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**EMPLOYMENT: SMOKE-FREE WORKPLACE ACT REGULATIONS ISSUED**

By Evelyn P. Schonberg

In the first quarter RBS newsletter, we described the new Smoke-Free Workplace Act that was enacted by the citizens of Ohio and went into effect on December 7, 2006. Briefly stated, the law:

1. Bans smoking in public places and places of employment, including at each entrance. "Place of employment" includes vehicles used for business purposes.
2. Requires posting of "no smoking" signs in public places and places of employment. Appropriate signs can be downloaded at [www.odh.ohio.gov](http://www.odh.ohio.gov).
3. Requires removal of ashtrays and receptacles from areas where smoking is banned.
4. Requires an employer to take reasonable steps to prevent smoke from entering prohibited areas, including asking people to stop smoking in those areas.
5. Prohibits retaliation against anyone for exercising any right under the new laws.
6. Places significant responsibilities on employers and proprietors to ensure that the smoke-free law is followed by all individuals and employees.

Since its enactment, there has been confusion as to whether or not the new law was really in place and whether or not it could be ignored. The confusion was

the result of the absence of regulations describing the enforcement mechanisms.

On March 21, the Ohio Department of Health (ODOH) filed the regulations which took effect on May 3. The regulations designate local boards of health as the main enforcer of the law. The only way to initiate enforcement is by filing a complaint, which can be e-mailed, phoned or mailed. Only those complaints that appear to have merit and are made in good faith will be accepted and acted upon.

Once a complaint is accepted, a copy of it (along with a formal notice of violation from ODOH) will be provided to the offending party. Within 30 days from receipt of the notice, the offending party must submit a written statement responding to the allegations in the complaint. Upon receipt of the written statement, an investigation will commence.

If the investigation reveals that a violation has occurred and that the violator has no other violations in the past two years, the ODOH will issue a warning letter. However, if the violator has had a violation in the past two years, a proposed finding of a violation and a proposed fine will be issued. The alleged violator has the right to seek an administrative review of the decision and may appeal that into court.

The rules establish the following fine schedule:

*continued on page 4*

# WORKERS' COMPENSATION: EMPLOYEE OR INDEPENDENT CONTRACTOR?

By Anthony A. Baucio

Consider this scenario: Acme Builders is constructing a beautiful home for new Browns quarterback Brady Quinn. Acme contracts with former Browns quarterback (and first round draft pick) Tim Couch, out of work and quite bored, to hang drywall at the worksite. Tim verbally agrees with Acme that he is an independent contractor and therefore acknowledges that Acme will not provide him with workers' compensation coverage. A few days into the job, Tim sustains a serious workplace injury. Although Tim's injury itself is not surprising, Tim's actions post-injury are surprising. Despite his verbal agreement with Acme, Tim decides to file a workers' compensation claim. Acme contests the same under the assumption that Tim (as an independent contractor and not an employee of Acme) is simply not entitled to workers' compensation benefits through Acme.

Whether or not Tim will receive workers' compensation benefits for his injury will initially turn on his classification as an employee of Acme or an independent contractor. As a general rule, independent contractors are not considered employees for workers' compensation purposes. If Tim is considered an independent contractor (and therefore not an employee of Acme), he will be unable to receive workers' compensation benefits through Acme. However, if Tim is considered an employee of Acme, the question will then proceed to whether or not there is a compensable claim. Acme would also have to prepare for an inquiry by the Ohio Bureau of Worker's Compensation as to other similarly situated individuals who have contracted with Acme, and past and future premiums Acme may owe the Bureau. So clearly, Tim's claim could have a significant impact on Acme!

So, how will the Industrial Commission determine if Tim is an employee of Acme or an independent contractor? Although it seems fairly straightforward, it unfortunately is not.

The Ohio Workers' Compensation Act sets forth a very detailed definition as to who specifically constitutes an "employee" for workers' compensation purposes. Moreover, the Act provides that persons who perform labor or provide services pursuant to a construction contract will be considered an employee if specific criteria apply. Twenty specific criteria are listed and ten must apply for an individual to be considered an employee.

Additionally, Ohio courts have consistently stated that when determining whether an individual is an employee or an independent contractor, the key factual determination is "who had the right to control the manner or means of the individual's work." This is commonly called the "right to control" test and it basically states that an employer-employee relationship exists when an employer reserves the right to control the manner and means of doing the work. Conversely, if the manner and means of doing the work is left to one who is responsible to the employer only for the result, an independent contractor relationship is created. The Supreme Court of Ohio has held that when determining "who has control," the factors to be considered include (but are not limited to), who controls the details and quality of the work, who controls the hours and days worked, who selects the materials, tools and personnel used, who selects the routes traveled, the length of employment, the type of business, the method of payment and any pertinent written or oral agreements.

As you can see, determining whether or not Tim is an employee of Acme or an independent contractor requires a fairly

detailed analysis. With more facts, it would be possible for us to analyze this situation with the numerous criteria outlined above and in the Ohio Revised Code. This would give us a good idea as to how the Industrial Commission of Ohio would rule in this matter.

Luckily, Acme's predicament is a purely fictional one. However, many Ohio employers are going to have a similar situation arise at one point or another. From a practical standpoint, remember that oral or written agreements between parties will not be the ultimate authority in a determination concerning whether or not an individual is an employee, but only one factor reviewed in light of many others. As such, it is always wise to procure an agreement, but do not hope to rely solely on the same. Creating a working relationship with a focus upon the criteria noted above will ensure that an independent contractor relationship exists.

*Does the above situation sound familiar? Do you question whether or not your business has entered into an employer-employee relationship for purposes of workers' compensation? Do you have specific questions as to the criteria outlined in the Ohio Revised Code? If so, do not hesitate to contact Tony or any of the workers' compensation attorneys at RBS to discuss the same.*

## WORKERS' COMPENSATION: COVERAGE ISSUES FOR EMPLOYEES WHO WORK AT HOME

By Nicole H. Farley

A recent decision by the Ohio Eighth District Court of Appeals involved an employee who performed a portion of her work at her home and commuted to a main office to spend a portion of the week. This decision is relevant for employers who allow their employees to work, in part, from home.

In the case before the Eighth District, the claimant was found not to be entitled to workers' compensation benefits as a result of an automobile accident. The claimant was employed as an office manager for an auto parts company. As manager, the claimant's duties included, but were not limited to, accounts receivable, accounts payable, recordkeeping, advertising, promotions, mailing fliers and general office work. The claimant performed some of her job duties at home on a weekly basis and others at the main office.

On the date of injury, the claimant, pursuant to her job duties, completed labeling and stuffing approximately 300 promotional fliers at her home. After dropping off her child at school, she mailed the fliers at a nearby post office. She then drove to the main office. The claimant was involved in a motor vehicle accident en route to the office.

The claimant filed a claim with the Bureau of Workers' Compensation, which tentatively denied her request. A Staff Hearing Officer of the Industrial Commission found that the claimant was injured during her normal commute to work and therefore was not entitled to workers' compensation benefits. The claimant appealed the decision, and the matter came before the Eighth District.

The court first addressed whether the claimant performed substantial employment duties at her home or whether the claimant commenced her

substantial employment duties only after arriving at the main office. A general rule, known as the "coming-and-going rule," holds that an employee who has a "fixed" place of employment is not entitled to workers' compensation benefits when injured traveling to or from her place of employment. The claimant argued that the "coming-and-going" rule did not apply because she performed substantial job duties at her home and therefore did not have one "fixed" place of employment. The court disagreed with the claimant and found that the claimant failed to establish that she performed substantial job duties at her home. As such, the claimant was not entitled to benefits stemming from the accident that occurred en route to her "fixed" place of employment, the main office.

Second, the court addressed whether or not the "totality of the circumstances" exception to the coming and going rule applied. This exception involves a multiple-factor test to determine whether or not a sufficient causal connection exists between the claimant's employment and the injury. The court found that the facts of this claim failed the test and therefore did not support compensation.

Last but not least, the court considered the "special errand and/or special mission" exception to the coming-and-going rule. Under the law, in order for the special errand and/or special mission exception to apply, the mission must be a major factor in the journey (not incidental) and the mission must be a substantial one. The court found that the claimant's mailing of the fliers was merely incidental to her dropping off her daughter at school. The court also found that the claimant's mailing of fliers was not a major factor in the claimant's journey.

This decision is an important one for employers who are allowing their employees to perform a portion of their work from home, but also requiring that they run work-related errands in their automobile or commute to a main office for a portion of the week. As evidenced by this decision, a great deal of emphasis will be placed on the nature of the work an employee actually performs at home. Specifically, courts will look at whether or not the work that is performed while at home is substantial in light of the employee's prescribed work duties.

*Do you have an employee who works, in part, from home? If so, it is important to be cognizant of the workers' compensation risks associated with employing such a person! Please contact Nikki or any of the workers' compensation attorneys at RBS to discuss this matter or any other workers' compensation issue on your mind.*

## EMPLOYMENT: SMOKE-FREE WORKPLACE ACT REGULATIONS ISSUED CONT'D FROM FRONT COVER

### Violations by Proprietors/ Places of Employment

1st violation	Warning letter
2nd violation	\$100
3rd violation	\$500
4th violation	\$1,000
5th or subsequent violation	\$2,500

### Violations by Individuals

1st violation	Warning letter
2nd or subsequent violation	\$100

### Violations for Retaliation

1st violation	Warning letter
2nd violation	\$1,000
3rd or subsequent violation	\$2,500

Upon a final finding of a violation, each day that a violation continues is a separate violation, subject to further fines. In addition, ODOH may double the fines imposed for intentional violations. Finally, ODOH has the discretion to reduce or waive a fine

upon consideration of several factors.

At the time this article was written, at least three lawsuits are challenging the private club exemption that was written into the law. Under that exemption, all private clubs that have no employees are exempted from the smoking ban. The regulations further explained that “[f]or purposes of this exemption, the term ‘employees’ does not include members of the private club who provide services to the private club.”

Not surprisingly, bar and restaurant groups are claiming that the exemption and the regulations create an unfair competitive advantage to private clubs. The American Cancer Society argues in its suit that the regulations leave an entire class of employees unprotected by the no-smoking law.

On April 30, a judge held that the

American Cancer Society had shown a substantial likelihood of success on the merits and issued a temporary restraining order that forbids members of private clubs, such as the Veterans of Foreign Wars or Elks Lodge, to continue smoking. The order was scheduled for a further hearing on May 14.

Now that the no-smoking law is being enforced, all employers and owners of property must ensure that the no-smoking signs are posted at all entrances into a building, all ashtrays are removed from areas in which smoking is banned, and that a no-smoking policy be included in all employee manuals.

*Please do not hesitate to contact Lynn Schonberg with any questions concerning the Smoke-Free Workplace Act Regulations.*

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

6000 Freedom Square Drive  
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upcoming

[ events ]

## BREAKFAST BRIEFINGS

### “DEALING WITH THE INJURED EMPLOYEE”

We continue to receive voluminous calls from our clients on the never-ending issues involved in dealing with the employee who is injured at work. This session will walk you through the various landmines that exist in this area, beginning with the workers' compensation claim, whether or not to implement wage continuation, the type of leave of absence to grant, COBRA issues, light duty, reasonable accommodation, and if and when the claimant can be terminated.

Presented by Lynn Schonberg & Carol Strassman, in conjunction with Nick Phillips of HR Department Unlimited.

Date: June 21

### “2007 AND BEYOND: ANNUAL LEGAL UPDATE”

This annual year-end session will review what happened in 2007 and what to look forward to in 2008 and beyond.

Presented by the attorneys of Ross, Brittain & Schonberg.

**Date:** December 6

All breakfast briefings are held from 8:30 AM to 10:30 AM at 6000 Freedom Square Drive, Independence, in the ground floor amphitheatre.

**Registration:** Please contact Melody at (216) 447-1551 for information or register online at [www.rbslaw.com](http://www.rbslaw.com).

(No cost to RBS clients and HRDU members).

## RBS ATTORNEY SPEAKING ENGAGEMENTS

**October 23** – Lynn Schonberg will be speaking on the topic of advanced employment law for the National Business Institute in Cleveland. For more information, please contact Melody at 216.447.1551.

## ASSOCIATED BUILDERS & CONTRACTORS, NORTHERN OHIO CHAPTER

### **32 Hour Medical Gas Training with NITC Certification**

May 29 through June 1 from 8:00 AM to 5:00 PM

Cost is \$750 per person for ABC members.

### **Motor Controls Course**

June 5, 12, 19, 26 and 28 from 5:30 PM to 9:30 PM

Cost is \$150 per person for ABC members.

### **Business to Business Seminar**

June 27 from 12:00 PM to 5:00 PM with networking to follow.

Cost is only \$25 per person for ABC members.

### **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.

Contact Jennifer at ABC (440-717-0389) for more details.

You can also visit [www.nocabc.com](http://www.nocabc.com) for updates on events and new course offerings.

### **SAFETY COURSES ARE AVAILABLE ONLINE THROUGH ABC!**

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

# 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 Brian Brittain at (216) 447-1551 for additional information and membership details.

## FIRM NEWS

We are pleased to announce the addition of two new attorneys to the firm!

**Carol Strassman** is an associate who brings over 25 years of experience in Ohio workers' compensation law. Her practice focuses primarily on representing both state-funded and self-insured employers in administrative litigation before all levels of the Industrial Commission. Carol is an Ohio State Bar Association Certified Specialist of Ohio Workers' Compensation Law. She has a successful track record in defending employers throughout Ohio, and has developed a reputation of integrity among both opposing counsel and hearing officers. She excels in conducting medical legal research analysis.

Carol is active in and has served in various positions with the Cleveland Bar Association, including Chair of the Workers' Compensation Section. She also has been a featured speaker on workers' compensation issues for both the Cleveland Bar and Ohio State Bar Associations. Prior to joining the firm, Carol was in private practice with prominent Cleveland law firms, concentrating on the area of workers' compensation.

Carol graduated from Case Western Reserve University School of Law. She completed her undergraduate degree at Miami University.

**Ryan Neumeyer** is an associate who focuses his practice on the representation of management in employment matters. Prior to joining the firm, Ryan was an appellate attorney for the Office of the State Appellate Defender in Chicago, Illinois. He was previously an associate in the employment section at Ross, Brittain and Schonberg in 2003-04. Ryan graduated cum laude from Cleveland-Marshall College of Law and completed his undergraduate degree at Mount Union College.