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EMPLOYMENT: WHEN JOHNNY COMES MARCHING HOME: THE RIGHTS OF EMPLOYEE VETERANS UNDER USERRA

By Ryan T. Neumeyer

We are all concerned about our troops who are fighting overseas and we sincerely hope that they all make it home safely. Many of us personally know at least one soldier that has shipped out to perform their duty for our country. Some of you may even have an employee who was obligated into service. If that is the case, you should be cognizant of a service person's rights under the Uniformed Service Employment and Reemployment Rights Act (USERRA).

USERRA provides that "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled" to reemployment. To ultimately be eligible for reemployment, a service person must comply with certain requirements. For example, a service person must give their employer notice of their service requirements before deploying and must submit certain documentation upon return. Although there are more requirements than just these two examples, most returning service persons will meet the requirements for reemployment.

When a service person comes home and returns to work, USERRA provides that the service person must be returned to a position that they would have been in had their employment not been interrupted by military service. The position must have like seniority, status, pay and duties of which the returning employee is qualified to perform. Courts have consistently interpreted USERRA

liberally for the benefit of "those who left private life to serve their country." Thus, a reduction in duties or diminished role upon the service person's return to work will likely violate USERRA.

Further, once a service person is reemployed, under most circumstances an employer may not terminate that person for *one year* unless the company has *just cause* to do so. Just cause under USERRA has been defined by various courts in a number of different ways. However, it generally means a reasonable cause which is not arbitrary or taken with a purpose to avoid the statute. Accordingly, the returning service person is no longer an at-will employee under the law.

Finally, USERRA provides that a service person or former service person may not be discriminated against on the basis that he or she served in the armed forces. While this portion of the act may sound like an absurd vestige from another time in our country's history, an employer must still be aware of the protections afforded to all who have served in the military, and not just those who have recently served.

Do you employ veterans and/or persons in the reserves? If so, it is important to know both service persons' reinstatement rights and your own rights under USERRA. Please do not hesitate to contact Lynn Schonberg or Ryan Neumeyer with any questions concerning USERRA. ■

WORKERS' COMPENSATION: A NEW STANDARD FOR THE AGGRAVATION OF A PRE-EXISTING CONDITION: IS THE AGGRAVATION SUBSTANTIAL?

By Anthony A. Baucio

As an employer, you take your employees as you find them. You assume the risk that your new employee may have a pre-existing medical condition that could be aggravated by an unfortunate work-related injury. For instance, you'll rarely have any idea that your otherwise healthy new employee has a moderate age-related arthritic condition throughout the discs of his lumbar spine. After that healthy new employee sustains a lumbar sprain on the job, you'll eventually wonder why it is taking him so long to recover from the injury. A lumbar MRI will soon reveal the hidden pre-existing arthritic condition. Your employee's treating physician will next opine that the work-related injury aggravated this pre-existing condition. Before you know it, your now-disabled employee will be requesting an additional allowance, for aggravation of pre-existing degenerative disc disease of the lumbar spine. Now what?

For all injuries prior to October 11, 2006, Ohio law favors your employee, as many employers unfortunately know from experience. Your employee's aggravation of

a pre-existing condition does not have to be "substantial" to be compensable. This means that your employee's subjective complaints are enough to prove an aggravation occurred. Your employee is not required to provide any objective diagnostic or clinical findings which support a worsening of the pre-existing condition. Furthermore, employers will continue to be held responsible for the work-related aggravation, even after it has subsided and the pre-existing condition returns to pre-injury status.

Senate Bill 7 recently revised the Ohio Revised Code in favor of employers. Effective October 11, 2006, aggravations now must be substantial to be compensable. A substantial aggravation must be documented by objective diagnostic findings, objective clinical findings or objective test results. A claimant's subjective complaints may still be considered evidence of a substantial aggravation, but said complaints, without objective findings, are alone insufficient to prove a substantial aggravation. Simply put, this major change in the law will make it much more difficult for an employee to claim aggravation of a pre-existing condition.

Additionally, the Ohio Revised Code now provides that even if a substantial aggravation is proven, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury. Again, this is another major change in the law and it will be interesting to see how this change is handled in hearings before the Industrial Commission.

Last but not least, the Industrial Commission recently issued a new memorandum under its policy statements and guidelines. Hearing officers must ensure that an order is clear as to which standard of aggravation is being applied in a claim. Furthermore, if a hearing officer allows a claim for a substantial aggravation, the order must specifically cite the objective evidence being relied upon.

Aggravated by an aggravation issue? Please do not hesitate to contact Tony or any of the workers' compensation attorneys at RBS to discuss the applicable standard in your specific situation. ■

LABOR: NLRB DEFINES WHICH EMPLOYEES ARE "SUPERVISORS" UNDER THE NATIONAL LABOR RELATIONS ACT

By Nick A. Nykulak

The National Labor Relations board (NLRB) recently issued decisions in three cases that further define which employees can be characterized as "supervisors" for the purposes of Section 2(11) of the National Labor Relations Act (NLRA). So why is being characterized as a "supervisor" important under the NLRA? Because unlike your other employees, employees characterized as supervisors *do not* have the right to join labor unions under the NLRA, nor can they actively participate or vote in the union's organizing campaign.

Section 2(11) of the NLRA defines a "supervisor" as any individual having the authority, in the interest of an employer, to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward or

discipline other employees, or *responsibility to direct* them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires use of *independent judgment*.

Pursuant to this definition, individuals are statutory supervisors if (1) they possess the authority to engage in any one of the twelve supervisory functions listed above or can effectively recommend any one of the twelve functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held "in the interest of the employer." The three recent NLRB decisions clarified and further defined the terms "assign," "responsibility

to direct," and "independent judgment" as those terms are used under the NLRA.

The NLRB held that a supervisor met the definition of "assign" when he or she had the independent authority to designate an employee to a place of work (such as a location, department or wing within the company), appoint an employee to a specific working time (such as a shift or to assign overtime), or had the independent authority to assign overall duties or tasks to an employee to complete. In considering a supervisor's ability to assign duties and tasks to an employee, the NLRB cautioned that a supervisor who only had the authority to choose the order in which the employee would perform those duties or tasks would not be indicative of exercising authority to "assign."

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EMPLOYMENT: AN EMPLOYER'S NEW OBLIGATION FOR DOCUMENT RETENTION AND PRESERVATION

By Ryan T. Neumeyer

Employees today create, store and transmit hundreds of documents each day through their desktop computers, laptops, PDA's, cellular phones and memory sticks. What happens when your company finds itself in a lawsuit where various electronic documents are requested by an opposing party during the "discovery" process? For those of you out there lucky enough to never have been subjected to a past lawsuit, "discovery" is the period of time, after the onset of a lawsuit and before trial, where parties to a lawsuit will request and attempt to "discover" as much crucial information from the opposing party as possible. When it comes to discoverable documents, a person generally thinks of huge files filled with thousands of paper documents. However, electronic documents are much more prevalent in 2007 and federal law is catching up to address "electronically stored information" or "ESI."

The Federal Rules of Civil Procedure changed at the end of 2006 to include new provisions, which require a party in litigation to discuss the preservation of ESI at the initial pretrial hearing. These rule changes also significantly increase the degree of knowledge that attorneys must have regarding their client's potentially discoverable ESI, computer systems and record retention policy prior to the initial discovery conference. Accordingly, the new rules impact the obligations of an employer to both retain and be able to retrieve all relevant ESI during discovery. Moreover, given that Ohio's rules of civil procedure mirror the federal rules, it is probable that some courts may follow some of the federal rules relating to e-discovery and that Ohio may even someday adopt them.

The new rules place unique burdens on employers during litigation due to the one-sided nature of discovery in employment litigation. In employment litigation, the majority of discoverable information is usually possessed by the employer. While personnel files, time records and other important paper communications or documents are probably maintained by most employers, the underlying documentation

for disciplinary notices or performance evaluations may be found in e-mails, on a supervisor's PDA, on computer-generated calendar entries maintained by the employer or even on an employee's own workplace computer. Similarly, electronic time-clock and electronic key-card data could be discoverable in a wide variety of employment matters.

Employers are responsible for maintaining all relevant data after they know or should have known that litigation is pending. The penalties for failing to do so can be very severe, including, but not limited to, monetary sanctions and having a plaintiff receive an evidentiary inference at trial.

Although it may seem like the burdens of e-discovery are huge, there a number of steps an employer may take to protect itself prior to the anticipation or onset of litigation. The new federal rules provide a "safe harbor" for the good faith destruction of electronically stored information or paper documents in the regular course of business. The "safe harbor rule" applies if the employer destroyed documents pursuant to a document retention program before it anticipated litigation. Accordingly, employers should adopt a written records retention and destruction schedule in compliance with applicable state and federal law. Doing so will permit employers to take advantage of the safe harbor rule in appropriate circumstances. In conjunction with the document retention program, an employer should also have a litigation-hold policy, which is a systematic plan to stop the destruction of discoverable material once the employer anticipates litigation.

In summary, every employer should be aware of the new federal rules and the issues employers now face throughout the discovery process. To ensure compliance, employers should consider all of their sources of electronically stored information and the best methods of records management for their organization.

Please do not hesitate to contact Lynn Schonberg or Ryan Neumeyer with any and all questions regarding e-discovery

and/or document retention and preservation. Lynn and Ryan would be happy to assist your company in developing a document retention program and a litigation-hold policy. ■

LABOR: NLRB DEFINES WHICH EMPLOYEES ARE "SUPERVISORS"...

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Next, the NLRB clarified what it means to have a "responsibility to direct." If a person on the shop floor has "men under him" and that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that his or her direction of other employees is both "responsible" and carried out with "independent judgment." For the direction to be "responsible," the person directing and performing the oversight of the employee must be held accountable for the overall performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. Therefore, to establish accountability for purposes of "responsible" direction, it must be shown that the employer delegated to the putative supervisor not only the authority to direct the work, but also the authority to take corrective or disciplinary action with regard to the employee, if needed.

Last, the NLRB determined that in order to exercise "independent judgment," an individual must at a minimum act, or effectively recommend action, free from the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by a detailed set of instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the

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LABOR: NLRB DEFINES WHICH EMPLOYEES ARE “SUPERVISORS” UNDER THE NATIONAL LABOR RELATIONS ACT

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policies allow for discretionary choices. It is ultimately the degree of discretion involved in making the decision, not the kind of discretion exercised (whether professional, technical, or otherwise) that determines the existence of “independent judgment” under Section 2(11).

For example, the authority to effect an assignment must be independent, must involve a judgment, and the judgment must involve a degree of discretion that rises above “routine or clerical.” If there is only one obvious and self-evident choice when a putative supervisor is faced with a particular set of facts, or if the assignment is made solely on the basis of equalizing workloads according to company policy and procedure, then the assignment is “routine or clerical” in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning

and comparing data. Essentially, a person who has the independent authority to make two different decisions when faced with a particular set of facts regarding employee hiring, transfers, suspensions, lay offs, recalls, promotions, discharges, assignments, rewards, or discipline will be considered a supervisor under the NLRA; in other words, choosing to discipline an employee versus terminating him or her for a violation of company policy.

Classifying certain employees as supervisors can be the difference between winning and losing an organizing campaign. Although the factors discussed above provide guidance and are informative, ultimately a Board Agent will determine supervisory status for each employee on a case-by-case basis. For more information regarding whether

some of your employees would be considered “supervisors” under Section 2(11) of the NLRA, please feel free to contact Alan Ross or Nick Nykulak. It is never too early to develop an effective legal strategy to address potential organization and collective bargaining issues. ■

ROSS,
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upcoming

[events]

BREAKFAST BRIEFINGS

“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

8:30 AM to 10:30 AM in the Corporate Plaza I Amphitheatre, 6450 Rockside Woods Blvd. South, Independence.

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).

RBS ATTORNEY SPEAKING ENGAGEMENTS

October 13 – Lynn Schonberg will be speaking on the topic of “Counseling the Small Business Client” at a seminar in Cleveland for Cleveland-Marshall College of Law’s continuing legal education program

October 23 – Lynn Schonberg will be speaking on the topic of advanced employment law at a seminar in Cleveland for the National Business Institute

December 7 – Carol Strassman will be the Chair of the Cleveland Bar Association Annual Advanced Workers’ Compensation Medical-Legal Seminar in Cleveland for the Cleveland Bar Association

December 13 – Lynn Schonberg will be speaking on the topic of “Payroll Fundamentals: Basic Principles to Help You Manage the Payroll Process” at a seminar in Akron for Lorman Education Services

January 15 – Lynn Schonberg will be presenting an “Employment Law Update” at a seminar in Cleveland for Sterling Education Services

For more information, please contact Melody at [216] 447-1551.

ASSOCIATED BUILDERS & CONTRACTORS, INC., NORTHERN OHIO CHAPTER

Education Day - Business to Business

Four one-hour seminars on various topics to help your construction business

All seminars held on September 6 from 12:00 PM to 5:00 PM

Cost is only \$25 per person for ABC members • Cost includes all seminars and lunch

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

Apprenticeship Classes

Classes in Electrical, Plumbing, HVAC, Carpentry, Painting and more

Classes begin the week of September 10 • Classes are held one night a week from 6:00 PM to 10:00 PM

Cost is \$1,275 per person for ABC members and \$1,775 for non-members

Contact Sandi at ABC (440-717-0389) for more details and the class schedule

Project Supervisor or Project Manager Courses

Courses will cover quality control, planning and scheduling, human relations, problem solving, construction planning, estimating and more

Classes begin the week of September 24 • Classes are held one night a week from 6:00 PM to 10:00 PM

Cost is \$800 per person for ABC members/students and \$1,200 for non-members

Limited enrollment! Call and pre-register or contact Jennifer (440-717-0389) for more details.

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.

You can also visit 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.

EMOTIONAL INTELLIGENCE: THE KEY TO ORGANIZATIONAL EFFECTIVENESS

By: Michael Duchon and Nicholas Phillips of HR Department Unlimited

There was a time not long ago when we were judged by how smart we were and the type of technical expertise we brought to the job. Today, while these attributes are still important, we are judged by a different yardstick. More than cognitive intelligence or technical expertise, organizations need leaders with the necessary "emotional intelligence" to thrive and survive.

According to author Daniel Goleman, emotional intelligence is the ability to sense, understand and effectively apply the power and acumen of emotions as a source of human energy, information, connection and influence. In simple terms, it is the capacity to recognize and manage your feelings and the feelings of others so that they are expressed appropriately and effectively, enabling people to work together smoothly toward common goals. Our level of emotional intelligence is not fixed genetically, nor does it just develop in early childhood. Unlike one's intelligence quotient, which changes little throughout one's life, emotional intelligence is largely learned and can be developed and honed over time.

Today's competitive workforce puts a premium on emotional intelligence, as it influences development of talent, teamwork, employee commitment, productivity, efficiency, sales, revenues, quality of service and customer loyalty. Furthermore, emotional intelligence is key to an organization's competitive advantage. Implementing an emotionally intelligent culture is a journey that will translate into higher development of human capital, increased productivity and organizational profitability.

Effective emotional intelligence training programs should be comprehensive and seek to develop those who have direct reports, who have influence over others within the organization, or who have a high level of interaction with customers.

Would you like more information on emotional intelligence training? Please contact Michael Duchon or Nicholas Phillips at HR Department Unlimited at [216] 520-1010. You can also obtain additional information at www.HRDUonline.com.