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PERSPECTIVES

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Be Mindful of Affordable Care Act Requirements for Seasonal Employees

Spring is in full swing, which means your seasonal employees have returned to upkeep the lawns, maintain the parks, staff and the local pool. With the new season comes new questions – are my seasonal employees included in my calculation of total employees for purposes of the Affordable Care Act? Do I need to keep my seasonal employees part-time? How many days of work constitute a "seasonal" employee?

The Affordable Care Act ("ACA") addresses the meaning of a seasonal employee in the context of whether an employer meets the definition of a large employer; however, it otherwise does not address the definition of a "seasonal employee." A "large" employer under the ACA means an employer with fifty (50) or more full-time and full-time equivalent employees. The IRS has stated that, at least through 2014, employers are permitted to use a reasonable, good faith interpretation of the term "seasonal employee." Under the Affordable Care Act, seasonal employees are excluded from the calculation of full-time employees, even if they work more than 30 hours. Generally, an employer can stand by considering their "seasonal employees" to be just that, seasonal, whether it is cutting grass from April to October, or staffing the pool May through August. So long as the employer is relying upon a reasonable, good faith interpretation, in classifying an employee as "seasonal" for purposes of the Affordable Care Act, the employer is acting in compliance.

As with many other employment law matters, internal employment documents, such as job descriptions and employee handbook provisions, could be important in supporting the reasonableness of the employer's actions.

For questions about the ACA, please feel free to Matt Whitman at mwhitman@fishelhass.com.

Is Eyesight an Essential Function for Firefighters? Maybe Not.

On February 26, 2014, the U.S. Court of Appeals for the Sixth Circuit (Ohio) overturned the trial court on a case involving a firefighter who lost vision in one eye. The Sixth Circuit found that there was a dispute of fact whether a monocular firefighter could perform the essential functions of his job, requiring a trial to resolve the issue.

In *Rorrer v. City of Stow*, Rorrer worked as a firefighter for nine years until an accident blinded him in the right eye in 2008. While his personal doctor and the city's Department physician's office cleared him to return to work without restrictions, Fire Chief Kalbaugh insisted that he not return to work until the matter was straightened out. The Chief then called the Department physician and convinced him to reverse the medical release, thus preventing Rorrer's return to duty. Rorrer requested to continue work as a firefighter without having to drive, or in the alternative, be transferred to fire inspector duties. The City denied both requests and terminated Rorrer. Rorrer sued alleging a violation of the Americans with Disabilities Act ("ADA"), among other claims.

According to the Sixth Circuit, "Chief Kalbaugh testified that the City terminated Rorrer because his monocular vision prevented him from performing an essential function of the firefighter position." After Rorrer challenged his termination, the City cited National Fire Protection Association ('NFPA') guideline 1582-9.1.3(10): 'Operating fire apparatus or other vehicles in an emergency mode with emergency lights and sirens' ('Job Task 10'). The NFPA lists Job Task 10 as an "Essential Job Task." The Union and Rorrer's attorney argued that the City never adopted the NFPA guidelines. The job description, meanwhile, stated that the employee "may" operate emergency vehicles. The District Court granted summary judgment to the City and Rorrer appealed to the Sixth Circuit, which overturned summary judgment on the basis that there were genuine issues of fact as to whether the City adopted the NFPA guidelines and whether driving was an essential function of a City firefighter.

This case illustrates the importance of treating essential functions as essential, and defining those essential functions in job descriptions and policies. The Sixth Circuit found significant evidence that the City did not adopt or follow the NFPA guidelines, and it did not rely on them when it determined Rorrer was unfit for duty. The Sixth Circuit also emphasized that employers are entitled to have their judgment considered when determining whether functions are essential, but employers are not entitled to have the court show deference to their judgment.

For more information about this case or accommodating employees under the ADA, please contact our Firm at info@fishelhass.com

Poorly Drafted Legislation Leads to Potential Liability

On February 28, 2014, Ohio First District Court of Appeals overturned a trial court's grant of statutory immunity to the Three Rivers School District based on poorly drafted legislation that left a school bus driver in a dilemma. *Salee v. Watts*, et al., 2014-Ohio-717.

A first grade student at Three Rivers rode her bus home and got off the bus at her designated stop. However, instead of crossing the road in front of the bus, she ran down the street with her friend. The bus driver honked her horn but could not get the student's attention. The driver then called in to the school to inform that the student had left with another student. The driver then proceeded on with her route. The student later attempted to cross the street where she was hit by another driver. Her parents sued the School District, claiming the bus driver and school were negligent.

The School District claimed it had statutory immunity from the lawsuit. In Ohio, certain governmental entities, like school districts, are not liable (immune) for injuries caused by an act or failure to act of the entity or its employee in connection with a governmental or proprietary function. Bussing children to and from school is a governmental function. The trial court granted immunity to the School District. The parents appealed.

The Court of Appeals overruled the trial court, finding that this matter fell within "the operation of a motor vehicle" exception to immunity. Under that exception, the public entity is not entitled to immunity for injuries caused by the negligent operation of any motor vehicle by its employees. The School District argued that there was no "operation of a motor vehicle" because the bus pulled away from the bus stop and was not present when the car struck the child.

The Court of Appeals disagreed with the School District, finding that the "operation of a motor vehicle" exception was relevant to this case because there is another Ohio statute that states that "no school bus driver shall start the driver's bus until after any child [. . .] who may have alighted therefore has reached a place of safety on the child's [. . .] residence side of the road." R.C. § 4511.75 (E).

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It was clear to the Court that the bus driver violated this statute, no matter the fact that the driver had little choice but to do so. The statute sets forth a specific requirement and leaves no room for what a reasonable person would do. The Court of Appeals found that the violation of this statute was enough of a connection to the "operation of a motor vehicle" exception to immunity.

The Court of appeals recognized the dilemma of the bus driver, stating "it is hard to imagine what more Krimmer could have done in this situation." However, the Court held that it had to apply the law as written. At the same time, the Court encouraged the General Assembly to revise the law to allow a bus driver to do something that would protect the child who dismounts from the bus, the children who remain on the bus, and the driver whose only goal is to protect and serve them all.

FHKA will continue to monitor whether the General Assembly accepts the invitation of the Court and report any further activity.

Public Records Departments Take Note: Respond to Requests Timely & Completely

In *State ex rel DiFranco v. S Euclid*, the Ohio Supreme Court recently addressed whether an individual was entitled to statutory damages and attorney fees when a city took nearly two months to respond to a public records request. Even then the initial production of documents was a partial response and not completed until several months later. The Ohio Supreme Court held the requester was entitled to statutory damages, but not attorney fees.

The city of South Euclid received the public records request in question in October, 2011. After no response for two months, the requester filed a mandamus action to compel the City to produce the records requested. Four days later the City produced some but not all of the public records requested. The City attributed its delay in responding to an internal office difficulty in processing the mail. In February, 2012, the requester submitted an affidavit from a certified public accountant that stated that several of the documents requested were not produced, but must exist. The City did not respond until the court required a response in July, 2012. The requester urged that she was entitled to statutory damages and attorney fees based on the chronology of the case and the department's failure to respond.

The Ohio Supreme Court agreed. The Court found that the requester was entitled to statutory damages because the City failed to timely respond to the initial request. Also, the City did not promptly produce and make available the requested records. The city did not respond to the initial request for two months. It took the city an additional six months to produce all of the records requested. The Court held that the requester was entitled to the statutory maximum of $1,000 in damages. However, requester was not awarded attorney's fees.

This case reminds us that public entities must be as responsive as possible. It is generally wise to notify requesters in writing that their request was received and a response will be provided in a reasonable time pending legal review. When producing a large number of public records it is advisable to notify, in writing, the requester of the status of the response and produce documents in stages, if necessary. A public entity that is responsive and communicative while fulfilling its obligation to produce public records reduces its exposure to lawsuits, statutory damages and attorney's fees.

For any questions regarding public records and the public records process, contact Frank Hatfield at fhatfield@fishelhass.com.

On Again Off Again: Department of Labor Persuader Rule Postponed

Employer pop quiz: What's the Labor-Management Reporting and Disclosure Act ("LMRDA")? If you don't know, you are not alone. Very few private employers are aware of the LMRDA, which has been in effect since 1959. However, employers are wise to learn about the LMRDA and monitor recent proposed changes that are of great concern.

The purpose of the LMRDA, is to establish labor-management transparency through reporting and disclosure requirements. Under the Act, employers and their consultants are required to report to the federal government when they have engaged in certain activities, where the object is to either directly or indirectly persuade employees as to the manner of excising collective rights or in regard to unionizing. Attorneys who do not have direct communication with employees but merely provide advice and other legal services to their employer clients, even if the object of the advice was to effect employee persuasion, were deemed to have given attorney-client privileged "advice" and were not required to be report.

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DOL…Continued from pg. 3

Beginning in 2011, the Department of Labor decided that this "advice" exception swallowed the general rule. The DOL then proposed an amendment to the LMRDA which significantly narrows this exception. The proposed rule referred to as the "persuader rule" requires employers to file public reports every time they speak to a lawyer about labor work. Employers failing to comply may face up to a year in jail and a $10,000 fine.

By most accounts, this proposed amendment to the law goes too far. Many national organizations including the U.S Chamber of Commerce and the American Bar Association have opposed this amendment because of the likelihood of requiring attorneys and their employer-clients to divulge attorney-client protected communications. The proposed rule was scheduled to be published March, 2014, but was postponed. Given the DOL's frequent efforts to enact the persuader rule, employers are wise to monitor this issue and oppose issuance a proposed persuader rule. FHKA will monitor LMRDA developments and issue updates as appropriate.

Facebook Post Spoils Settlement Agreement

A former school headmaster brought suit against his employer claiming age discrimination and retaliation. Shortly thereafter, the parties were able to reach a settlement agreement that included a detailed confidentiality provision. The provision stated that neither the headmaster nor his wife would disclose to anyone, directly or indirectly, other than their lawyers or professionals the existence or terms of the agreement. Four days after signing the agreement, the headmaster's daughter posted the following on her Facebook page: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

The daughter's post cost the headmaster $80,000. A Florida appeals court found that, by breaching the confidentiality provision, the headmaster was not entitled to a portion of the settlement proceeds. *Gulliver School, Inc. v. Snay*, 2014 WL 769030 (2014). Even though the headmaster stated in his deposition that he only told his daughter that the case had settled and that he was happy with the result, it did not absolve him of his duty not to disclose.

The impact of social media is becoming more and more prevalent within the legal landscape. Not only do parties have to be increasingly vigilant in their own social media activity, but they also must be aware of how others may disseminate information about them through these mediums.

Workers' Comp Hearing Statistics from 2013 Serve as a Reminder for Employers

Statistics recently published in the Industrial Commission of Ohio ("IC") Annual Report FY 2013 serve as a reminder that Employers must be diligent in investigating alleged workplace injuries, and in preparing to defend against disputed claims.

The IC is the adjudicatory branch of the workers' compensation system. The IC exists to hear disputes about whether a workers' compensation claim should be allowed or disallowed, what treatment or compensation should be granted to an injured worker, if any, and other claim matters. The IC is available for a party to appeal an initial determination from the Ohio BWC about a claim.

The IC has hearing offices in 12 cities in Ohio. There are three IC hearing levels in the process: District Hearing Officer (DHO) level, Staff Hearing Officer (SHO) level, then Commission (IC) level. In addition to the 3 Commissioners who make up the IC, there are 95 DHO & SHO attorney hearing officers in the State. In FY 2013, the IC heard 150,070 claims. District hearing officers heard 104,538 claims. Staff hearing officers heard 45,110 claims and the Commission heard 422 claims. An average of 608 claims were heard per day at the DHO and SHO hearing levels throughout the State. District Hearing Officers averaged 427 claims heard per day while Staff Hearing Officers averaged 184 claims heard per day. In 2013, for the time between the filing of an IC appeal to an IC hearing date, DHO level hearings averaged 30 days and SHO level hearing appeals averaged 32 days.

The significant number of claims heard each year serve as a reminder to employers to be diligent in investigating workplace injuries and to act promptly to prepare a defense if the claim is contested. Not only is there little time between the filing of an appeal and the date of the IC hearing, but also most hearings are docketed for about 15 minutes total, unless a party requests more time before the hearing. With only a few weeks to prepare for a hearing, and only a few minutes to present its case, the employer must act quickly before the hearing to: investigate the circumstances of the alleged injury, obtain witness statements or testimony, work with its third party administrator or attorney to obtain and review the medical evidence, and possibly obtain medical evidence from the employer's physician about the claim.

For questions about workers' compensation claims or workplace accident policies, please contact David Riepenhoff at driepenhoff@fishel.com.

WHAT IS HAPPENING AT FISHEL HASS KIM ALBRECHT, LLP:

You Don't Want to Miss Our Next Free Friday!

Do you have a legal question you've been itching to ask? Our next "Free Friday" Matt Whitman will be on standby to answer your calls – on the house. You can submit your questions to Matt on Friday, May 2, 2014 from 9 am - 4 pm by calling (614) 221-1216. Please no emails as we will only be accepting and responding to phone calls. Be sure to check out for future "Free Friday" dates by visiting www.fishelhass.com

Please Welcome Melanie Williamson, George Limbert, Jennifer George, & Kacie Bash to Fishel Hass Kim Albrecht LLP

Melanie Williamson received her law degree from the Capital University School of Law, and graduated *summa cum laude* with a Bachelor of Arts in English from The Ohio State University. Prior to joining the firm, Melanie worked as the Associate Director of Development for The Ohio State University Wexner Medical Center in the Department of Development and Alumni Affairs. In addition, she worked as a staff attorney with the Ohio Department of Education's Office of Professional Conduct investigating unprofessional conduct and initiating disciplinary action against educators' credentials. Following law school, Melanie served as a trustee and the executive board secretary for the Society for Equal Access and was a grant reader for The Women's Fund. Melanie can be reached at mwilliamson@fishelhass.com

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George Limbert joins FHKA as Of Counsel. George received his law degree from the University of Dayton School of Law, and graduated from The Ohio State University, The Max M. Fisher College of Business. George currently serves as Corporate Counsel for Red Roof Inn along with being a business owner/land developer. What better person to help with business issues than another business owner who faces similar issues? From business to real estate, George is an all-around practitioner. George can be reached at glimbert@fishelhass.com

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Jennifer George received her law degree from the University of Dayton School of Law, and graduated with a Bachelor of Science from Vanderbilt University. Jennifer brings a variety of litigation experience to FHKA. She has represented individuals, businesses and local governments in the areas of employment law, civil rights, construction, property and commercial litigation. Jennifer can be reached at jgeorge@fishelhass.com

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Kacie Bash joined FHKA last month as our new legal assistant. Kacie worked as a legal assistant for the past three years in Lima, Ohio before coming to FHKA. Kacie graduated from The University of Northwestern Ohio with a Paralegal Degree, Associates Degrees in Business Administration, Marketing, and Legal Office Management, and a Bachelor's Degree in Business Administration. Kacie can be reached at kbash@fishelhass.com.

Cheri Hass Receives Award of Excellence

At the February 2014 OHPELRA conference, the County Risk Sharing Authority (CORSA) received the Pacesetting Award for the policy manual Cheri Hass and Frank Hatfield helped work on. Cheri also received the Award of Excellence. Pictured is Marc Fishel, Frank Hatfield and Brad Bennett accepting the honor on behalf of Cheri.