



ELECTION ISSUE 2006

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

I S S U E 4 0

Published Fourth Quarter 2006

what's

[inside]

Labor:
Equal Rights for Employers!..... 1, 2

Employment:
Beware of Boilerplate
Employment Forms..... 2

Workers' Compensation:
BWC Issues New Rules on
Mergers & Acquisitions..... 3

Workers' Compensation:
Update on Worker's
Compensation Reform Bill..... 3

Interviewing Tips..... 4

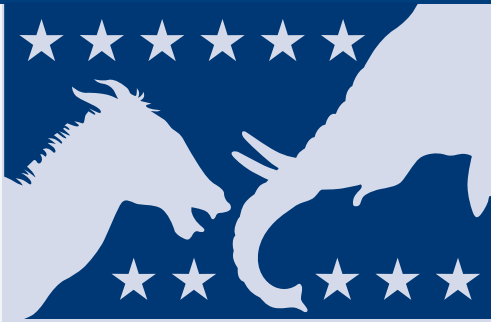
Employment Law
Breakfast Briefings.....insert

Attorneys
Alan G. Ross
Brian K. Brittain*
Evelyn P. Schonberg**
David T. Andrews
Thomas R. Wyatt
Anthony A. Baucco
Jennifer A. Bennett
Jerry P. Cline
Scott Coghlan
Christopher R. Debski
David S. Farkas
Nicole H. Farley
Nick A. Nykulak
Meredith L. Ullman

Paralegals
Renee Mezera
Kimberly L. Altstadt
Lorraine J. Geiger
Megan E. Geist
Arlene M. Goliás
Joyce L. Hale
Carla E. Reznik

*OSBA Certified Specialist Workers' Compensation
**OSBA Certified Specialist Labor & Employment

6000 Freedom Square Drive, Suite 540
Cleveland, Ohio 44131
Phone: [216] 447-1551 Fax: [216] 447-1554
www.rbslaw.com



Like it or not, election season is once again upon us. As a scrupulously non-partisan publication, the RBS Newsletter does not officially endorse candidates running for public office. However, we urge our clients to learn the candidates' position on matters of interest to them. On a national level, this might include learning which candidate would be better for business owners, or which candidate would better promote the interests of merit shop contractors.

On a state level, candidates should also be asked about issues such as workers' compensation reform (discussed in this issue), prevailing wage reform, project labor agreements, and other employment legislation.

We are never rash enough to predict results, but we will continue to keep you informed of the legislative agenda, from wherever it comes!

LABOR: EQUAL RIGHTS FOR EMPLOYERS!

BY DAVID S FARKAS

In America we are all "equal." Our Constitution contains something called an "equal protection" clause. It all sounds wonderful, doesn't it? The problem is, to paraphrase Napoleon the Pig in George Orwell's classic, *Animal Farm*, "Some of us are more equal than others." I often feel the same way about unions.

It is no secret that, in an organizing campaign, the National Labor Relations Board employs a double standard in the law it applies to unions and employers. In fact, the Board admits this openly. The oft-stated rationale for this explicit double standard is the Board's belief that the union is an outsider looking in, while the employer is actually in a position to set and change policies at will. As a result of this distinction, the Board very carefully scrutinizes election conduct and statements by employers during organizing campaigns, while looking the other way when the same statements are

made by the union. This distinction has led to numerous employer-won elections being overturned, while certifications are issued to unions who engage in the exact same form of electioneering that would have cost the employer the election.

All of this may be about to change. In a recent press release, the Board announced its decision that it would no longer allow this double standard, at least within the context of photographing or recording employees when the union is distributing campaign literature. In a case called *Randell Warehouse*, the Board held that the union was permitted to photograph employees because it was not accompanied by other coercive conduct. In the same decision, the Board maintained that if an employer were to photograph employees it would be presumptively coercive, even if not accompanied by actual threats, or actual evidence of coercion. On appeal, the D.C. Circuit noted this anomaly,

EMPLOYMENT: BEWARE OF BOILERPLATE EMPLOYMENT FORMS

BY NICK A. NYKULAK

We have been seeing more and more boilerplate employment applications and interview forms popping up in employee files that should not be used. Many of the authors of these forms are unknown, and the date these forms were created or last updated can be a complete mystery. Just because these forms are sold commercially and are readily available in stores and on the internet does not mean they automatically comply with state and federal law.

Basing your hiring decisions on an applicant's age, race, gender, religion, color, sexual orientation, or national origin, to name a few categories, is strictly prohibited by state and federal statutes. Although you would never deliberately base your hiring decisions on these impermissible criteria, using boilerplate forms may unwittingly subject your company to trouble. Most of the time, these boilerplate forms delve into the realm of impermissibility by asking questions that seem entirely innocent, but the responses they illicit from the applicant are unlawful. For instance, an employment application should almost never reference age, especially questions that would reveal that the applicant is over the age of 40. This includes asking questions regarding the date

the applicant graduated high school or how many total years of work experience he has since graduating high school. An employment application should also never ask questions regarding where the applicant was born, how a foreign language was acquired, or questions regarding the applicant's parents, grandparents, or spouse that could be used to determine the applicant's religious denomination, race, or national origin.

Requesting an applicant to list all non-work related activities, such as memberships in clubs and organizations can also inadvertently require the applicant to disclose his class status. An employment application should not ask questions which would require disclosure of past or present medical conditions that are not directly related to fulfilling the essential functions of the position offered. Although you are not asking the applicant to directly disclose if he has a disability, you may have inadvertently requested enough information to determine the answer for yourself. Following the same lines regarding disability, you should never inquire into an applicant's workers' compensation history. Asking questions regarding how many injury claims the applicant has filed, when the claims were filed, or what the injury was should be avoided at all costs.

Not every question is unlawful. You may ask applicants questions to ensure they meet the minimum state age requirements to work; questions regarding the nature and extent of their academic, professional, or vocational training; request references; request names of previous employers and their supervisors; criminal conviction information; memberships in professional organizations; the applicant's available work schedules; etc. . . . You can also require an applicant to take a drug test or to undergo a pre-employment physical, so long as these requirements are applied equally. Of course, any question that would be unlawful to ask on an employment application would also be unlawful to ask during an interview.

RBS, in connection with HR Department Unlimited, can assist your company in assuring that your employment application and interview forms are compliant with state and federal laws. (See the companion article on this topic elsewhere in this issue.) We can also assist your company in creating employment applications and interview forms that meet the specific information needs of your company without violating state and federal statutes. For more information regarding the services we can provide your company, please contact Lynn Schonberg, David Andrews, or Nick Nykulak.

LABOR: EQUAL RIGHTS FOR EMPLOYERS! CONT'D

reversed the Board, and remanded it to the Board for "further consideration and a reasoned opinion."

In the remand, the Board finally acknowledged the "disparate treatment" it afforded to unions and employers, and stated that such disparate treatment could not be squared with the fundamental principles of the National Labor Relations Act, a law that guarantees the right to both engage in and refrain from union activity. As such, the Board held that one rule would govern the taking of pictures at an election. The dissent, as expected, argued that employees could not feel threatened by union photography because, they claimed, unions are less able

to retaliate against employees than employers. Significantly, the Board dismissed that argument. It observed that experience has shown "unions also have ample means available to them to punish employees, and that some unions have used that power in reprisal against employees who oppose them in organizing campaigns."

The significance of this decision should not be overestimated. It does not explicitly state the ruling I would have preferred — a complete elimination, once and for all, of any distinction in law between the union and the employer in election campaigns. Nevertheless, it is still a giant leap forward. Unionization campaigns, called "organiza-

tion" campaigns by the unions, are happening more and more, as the unions fight to maintain strength in the 21st century. The law governing such organization campaigns must be properly understood in order to wage an effective, but legal, campaign. We will continue to monitor all developments in this always-changing body of law.

Have you seen signs of increased union activity at your company? Do you sense an organization campaign coming your way? Before you do or say anything, make sure you know the law! Contact Alan Ross or David Farkas with all your questions and concerns.

WORKERS' COMPENSATION: BWC ISSUES NEW RULES ON MERGERS AND ACQUISITIONS

BY LAURIE COCHRAN AND JENNIFER BENNETT

One aspect of a merger or acquisition that is often overlooked is the workers' compensation impact. In the past, a company that merges with another entity can be found to be a successor to the company that was purchased. This means that the successor employer inherits the experience history, good or bad, of the predecessor employer. More often than not, this leads to increased workers' compensation premiums due to a less than desirable risk experience of the predecessor entity. Historically, while the Bureau of Workers' Compensation would transfer the claims experience, it did not always transfer any

outstanding premium obligations of the predecessor entity based on various circumstances. That is now changing and will make the merger/acquisition area even more complex!

The BWC has just recently made a critical change to the Successorship Rule, which can be found in the Ohio Administrative Code. Specifically, as of September 1, 2006, the BWC will not only assess a successor employer with the experience of a predecessor, but it will also assess any outstanding liabilities (for unpaid premiums, rate adjustment increases, retrospective billings, etc.) to the successor employer. This could obviously

have a significant impact on the bottom line of a merger or acquisition.

Before a company undergoes a merger or acquisition, it would be wise to have a complete analysis and experience combination performed of the predecessor and successor risks. Employers can then enter into the purchase fully informed of any potential cost increases that might be associated with the purchase.

Our office specializes in identifying risks associated with mergers and acquisitions and has vast experience in the successorship area. Contact any of our workers' comp attorneys for more information.

WORKERS' COMPENSATION: UPDATE ON WORKERS' COMPENSATION REFORM BILL

BY JERRY P. CLINE

As we reported previously, a comprehensive workers' compensation reform bill was passed by both the Ohio House and Senate and was signed into law on March 31, 2006. The bill was to become effective on June 30, 2006, but on April 6 the United Auto Workers and a group of claimant attorneys filed a statewide referendum petition challenging several pro-employer provisions of the reform bill. This petition did not affect the unchallenged portions of the bill and those provisions are now law. If the petition is certified, the referendum will appear as Issue 1 on the ballot.

The challenged portions of the reform bill:

- Prohibit psychological allowances unless the claimant is also suffering from a physical injury;
- Require that there must be "substantial aggravation" for an aggravation type injury to be compensable and which provides that once an aggravated condition returns to its pre-injury state, no further compensation is payable for that injury;
- Provide that a claimant cannot dismiss an employer's appeal of the claim into court without the employer's consent;

- Provide that settlement of the claim may be voided if the claimant dies within the 30-day waiting period after the settlement has been signed;
- Reduce the number of weeks for working and non-working wage loss;
- Reduce the permanent total disability awards by basing payments on the worker's average weekly wage at the time of injury; and
- Provide that the loss of one limb does not equal the loss of two body parts.

To satisfy the referendum requirements under Ohio law, the UAW/claimant attorney group needs 193,740 valid signatures, or 6% of the total votes cast in the last gubernatorial election, to place the referendum on this November's ballot. In addition, 3% of the valid signatures must come from at least 44 of the 88 counties. On June 29, the UAW/claimant attorney group filed approximately 225,000 signatures with the Secretary of State office. On August 25, the Secretary of State's office certified a deficiency of nearly 73,000 signatures statewide as well as a deficiency in 24 counties.

The UAW/claimant attorney group timely filed an additional 103,000 signatures in an attempt to cure this deficiency. As of the time of this writing, the Secretary of State has not yet certified the validity of the additional signatures so it is unknown whether or not the referendum will appear on the November ballot. If Issue 1 is placed in the ballot, it is unclear at this time just how it will appear. However, no matter how it is written, employers are urged to vote such that the reform bill becomes law. Both houses of the Ohio Legislature and Governor Taft supported this pro-business legislation. We urge you to do the same.

We will continue to monitor this development, and apprise our readership of any changes.

INTERVIEWING TIPS

Editor's note: Our guest articles on general human resources issues have generated much positive feedback. Herewith we present another article from Nicholas Phillips of HR Department Unlimited. We intend for this to be a recurring feature of the RBS Newsletter.

By Nicholas Phillips, HR Department Unlimited

As your company performs daily routines and adapts to current needs, the potential for bringing on new talent always exists. You might place an ad, contact an HR consultant, or tap your business network. Remember, the person you hire today will inevitably affect your business tomorrow, so choose wisely.

Tip #1: Set a formal business tone for the interview right from the beginning and avoid inappropriate personal questioning. Doing so will yield a more effective and efficient interview, and will show the job candidate that you are interested in his/her ability to perform within your organization.

Many employers feel that breaking the ice with some light, personal background talk can make the rest of the interview easier; however, this not only detracts from the business nature of the visit, but it also may open the employer up to potential liability. Plan what types of questions you will ask and keep to an agenda.

Tip #2: Ask the job candidate about his or her past successes with other companies in real and specific terms. Past performance is the best indicator of future success, so learning how the job candidate has suc-

ceeded in the past, and the terms and tactics employed to achieve that success, can help you to infer how he or she may succeed in the position you are seeking to fill.

Behaviorally-based questions referring to past performance can help you to forecast if it is reasonable to believe that a candidate will meet performance expectations. There is no sure way to know whether or not the job candidate is honestly referencing actual experiences; however, if the examples given are actually made up but you agree with the answers provided, then at the very least you can observe a logical approach to problem-solving and decision-making that either matches or conflicts with what you are looking for.

Tip #3: Take time to fully disclose the role and responsibilities of the position as well as to explain in detail the culture and expectations of the organization. It is critical for you to effectively evaluate whether or not the job candidate understands what the job will entail, and to be certain that he or she would be a good cultural match for the company.

Part of the interview process is considering whether or not the candidate will “fit” into your value structure and overall company culture. Full disclosure ahead of time during the interview can prevent a new employee from learning later (after being hired) that the job and/or company are not what he or she had expected.

Like much of what you deal with running a successful business, interviewing takes careful planning, experience, and an understanding of various techniques and tactics used to sort through the mounting pile of resumes you're faced with. This is one important reason why many companies look for quality supplemental assistance. The growing trend of working with a human resources consultant provides organizations with experienced assistance in areas such as recruiting and pre-screening, policy and procedure development, compensation structures, employee relations, training and development, and other essential components of the human resource function.

Visit Nicholas Phillips and Michael Duchon at www.HRDUonline.com, 216.520.1010

ROSS,
BRITTAIN
&
SCHONBERG
CO., L.P.A.

6000 Freedom Square Drive
Suite 540
Cleveland, Ohio 44131

upcoming

[seminars]

EMPLOYMENT LAW BREAKFAST BRIEFINGS

PRESENTED BY LYNN SCHONBERG & DAVID ANDREWS, IN CONJUNCTION WITH
NICK PHILLIPS AND MICHAEL DUCHON 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)

December 7

2006 and Beyond – Annual HR Legal Update

This annual year-end session will review all the employment law developments of 2006 and look forward to what is coming for employers in '07.

RBS Attorney Speaking Engagements

October 19 – Lynn Schonberg will address the Lake/Geauga Society of Human Resources Managers, and will present a review and update of current law regarding employment handbooks. The event will be located at the Radisson Hotel in Eastlake, and Lynn will speak from noon to 1:30 p.m.

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.

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.

Beginning October 18, ABC will conduct a six-part series entitled “Know the Business of Your Business,” as part of its Emerging Contractor Series. The Series will run for six consecutive Wednesday afternoons, from 4:00 p.m. to 6:00 p.m. The six classes will cover:

October 18 - basic accounting

October 25 - estimating and bidding

November 1 - legal labor law and contractual issues

November 8 - human resources

November 15 - risk management and financial planning

November 29 - bonding and surety issues

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

SAFETY COURSES ARE 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!

Coming Soon!

ABC will soon be starting an Advanced Electrical Program, covering cable selection, wire and cable terminations, fiber optics, CCTV systems, PLC's, broadband systems, and much more. Details to be announced.