employers to be wary.

- Supervisors should understand the implications of federal, state and local employment law. Have they even heard of the PDA? Do they realize how far courts can go in expanding such laws?
- Document, document, document. It was only the written evidence of Kocak's poor performance that saved the hospital in the end. My advice to employers has always been to record the most seemingly inconsequential discipline in writing. Remember – a recollection can always be challenged; a record is written in stone.

Lynn Schonberg adds — The above case was based on the federal PDA, which applies to all businesses employing 15 or more employees. Simply stated, it mandates that women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected. Ohio law contains almost identical language as the PDA and it applies to all Ohio businesses that employ 4 or more employees. Taken together, these two laws require employers to give equal, *not* preferential, treatment to pregnant employees.

A reasonable conclusion from these two laws is that, generally speaking, there is no obligation to provide a leave for a pregnant employee so long as the business does not provide leave for any other medical condition. However, that conclusion would be wrong. In the Ohio Administrative Code, which are regulations that interpret Ohio law, the law on pregnancy discrimination has been interpreted as *requiring* that a female employee be granted a reasonable leave on account of childbearing. Such interpretations have spawned complicated judicial offspring, some of which we will cover in future articles.

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 Megan Geist at (216) 447-1551 x165 for additional information and membership details.

[firm news]

As we have had occasion to remark upon in the past, accolades are always nice, but 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. We are therefore delighted to announce that all three of the RBS founding partners were recently honored with news of their selection as Ohio "Super Lawyers" for 2006. Alan Ross, head of the labor group; Brian Brittain, head of the workers' compensation group; and Lynn Schonberg, head of the employment division, were selected for the distinction by *Law & Politics* magazine. The periodical mailed more than 33,000 ballots to attorneys across the state, asking them to name attorneys they thought were deserving of this accolade 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.

Congratulations to Alan (who received the distinction for the third year in a row) Brian (second year in a row) and Lynn on this notable achievement!

RBS is also pleased to announce three new attorneys who have joined the firm:

Tony Baucco is an associate who focuses his practice on the defense of workers' compensation matters. Prior to joining the firm, Tony practiced in the areas of workers' compensation and personal injury. Tony graduated *cum laude* from Cleveland-Marshall College of Law where he served as Executive Editor of the *Cleveland State Law Review*.

Scott Coghlan, a veteran litigator, has represented clients in over fifty Ohio Common Pleas Courts, as well as before the federal district court and Sixth Circuit Court of Appeals. His practice focuses on workers' compensation litigation. Prior to joining RBS, Scott represented employers in both workers' compensation and construction litigation.

Nick Nykulak joins the firm as an associate in our growing employment practice. Previously Nick served as a judicial law clerk in the Eighth District Court of Appeals, Cuyahoga County. Nick graduated *magna cum laude* from the Cleveland-Marshall College of Law, where he served as executive editor of the *Journal of Law and Health*.

Wage and hour overtime regulations...
continued from page 2

primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Doctors, lawyers, scientists, theologians, and engineers fall under the learned professional exemption.

An employee may be exempted from overtime regulations through the computer exemption. To fall under this exemption, an employee must be compensated either on a salary fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour; the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field.

In our next issue we will discuss other exceptions that can apply to blue collar workers, or to workers in a collective bargaining agreement. Nick and the rest of the employment group are standing by to assist you!

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