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NLRB Says Two's Company at Disciplinary Interviews

By Dean E. Westman

In one of its most significant proclamations of policy, the National Labor Relations Board (NLRB) disregarded 15 years of precedent and granted non-union employees the right to have a representative present during investigatory interviews.

The NLRB's July 10, 2000 decision in *Epilepsy Foundation of Northeast Ohio* involved a Cleveland employer and two former employees who were terminated in early 1996. Because the NLRB applied its new policy retroactively, the employer has been ordered to offer reinstatement to both employees and pay them for any lost wages and benefits, plus interest, for the 4-1/2 years it took for the case to be processed and decided by the Board. Two of the five NLRB members refused to go along with the decision. Even organized labor has cause to dislike the Board's decision.

The employees of the Epilepsy Foundation were not represented by a union. Two employees, Arnis Borgs and Ashraful Hasan, wrote a memo to their supervisor in January 1996 stating that his supervision of them no longer was required. They copied the memo to the agency's executive director as well. Less than two weeks later, the two employees sent a second memo to the executive director criticizing their supervisor and mentioning several examples of incidents where they believed their supervisor had acted inappropriately.

In response, the executive director instructed Borgs to meet with her and the supervisor. Borgs asked if he could meet alone with the executive director. She declined. Borgs then asked if his fellow employee, Hasan, could be present at the meeting, and this request also was denied.

Borgs continued to object to meeting alone with his supervisor and the Executive Director and was dismissed for the rest of the day. The next day, Borgs was fired for gross insubordination based upon his refusal to meet the previous day.

Hasan agreed to meet alone with his supervisor and the Executive Director and was issued a written warning for the insubordinate memo he had co-authored. He was advised that any future acts of misconduct or insubordination would result in his immediate termination.

A few weeks later, Hasan refused to sign off on his performance evaluation and then refused to sign off on written personal performance goals prepared by his supervisor. The Executive Director then terminated Hasan, citing not only his refusal to sign these documents, but also his conduct over a period of nine months, including refusal to accept supervision and various confrontations with other staff members.

The two pursued charges of unfair labor practice. Nearly two years after these events, an NLRB Administrative Law Judge (ALJ) ruled that neither termination was unlawful. He found that Borgs, a non-union employee, had no legal right to condition his attendance at the meeting on the presence of his fellow employee. Similarly, Hasan's written warning and subsequent termination were upheld by the ALJ.

> ***The National Labor Relations Board (NLRB) disregarded 15 years of precedent and granted non-union employees the right to have a representative present during investigatory interviews.***

Hasan and Borgs' first memo was viewed as an attempt to get rid of their supervisor. The second memo also was deemed to be unprotected activity. Therefore, the written warning was deemed lawful. The ALJ further found that Hasan had been involved in several other incidents of unprotected activity, including a demand for preferential clerical assistance, an incident in which he was accused of insensitivity toward the parents of an agency client, and his refusal to sign his written performance objectives. The ALJ found no evidence that the termination of Hasan was motivated in any way by Hasan's involvement in protected activity.

The ALJ's decision followed a long history of similar cases with identical outcomes. However, when the ALJ's decision was appealed to the NLRB, the Board made a complete about-face – not only in the outcome of the case, but also

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in longstanding labor policy. Although graciously noting that the ALJ accurately applied the relevant NLRB precedent in rendering his decision, the Board overruled that precedent and declared both terminations unlawful.

Unionized employees have had the right to have a union representative present at investigatory interviews since 1975, when the U.S. Supreme Court decided the case of *NLRB v. J. Weingarten, Inc.* The right to such representation came to be known as the "Weingarten right," and was limited to investigatory interviews where unionized employees reasonably believed that the interview might result in their being disciplined.

In those situations and upon the employee's request for a union representative the employer cannot require the employee to meet without the union representative present. The failure to observe an employee's Weingarten right constitutes a violation of the National Labor Relations Act and makes any resulting discipline of the employee unlawful.

In 1982, the board issued a decision extending Weingarten rights to non-unionized employees, but reversed the decision only three years later when it concluded that Weingarten principles do not apply absent a unionized workforce.

Now, 15 years later, the Board has tossed aside its prior interpretation, and non-union employers must grapple with a new rule for their disciplinary process. What does this mean, as a practical matter? And why should this decision be disliked by nearly everyone?

From the non-union employer's standpoint, it means that non-supervisory employees must be allowed to have a "representative" present during an investigatory interview of the employee where he or she reasonably believes discipline may result.

While this is not a monumental burden, it likely will require the rewriting of your disciplinary procedures and retraining for your supervisors and managers. The NLRB will assume that employers know about this change in the law and therefore require immediate implementation of the new directives.

Alternatively, non-union employers may choose not to conduct an investigatory interview before imposing discipline. This undoubtedly will cause less-than-exhaustive investigations of employee misconduct and perhaps some unwarranted discipline from time to time, which is why this NLRB decision is no friend of the non-union employee.

Organized labor may find the decision unpopular because the NLRB now has granted an important right to non-union employees that for at least the last 15 years has been extended only to unionized employees. Non-union employees now have the same right – without having to pay union dues – courtesy of the NLRB.

As noted by dissenting Board Member Peter J. Hurtgen, this decision places a potentially unknown "trip-wire" for unwary employers: "Employers in a nonunion setting will generally be completely unaware of this right to representation that the Board is imposing on them. The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds."

Non-union employers are well advised to take immediate steps to avoid this potential trap by incorporating this right into their disciplinary process and providing appropriate training for all managers.

Supreme Court Heightens Burden for Employers in Discrimination Lawsuits

By Keith L. Pryatel

A unanimous U.S. Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* eased the burden that employees must shoulder to get their employment discrimination cases heard by a jury. The decision also underscores to employers that a straightforward reason is the best one to give when explaining an employment action.

Pleased with the Supreme Court's ruling, the plaintiff's bar predicts it will have a "psychologically important" impact on the resolve of employment lawyers to take and file borderline cases and to demand more economic value in settlement.

Roger Reeves was a 57-year-old supervisor at Sanderson Plumbing and had accrued 40 years of seniority with the company before he was discharged. The company said he failed to accurately record the work hours of his subordinates.

In his age discrimination lawsuit, however, Reeves showed:

- he accurately completed time and payroll records, and that it was his manager who was responsible to ensure the accuracy of such records;
- that his termination announcement hung on the failure to report one employee's absence, but that absence occurred when Reeves was off work in the hospital;
- that one of his supervisors – an individual involved in the discharge decision – had commented that Reeves "was so old he must have come over on the Mayflower."

A federal jury in Mississippi awarded Reeves $35,000 in compensatory damages and $70,000 in statutory liquidated damages after finding that his release was age-motivated. On appeal, however, the Fifth Circuit Court of Appeals threw out Reeves' favorable verdict, finding that while he had presented sufficient evidence to demonstrate that Sanderson Plumbing's rationale for his discharge was false or pretextual, he had not sufficiently carried his burden of demonstrating age bias.

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Taking the case on discretionary review, the U.S. Supreme Court reinstated Reeves' favorable verdict. The high court said that once a discrimination plaintiff sufficiently demonstrates that an employer's articulated business reason is false or otherwise suspect, then it is the jury's role to determine whether discrimination in fact occurred. The Supreme Court's decision expressly rejected the positions of several federal courts of appeal that had decided that mere "falsity" was not enough, instead requiring discrimination plaintiffs to also come forward with additional credible evidence that their age, race, or other protected characteristic actually played a role in their release.

Reeves appears to be rejuvenating a hungry plaintiff's bar. The National Employment Rights Institute has predicted that "Reeves will strengthen the resolve of lawyers who have been reluctant to take even good cases" for fear that the matters would not survive summary dismissal by a court. Whether that proves to be true remains to be seen, but Reeves does have an immediate, critical impact. Employers need to carefully monitor statements made to EEOC investigators about the reasons for their employment decisions because it is practically impossible to later change the story and not have the case end up in front of a jury.

The value of candor in announcing a discharge also has been elevated. Announcing that an employee has lost his job due to "restructuring," when in fact the employee was difficult to work with or had other insurmountable faults, almost guarantees that the dispute will be resolved by a jury rather than summarily disposed of by a judge.

In short, Reeves emphasizes the importance of honesty by the employer in providing reasons for a particular employment action.

Employer Medical Plans Need the "Right Stuff" to Recover Claim Payments from Participants

By Kenneth M. Haneline

When a participant in a group medical plan makes a medical claim, then recovers damages from a third party, the group plan can recover the medical benefits expenditures only if the right language is in place.

That was the verdict of the Sixth Circuit Court of Appeals in the case of *Copeland Oaks v. Haupt.* In that case, Jeffrey Haupt participated in the medical benefit plan maintained by his employer, Copeland Oaks. Haupt filed a claim with his employer's plan for medical expenses after his daughter was injured in a car accident. The negligent driver's insurance carrier paid Mr. Haupt $5,000 for medical expenses and deposited $70,000 into a trust account for his daughter.

The Copeland Oaks' plan included a "subrogation" provision, requiring a participant to recognize the plan's right to seek reimbursement when a group member recovers damages from a third party. Specifically, the plan stated that "[t]hese rights provide the plan with a priority over any funds paid by a third party to a covered person relative to the injury or sickness, including a priority over any claim for non-medical or dental charges, attorney fees, or other costs and expenses."

The Copeland Oaks plan agreed to pay $300,000 in medical expenses for Haupt's daughter, but only after the Haupts signed a subrogation agreement. The plan also required Mr. Haupt to pay the plan the $5,000 insurance settlement he received for medical expenses before the plan would pay for his daughter's medical expenses.

After receiving their insurance settlement recovery, however, the Haupts disclaimed their subrogation agreements. Copeland Oaks sued the Haupts in the U.S. District Court for the Northern District of Ohio seeking a judgment that its subrogation agreement entitled it to the settlement proceeds. Haupt filed a counterclaim seeking payment for his daughter's medical expenses.

The district court granted summary judgment in favor of the Haupts, finding that Copeland Oaks was precluded from exercising its subrogation rights because the settlement Haupt's daughter received fell far short of fully compensating her. Copeland Oaks appealed.

On appeal, the Sixth Circuit Court of Appeals sided with the Haupts, saying the plan cannot enforce its subrogation rights if the third-party settlement does not fully cover the victim's costs, unless there is a clear contractual provision to the contrary.

> ***"[t]hese rights provide the plan with a priority over any funds paid by a third party to a covered person relative to the injury or sickness, including a priority over any claim for non-medical or dental charges, attorney fees, or other costs and expenses."***

Noticeably absent from the Copeland Oaks plan is a statement that it has a priority right over all recoveries, even any partial recovery, that a participant receives.

This employer's plan could have avoided the debate if its plan documents simply stated that the plan has priority rights over all recoveries, whether they fully or partially compensate the participant for injuries. With such plan language, the employer's plan even may have had a right to recover all of the Haupt's $75,000 insurance settlement.

Supreme Court Decisions Impact Collective Bargaining for Public Employers

By James P. Wilkins

Two decisions issued in June by the Supreme Court of Ohio significantly impact the collective bargaining process for public employers in Ohio.

The Court's decision in *State ex rel. Ohio Assn. of Public School Employees/AFSCME, Local 4 v. Batavia Local School District* has far-reaching implications for public employer collective bargaining. Batavia serves as a warning that the language of a collective bargaining agreement must be explicit if a public employer wishes to somehow negate a public employee's statutory rights.

Ohio's public sector bargaining law provides that unless the collective bargaining agreement specifies otherwise, public employers and public employees are subject to all applicable state and local laws relating to wages, hours and terms and conditions of employment. In Batavia, the management rights clause in the collective bargaining agreement gave the employer the right to lay off employees. The agreement also had a layoff procedure permitting such cutbacks "due to the abolishment of positions, lack of funds or lack of work."

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The school district decided to privatize its bus transportation service, abolish those positions, and lay off existing drivers, who were represented by OAPSE. The union filed suit to prevent the layoffs. The union alleged that the layoff would violate the job protection rights afforded to nonteaching school employees by state law. The district argued the statutory provision did not apply because the contract specified a layoff procedure.

In a 4-3 decision, the Court rejected the school district's argument. It held that because the agreement "failed to specifically exclude the employees' statutory rights," and those statutory rights could be reconciled with the employer's contractual rights, the statutory rights remained applicable.

The Court's decision in Batavia makes it clear that if an employer wants a collective bargaining agreement to govern all terms and conditions of employment, then the agreement must specifically negate each statutory right that the employees otherwise enjoy.

In *State ex rel. Calvary v. Upper Arlington,* the Court ruled that even a tentative, unratified draft of a collective bargaining agreement is a public record and therefore must be disclosed upon request to any member of the public.

The City of Upper Arlington had refused a citizen's request that it provide her with a copy of a tentative agreement that the City had negotiated with the Teamsters Union. The City sought to delay disclosure to the public until the tentative agreement was presented to council for ratification.

The Supreme Court rejected the City's argument that the tentative agreement was not a public record. The Court acknowledged that Ohio's public sector bargaining law expressly exempts collective bargaining meetings from Ohio's "sunshine" laws and also precludes disclosure of minutes of those meetings. However, the Court refused to accept the City's argument that the legislature also intended to protect drafts of collective bargaining agreements from public disclosure.

Typically, the parties to a tentative agreement will refrain from commenting on details until the agreement is ratified to avoid compromising the ratification process. The Court's decision in Upper Arlington obviously thwarts such a strategy by exposing the tentative agreement to public and media scrutiny.

The Court's decision leaves unanswered such questions as whether the written proposals exchanged by parties during the bargaining process also are public records. Having stepped onto a slippery slope, the Court or the Ohio General Assembly may be revisiting this issue in the future.

Other public sector developments

The U.S. Supreme Court recently upheld the right of public employers to require employees to use accrued compensatory time at times specified by the employer. In *Christensen v. Harris County, Texas,* the Court rejected a claim by employees that the Fair Labor Standards Act gives employees the right to determine when they will use their compensatory time, subject to the limitation regarding undue disruption of workplace operations.

The outcome may be short-lived. The Court left open the possibility that the Department of Labor could issue regulations prohibiting the forced use of compensatory time. It remains to be seen whether DOL will create such regulations.

Tips for Employers in Today's Job Market

By James M. Kitchin
Director of Human Resources Consulting

With the unemployment rate at a historic low both locally and nationally, many employers are finding it increasingly difficult to recruit and retain qualified, motivated employees. In fact, a recent poll of human resource professionals found that employee recruitment and retention is currently their greatest challenge. Here are some tips that might help you meet your staffing needs:

Recruitment – The Internet is becoming an increasingly important resource in recruitment. A recent survey of human resources professionals by the Society for Human Resources Management found that 20 percent of all resumes are received through e-mail or web sites, and that percentage is expected to increase dramatically. That means employers need a strategy for tapping into the Internet to meet their recruiting needs.

Locally, one interesting – and free – tool available to members of the Akron Regional Development Board is the NationJob Network. ARDB members can post their job openings as well as a company profile on the NationJob web site. The site generates a significant number of hits from candidates using the web to conduct a job search.

Retention – Of course, the best solution to recruitment problems is to simply retain the good people you already have. A recent study links high employee turnover to a lack of employee loyalty toward their employer. Indeed, the study revealed that less than half of all employees feel strong loyalty toward their employer.

Building loyalty goes beyond providing competitive wages, a good health insurance plan, and a retirement plan. Many employees say their employers have no genuine sense of concern for their well-being, both as workers and as persons. Employers can build loyalty by showing concern for their employees.

Begin by asking employees what matters most to them. An employee opinion survey will reveal what an employer is doing right, where it needs to improve, and what most concerns employees. By opening lines of communication and being responsive to the concerns of employees, an employer is likely to improve its employee retention rate.

Studies also reveal that the average workweek for Americans is longer than it was 20 years ago. Many employers are responding to the hectic lifestyles of their employees by providing access to personal services at work, such as on-site dry cleaning and laundry pickup, catered meals, on-site child care and fitness facilities. Many of these perks do not readily lend themselves to a cost-benefit analysis, but employers are banking on them to increase productivity and employee retention.

Employers also are turning to telecommuting and increased use of flex time. Allowing employees the flexibility to telecommute on a part-time or full-time basis may help retain employees who otherwise would leave. Flex time allows an employee to establish a work schedule that fits better with his or her personal schedule and reduces the risk that an employee will quit because work conflicts with other personal commitments, such as child care.

Exit interviews also can be helpful by flagging problems such as unsatisfactory compensation or benefits, or poor supervision. If properly conducted, an exit interview may even defuse a situation that might lead to legal claims or litigation.

More than ever, employers are finding it necessary to be creative to attract and retain high-caliber employees. If you would like help in devising recruitment and retention strategies that are right for your business, contact KWW's human resources staff for more information.

Courts, EEOC Provide New Guidance on ADA and FMLA Compliance

By Lisa A. Kainec

Compliance with the *Americans With Disabilities Act (ADA)* and the *Family and Medical Leave Act (FMLA)* poses complex daily challenges to today's employers. Several recent court decisions and agency actions provide important new information for employers in their ongoing compliance efforts. Here are some highlights:

Reassignment Under the ADA.

The Sixth Circuit Court of Appeals issued a recent decision that indicates employees share some of the responsibility for identifying new positions when they are unable to perform the essential functions of a former position.

In *Burns v. Coca-Cola Enter. Inc.,* the Court said "an employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position within the company for which that employee is otherwise qualified." However, the Court did not place the entire burden of identifying an alternative job upon the employer. Rather, the employee must request reassignment to a suitable position and may request specific assistance from the employer in identifying jobs for which he or she may qualify.

The Court made it clear that the employee must do more than make only a vague request for reassignment. Indeed, such a request was all that Burns issued, despite the Company's transfer policy that obligated Burns to file a transfer request to an available position for which he was qualified. The Court acknowledged Coca-Cola could have considered Burns for more than the one job for which he filed a transfer request, but concluded that the Company did not violate the ADA by refusing to do so.

Employers therefore must be careful to balance their accommodation efforts between the employee's identification of available positions and the requirements of their internal transfer or application procedures.

ADA and Permanent Transfer to Rotating Position.

In *Hoskins v. Oakland County Sheriff's Dept.,* the Sixth Circuit said employers are not obligated to reassign a disabled employee on a permanent basis to a job that is otherwise rotating or relief in nature.

The case involved a deputy sheriff who was restricted from restraining inmates. The deputy sought permanent assignment to a control booth position that was filled on a rotating basis by all of the deputies. The rotation was designed as a relief break from cell block duty for the deputies.

The deputy claimed that reassignment to the control booth position as a permanent assignment was a reasonable accommodation. The Court determined such a reassignment would in effect mandate a new position, which the ADA specifically does not require.

EEOC Issues New Guidance on Post-Employment Inquiries and Exams.

The Equal Employment Opportunity Commission (EEOC) has released new information on how employers may question and examine employees. The EEOC issued its Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA to supplement previously issued Guidance on post-offer, pre-employment medical inquiries and examinations. Highlights include:

- an explanation of the ADA requirement that examinations be "job-related and consistent with business necessity."
- examples of situations where an employer may or may not require a medical examination;
- the standards for an employer seeking to examine an employee who poses a direct threat to him/herself or to the workforce;
- the standards regarding medical examinations for current employees who apply for new positions and the documentation an employer may require regarding a disability;
- the conditions that must be present for an employer to request further documentation from an employee or require the employee to submit to a medical examination by a doctor of its own choosing.

The complete Guidance can be obtained from the EEOC's website at **http://www.eeoc.gov/docs/guidance-inquiries.html.**

FMLA Regulations and Advance Notice.

A recent decision by the Sixth Circuit in *Plant v. Morton Int'l Inc.* points out the importance of providing employees with written notice when they are considered to be using any of their FMLA leave entitlement.

Plant was injured in a car accident that necessitated his absence from work for extended periods on two separate occasions. During his time off, Plant received his full salary. After six weeks on his second leave of absence, Plant's employment was terminated for performance reasons. Plant sued, alleging that he was deprived of his rights under the FMLA. None of his time off had ever been designated in writing as counting against his FMLA entitlement.

A controversial regulation issued by the Department of Labor requires employers to provide advance written notice to employees before they can be considered to have used any of their FMLA leave entitlement. Other federal courts have rejected the requirement as unreasonable and beyond the scope of FMLA, but the Sixth Circuit is upholding it. Employers must ensure that their FMLA leave administration includes proper written notice to employees as required by the DOL regulations.

What You Don't Know (And Don't Do) Can Really Hurt You

By Bruce H. Fahey

Interested in reducing your workers' compensation premiums? There are several techniques available for doing so, but it helps to have an understanding of how workers' compensation claim costs drive your premiums.

The Bureau of Workers' Compensation (BWC) counts three broad categories of claim expenses from each of your company's claims when calculating your premium. The three categories are:

- **medical expenses** – payments for medical services for your injured worker;
- **compensation expenses** – all compensation paid to your injured worker; and
- **compensation reserves** – reflecting the BWC's estimation of the potential future liability of claims and what they will cost over their lifetime.

The amount of the reserve is directly related to the compensation paid and can be as much as four times or more of the amount of compensation already paid.

For those with less-than-average claim expenses, premiums are reduced below average and group rating programs may be an option. Those with higher-than-average claims are considered penalty-rated, with higher-than-average premiums.

The most important way to lower workers' compensation premiums, aside from having no claims, is to avoid compensation expenses. Here are some ways to do so:

Implement a wage continuation program: For most employers, it makes financial sense to continue an injured workers' wages for a designated period of time after an injury occurs. Wage continuation can be combined with a transitional or modified duty work program to not only avoid the compensation expense but also to realize some valuable work from the employee.

Settlement of claims: Every claim should be evaluated for settlement. If an injured worker is no longer employed or had an injury that will not recur, a good faith effort should be made to settle the claim. When a claim is settled, the reserve amount of the claim (usually the most expensive category of the three types of expenses) is eliminated and the amount of the settlement is added to the "compensation paid" category. By reducing the reserve, the premium likewise is reduced.

Handicap reimbursement: If one of your injured workers suffers a work injury or disease that was caused by any one of 26 medical conditions (such as arthritis, heart disease or diabetes), or such a condition makes the injuries suffered in the claim worse or delays recovery, part or all of the cost of the claim can be eliminated from your experience. It pays to know and monitor your claims, especially if one of your employees has a known disabling medical condition.

The most important way to lower workers' compensation premiums, aside from having no claims, is to avoid compensation expenses.

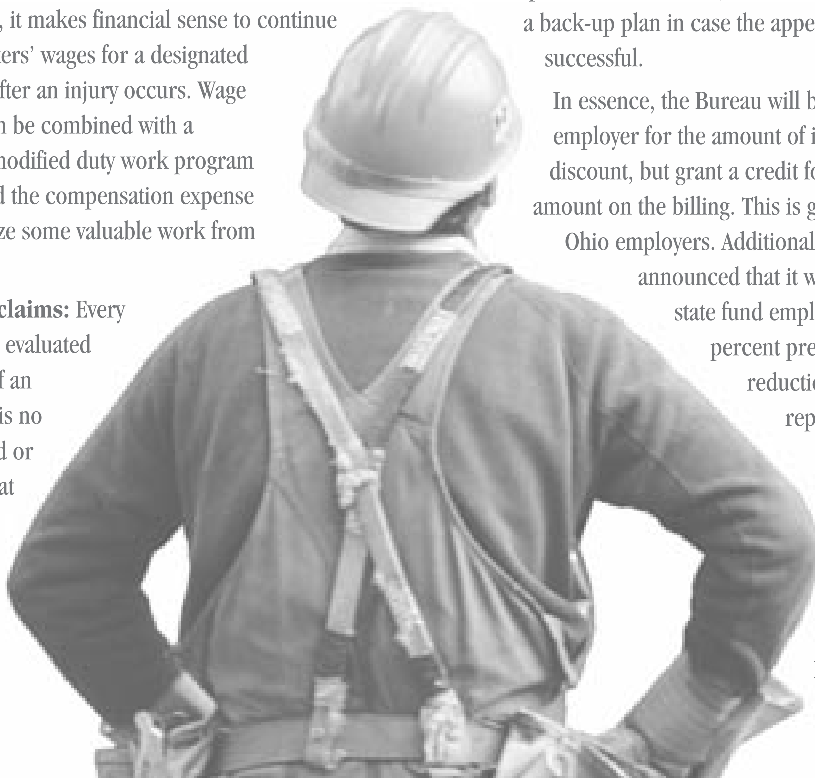
Third-party responsibility: If a third party causes a work injury to one of your employees, Ohio law permits the BWC or self-insured employers to recoup claim payments from the party who caused the accident or injury.

These are just a few cost-control techniques that every employer should utilize in managing their workers' compensation claims.

Premium Discount Update

As reported in our last edition of the ***kwwlaborlaw. communicator,*** an Ohio Court of Appeals held unconstitutional the BWC's premium reduction program for the first half of 1999. The Bureau has appealed the ruling to the Supreme Court of Ohio, but it also has developed a back-up plan in case the appeal is not successful.

In essence, the Bureau will bill each employer for the amount of its premium discount, but grant a credit for the same amount on the billing. This is good news for Ohio employers. Additionally, the Bureau announced that it will grant to state fund employers a 75-percent premium reduction for payrolls reported in the year 2001, largely as a result of excellent investment returns on its portfolio.



Department of Labor Proposes Major Overhaul of Affirmative Action Regulations

By James P. Wilkins

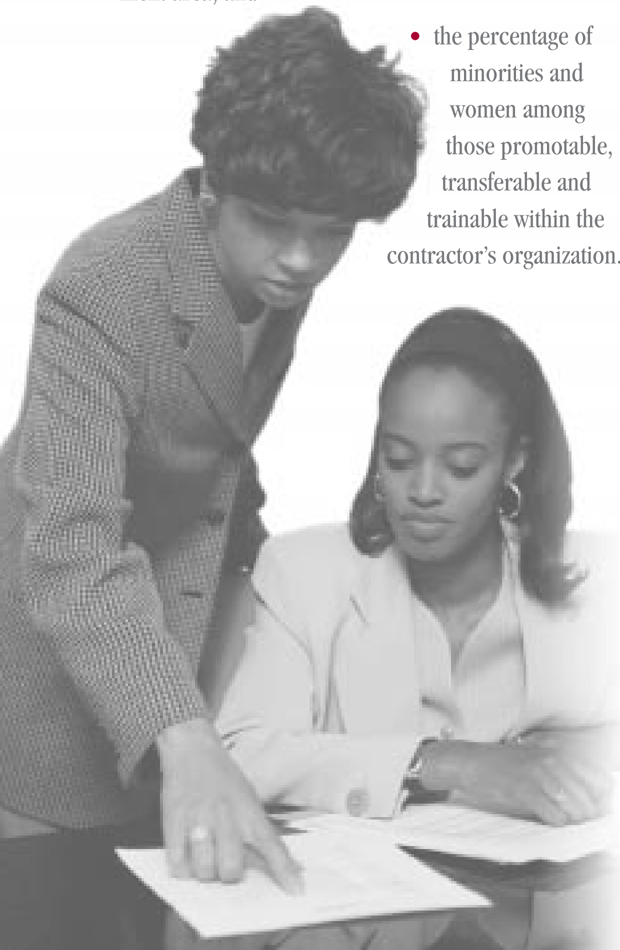
The affirmative action regulations governing the obligations of employers who do business with the federal government have been virtually unchanged for 30 years. In May, however, the *Department of Labor's Office of Federal Contract Compliance Programs* issued proposed regulations that if finalized would mandate significant changes in the content of affirmative action plans.

In general, affirmative action applies to any employer with 50 or more employees that has a government contract or subcontract of $50,000, any depository of government funds, and most financial institutions. Affected employers must develop and maintain a written affirmative action plan for each establishment.

Examples of changes proposed by OFCCP include:

Women and minorities – The eight-factor analysis to determine the availability of women and minorities in the labor market would be eliminated. The new regulations would require consideration of only two factors:

- the percentage of minorities and women with the requisite job skills who live in the reasonable recruitment area; and
- the percentage of minorities and women among those promotable, transferable and trainable within the contractor's organization.



Workforce analysis – The workforce analysis would be replaced by an "organizational profile." Currently the workforce analysis requires a contractor to group all jobs ranked from lowest paid to highest paid within each department or other organizational unit, showing the gender, race and ethnic composition of each job title. The organizational profile, which OFCCP likens to an organizational chart, would show the aggregate gender, race and ethnic composition for each organizational unit. The major difference is that contractors no longer would have to break down the information by job title.

In general, affirmative action applies to any employer with 50 or more employees that has a government contract or subcontract of $50,000, any depository of government funds, and most financial institutions.

Equal Opportunity Survey – The regulations would incorporate OFCCP's recently adopted requirement that contractors prepare and file an Equal Opportunity Survey upon demand. The survey requires summary data on applicants, hires, promotions and terminations as well as compensation data by job group, gender and race. One of the objectives is to more closely monitor the pay practices of federal contractors to assure nondiscrimination based on sex or race.

Separate sites, separate plans – The new regulations also would limit a contractor's right to aggregate separate facilities into a single affirmative action plan. Only employees who work at an establishment with fewer than 50 employees could be included in a consolidated affirmative action plan for another location. This change would result in a proliferation of plans for contractors with multiple facilities.

Job applicant defined – The regulations re-define "job applicant," which affects how a contractor maintains applicant flow data.

While OFCCP claims that the proposed changes will reduce the paperwork requirements imposed on contractors, the claim is very debatable. At a minimum, all contractors would have to significantly revise their existing plans to meet the regulations' new requirements.

A follow-up article will be included in a future issue of ***kwwlaborlaw.communicator*** once the regulations are finalized. Any questions concerning affirmative action obligations should be directed to Jim Wilkins.