

[firm news]

RBS is pleased to announce the addition of Thomas R. Wyatt as a shareholder in the firm. Since having joined the firm on the first day of 2002, Tom has become an integral part of the RBS team. A seasoned trial attorney, he has continued his extensive practice of workers' compensation litigation, while also developing a burgeoning intentional-tort defense and OSHA practice. His meticulous and thorough consideration of problems has made him a favorite of our clients, and it is hoped and expected that Tom will bring the

same talents in joining the administration of the firm. Congratulations, Tom!

We are also pleased to welcome Nicole (Nikki) Farley into the firm as a new associate, focusing her practice on workers' compensation defense. Prior to joining the firm, Nikki practiced in the areas of labor and employment law, advising employers on employment relations matters. Nikki is a volunteer attorney for Hospice of the Western Reserve, and received her law degree from Case Western Reserve in 2003. Welcome aboard, Nikki!

ROSS,
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6000 Freedom Square Drive
Suite 540
Cleveland, Ohio 44131

Beware of Age Discrimination... *continued from page 1*

his age. Indeed, in *Hoffman*, the court found the proffered reason was nothing more than a pretext to fire the older worker.

Age discrimination cases making you gray before your time? Lynn, David and Jerry are prepared to assist you in all areas of your employment relations.

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

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

EMPLOYMENT: BEWARE OF AGE DISCRIMINATION DURING LAYOFFS

By Jerry P. Cline

Many companies implement layoffs during business slowdowns or in times of financial crisis. However, be very careful who you choose to let go. Discharging older workers while retaining substantially younger, less experienced workers may violate state and federal laws against age discrimination.

In the recent Ohio appellate case of *Hoffman v. CHSHO, Inc.*, a nursing facility employed two nurse schedulers, one 60 years old (Hoffman) and the other, 27 years old (Connor). Faced with sustained operating losses, the company implemented a reduction in force and chose to terminate Hoffman and retain Connor. Hoffman filed suit against her former employer, alleging age discrimination.

To establish an age discrimination case under Ohio law, a plaintiff must demonstrate that he was at least forty years old at the time of his discharge and was qualified for the position. Prior to 2004, the plaintiff also had to prove he was replaced by someone under forty years old. However, in that year the Supreme Court of Ohio ruled that plaintiffs need only prove that they were replaced by someone of "substantially younger age." This is a much tougher standard against employers. Thus, formerly if you terminated a 50-year-old and replaced this employee with a 42-year-old, companies were protected against age discrimination. Now, however, an eight-year age difference could be deemed "substantial" for purposes of age discrimination.

When the termination is part of a reduction in force, courts also require the plaintiff to provide stronger evidence that the employer *intentionally* discriminated against the

employee because of age. A plaintiff-employee can meet this heightened requirement simply by demonstrating that he was more qualified than the younger person who was retained. In the *Hoffman* case, the plaintiff easily met this heightened burden because she had 26 more years of experience in various nursing positions than her substantially younger replacement.

Because Hoffman established her initial burden, the burden of proof shifted to the employer to offer a legitimate, nondiscriminatory reason for the discharge. If a legitimate, nondiscriminatory reason is offered, such as a layoff due to an economic slowdown, the burden shifts back to the plaintiff to show that the proffered reason was not the true reason for the plaintiff's termination, and that he was really discharged because of

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Attorneys

Alan G. Ross
Brian K. Brittain*
Evelyn P. Schonberg**
David T. Andrews
Thomas R. Wyatt
Anthony A. Baucio
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. Gollis
Joyce L. Hale
Carla E. Reznik

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

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: MEDICARE PART D REQUIREMENTS FOR EMPLOYERS

By Nick Nykulak

In 1965, Medicare was enacted as part of the Social Security Act to provide health coverage to individuals over age 65. Today, Medicare covers over 44 million Americans who are eligible for coverage due to their age (over 65), disability through Social Security Disability Insurance, or permanent kidney failure known as End Stage Renal Disease. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) created prescription drug benefits that were added to Medicare on January 1, 2006 (Medicare Part D).

All employers maintaining and providing group health plans with prescription drug benefits to Medicare-entitled individuals (whether retired or actively employed) should have already distributed a "notice of creditable coverage" to each of these individuals. This regulation does not include exceptions for small employers; any entity that sponsors prescription drug benefits for a Medicare-eligible individual is required to provide a creditable or non-creditable coverage disclosure. The initial enrollment period for individuals eligible for Medicare Part D coverage began on November 15, 2005 and will continue through May 15, 2006.

The MMA requires the sponsor of the plan, usually the employer or union, to disclose to all eligible individuals the "creditable" or

"non-creditable" coverage status of their current prescription drug benefits at the following times: prior to November 15 of each following year; when an eligible individual joins the plan; prior to when an individual becomes eligible for Medicare; prior to a change in the prescription drug coverage which causes it to change from being "creditable" to "non-creditable;" upon request from the beneficiary; and at other times as outlined under the regulations.

Coverage is "creditable" if the actuarial value of the coverage equals or exceeds the actuarial value of standard Medicare prescription drug coverage. In other words, creditable coverage means prescription drug coverage which is on average at least as good as the standard Medicare prescription drug coverage. An employer's prescription drug plan will be deemed to provide "creditable" coverage if, among other criteria, it covers brand and generic prescriptions, provides reasonable access to retail providers, pays on average at least 60% of participants' prescription drug costs, and meets certain other actuarial requirements.

If coverage under the employer's prescription drug plan is not creditable, employers must notify eligible employees that their drug plan's coverage is not creditable. They must also inform employees of the limitation peri-

ods on the Medicare Part D enrollment periods, and that the employees might be subject to late enrollment penalties of 1% per month they wait to enroll after May 15. Eligible employees who have creditable prescription drug coverage from their employer may postpone enrollment for Medicare Part D coverage until a later date and enroll without penalty.

It should also be noted that employers who provide drug coverage to eligible retirees can receive a tax-free federal subsidy equal to 28% of costs between \$250 and \$5000 in drug expenses per retiree. Employers must submit their application for the subsidy along with an actuary's attestation that the employer's plan is actuarially equivalent to Medicare Part D. The employer must engage a qualified actuary to prepare the attestation. The employer subsidy is only available for retirees who do not enroll in Medicare D.

Some of the new requirements can be quite complicated. Please feel free to call Dave Andrews, Lynn Schonberg, or Nick Nykulak should you have any questions regarding the notice requirements of Medicare Part D.

EMPLOYMENT: PREGNANT WITH MEANING, CONT'D

Editor's note: We received a great deal of feedback from our last article on the Pregnancy Discrimination Act (PDA), which appeared in our Fourth Quarter 2005 issue. Lynn Schonberg has prepared an article that answers some of the more frequently asked questions.

In my last article I noted that the federal PDA, which applies to all businesses employing 15 or more employees, 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. However, 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.

"If my business does not have FMLA obligations and no medical leave policy, then how long of a maternity leave must I permit?" According to the Regulations, a "reasonable leave" is required.

"But how long is a reasonable leave?" The answer depends on who you ask. The Ohio Civil Rights Commission (OCRC) will say it must be as long as the employee will need, since what is reasonable for one employee may not be for another. However, an Ohio judge has placed the following limits on the length of a maternity leave: "An employer need not have a policy allowing unlimited maternity leave: an employer is required only to have a reasonably adequate policy of maternity leave which

should be applied on the same terms and conditions as for other disabilities."

"If my business has a medical leave of absence policy that provides no more than 4 weeks of medical leave, is that reasonable?" Probably not. If a pregnant employee needs more than 4 weeks, you would need to provide the additional time to her. As to how much additional time would be required, the answer would depend on how much longer the employee needs. If another 8 weeks are needed, the safest course would be to provide it to her. If another 12 weeks are needed, you you will need to proceed very carefully. Our firm was involved in an OCRC matter where the OCRC stated that a 19-month leave was reasonable. Whatever amount of time is provided, all employers must be aware that denial of a reasonable

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EMPLOYMENT: PREGNANT WITH MEANING, CONT'D

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maternity leave "is, in effect, terminating the employee because of her pregnancy."

"My business has a 12-week policy under the FMLA. If a pregnant employee needs more than the 12 weeks, do I have to grant that request, even though all other employees must return to work within 12 weeks or lose their right to a guaranteed job upon return?" Remember that the Administrative Code has essentially created preferential treatment for pregnant employees. Also keep in mind that Ohio courts have held denial of a reasonable maternity leave is virtually akin to an automatic finding of sex discrimination. Consequently, employers must proceed cautiously where additional leave is requested.

"Can my business require that the new mother prove that she is unable to work after childbirth in order to be entitled to reasonable maternity leave?" No, because the fact that she recently

WORKERS' COMPENSATION: NOT UNCONSTITUTIONAL TO EXCLUDE PSYCHOLOGICAL INJURIES

By RBS Staff

Surely the most burning question on everyone's mind these days is this: Does excluding psychological injuries from workers' compensation violate the Equal Protection Clause of the U.S. and Ohio Constitutions?

Well, perhaps not everyone is troubled by this, but nonetheless the question recently managed to come before the Ohio Supreme Court. The question arose because an Ohio statute specifically excludes such psychiatric conditions from the workers' comp system. As a result of that statute, courts have held that compensable injuries require physical components to be suffered by the claimant. However, in a creative argument, claimants' lawyers pointed to the Fourteenth Amendment of the U.S. Constitution which states, in essence, that the states may not make or enforce any law which abridges the privileges of the citizens of the United States, nor can any person be deprived of life, liberty or property without due process of law. Although some readers might wonder how

gave birth to a child is sufficient.

"Do I need to continue to pay for health insurance during the leave or can I place the employee on COBRA?" Unless the FMLA applies or you continue to pay medical benefits for others on medical leave, you do not need to continue paying. Also, you are not required to provide paid leave, unless of course you do so for other medical leaves.

To cope with Ohio law on pregnancy leave, businesses with less than 50 employees should create a medical leave policy that includes pregnancies and permits leaves of at least 8 weeks. If a pregnant employee needs more leave, the employer should proceed cautiously and provide for incremental additional periods of 2 or so weeks. By operating in this manner, hopefully a balance between the rights of the employee and the remainder of the workforce will be attained.

this constitutional clause has any relevance to the workers' comp system, the Court of Appeals for Stark County agreed with the claimants' attorneys.

The Supreme Court reversed. In its analysis, the Court noted that legislative enactments are presumed to be constitutional. The Court applied what it calls the "rational basis standard" to analyze the law. That is, the Court stated that it would uphold the legislative decision if it had any rational basis, whether it agreed with it or not. In this instance, the BWC argued that it was reasonable to exclude psychological and psychiatric conditions because it is often difficult to prove the existence, as well as the cause, of such alleged injuries. Since the Court found it rational to exclude such injuries, the Court upheld the legislative exclusion.

Do workers' comp cases give you psychological stress? Give us a call! Led by Brian Brittain, an "Ohio State Bar Association Certified Specialist Workers' Compensation," our expert team is standing by.

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.

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 RBS clients and HRDU Members)

April 6, 2006 — Employee Handbook Check-up

Your employee handbook is a valuable tool for protecting your company in its employment relations matters. Like any other valuable tool, a little bit of maintenance is required now and then. This session will help you update your policies to be sure that your policies are legal and in line with the best practices for employers in 2006. What do you need? What needs to be updated? What shouldn't you have in the handbook? It will all be covered in this important session.

September 14, 2006 — Hiring the Perfect Employee

Okay, maybe we can't promise the perfect employee, but we can definitely make sure that you are doing all that the law will allow to help you find just the right employee. We'll cover all the aspects of hiring from developing your applicant pool, to screening applicants, interviewing and the post-offer/pre-hire process.

December 7, 2006 — 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.

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.

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ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC also offers apprenticeship and training for a variety of crafts.
Courses offered for 2006 include the following:

Fire Alarm Basics

January 28 and February 4,
8:00 a.m. to 12:00 noon

Fire Alarm State Test

February 22, beginning at 5:30 p.m.

Drug-free Workplace

March 22 between 5:00 and 6:00 p.m.

CFC Recovery

February 11 at 8:00 a.m. to 5:00 p.m.
March 2 and March 9 at 6:00 to 10:00 p.m.
in Perrysburg

CFC Recovery Test

February 13 in Cleveland
March 16 in Perrysburg at 6:00 to 10:00 p.m.

10-Hour Electrical Code

January 28 in Perrysburg
February 18 in Cleveland between
7:00 a.m. and 5:30 p.m.

Brazing

February, dates to be determined,
in Cleveland

Pipe-Conduit Bending

February, dates to be determined,
in Cleveland

Ohio Contractor Test Preparation

March 3 and 4 in Perrysburg,
between 8:00 a.m. and 4:00 p.m.

Motor Controls

March 1, 8, 15, 22, and 29 in Cleveland
between 5:30 and 9:30 p.m.

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!

SAVE THESE DATES!

March 13 through the 19, ABC National Convention in Las Vegas, Nevada.

February 23, April 27, June 29 and July 27 – networking events, details to follow.