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PERSPECTIVES

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KASICH SIGNS HB5 INTO LAW, POSES POTENTIAL PROBLEMS FOR MUNICIPALITIES

On December 19, 2015, Ohio Governor John Kasich signed House Bill 5 into law. The bill's aim is to streamline municipal tax codes in order to make it easier for businesses to file local tax returns. In Ohio, municipalities that have adopted a charter are permitted to pass their own laws, and as a result, many charter municipalities also have a local tax code, causing the tax codes to vary from charter municipality to charter municipality. Proponents of the bill argued that this made it very confusing for businesses that operate in multiple cities, often requiring them to hire accountants just to fill out local tax forms.

The exact impact of the bill on Ohio's municipalities is currently unclear, but many municipalities estimate that they will lose hundreds of thousands of dollars in local tax revenue as a result of the bill's passage. One troublesome provision for municipalities is that the bill requires all municipal corporations to allow businesses to deduct new net operating losses ("NOL") and carry forward those NOLs forward for five years, beginning in January 1, 2017. The NOL carry forward will be phased in over a five year period, beginning with 50% in 2018, and will be fully implemented in 2023.

Other notable parts of the bill include:

- Owners of pass-through entities only need to file a municipal tax return in their city of residence and the pass-through entity will be subject to a municipal net profits tax.

- Businesses that have individuals working in a temporary location for less than 20 days do not have to pay the municipality's income tax on those individuals' wages. Additionally, while the business can choose to pay the income tax, if workers end up working for more than 20 days, there is still no tax liability to the municipality for the initial 20 day period.

- Prohibits the taxation of employees of businesses with less than $500,000 in annual revenue in any municipality other than the location of that business's principal place of business.

- Municipalities are only allowed to treat individuals as residents for municipal income tax purposes if the individual is domiciled there.

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- There is a $10 threshold for municipal tax refunds and balances due (it was previously $5). If an individual owes less than $10 to the municipality, the individual does not have to pay the tax owed, but must file a tax return. Likewise, if an individual is owed a refund of less than $10, the municipality will not remit the refunded payment.

- Municipalities are required to create an income tax withholding schedule, semi-monthly, monthly, or quarterly for employers. Employers who paid more than $2,399 in the previous year will be required to pay taxes monthly, while employers who paid more than $11,999 in the previous year will be taxed on a semi-monthly basis.

This is just an overview of the changes the bill requires. The bill also mandates that municipal corporations that levy income taxes must amend their local ordinances by January 1, 2016 to reflect the bill's changes. For advice on how this may affect you, please contact the attorneys at FHKA.

FIRST AMENDMENT RIGHTS FOR PUBLIC EMPLOYEES

Two recent court rulings have provided further guidance on First Amendment protection for public employees. Both cases involve allegations from public employees that they were fired in violation of their First Amendment rights.

In June of 2014, the United States Supreme Court issued a decision in *Lane v. Frank,* which clarified free speech rights for public employees. Lane was an administrator at an Alabama community college. Lane was terminated after he was subpoenaed to testify before a federal grand jury and later at the criminal prosecution of a former employee of the college. Lane sued the college claiming he was terminated in violation of his First Amendment rights.

The U.S. Supreme Court in a unanimous decision held that the First Amendment protects a public employee who is subpoenaed and truthfully testifies where the testimony is outside the employee's duties. According to the Court, Lane testified at the criminal trial as a citizen on a matter of public concern. Lane's speech was not made pursuant to his official job duties even if some of what he testified about concerned his job duties.

Another recent ruling in *Dougherty v. Philadelphia School District* echoed the Supreme Court's decision in *Lane*. In *Dougherty,* an employee of the Philadelphia School District was fired after revealing to the Philadelphia Inquirer that he believed the Superintendent of the school district improperly steered a contract for security cameras to a minority owned business. As in *Lane*, the Third Circuit Court focused not on the content of the employee's speech but whether the speech itself was within the scope of the employee's duties. The Third Circuit found that the employee's report to the Philadelphia Inquirer was not made pursuant to his official job duties ad he had no obligations or responsibilities in fact or under the law. Dougherty spoke as a citizen on a matter of public concern and as such he was entitled to First Amendment protection.

As always employers should use caution when disciplining an employee in matters where First Amendment rights are implicated. These recent cases have made it clear that in certain instances public employees can speak on matters involving their public employment as a citizen and receive First Amendment protections.

Please feel free to contact us for copies of these cases or if you have any questions regarding First Amendment rights in the workplace.

AFFORDABLE CARE ACT EMPLOYER REPORTING REQUIREMENTS

Beginning January 1, 2015 the Affordable Care Act (ACA) imposes information reporting requirements on employers. The purpose of the employer reporting requirements is to provide verification to the IRS that health insurance with minimal essential coverage was offered to employees and to provide verification that the employee either accepted or denied the coverage. The IRS will use this information to administer the employer responsibility provisions and premium tax credits of the ACA.

The employer reporting requirements are found in Internal Revenue Code Sections 6055 and 6056. Pursuant to Section 6056, large employers are required to provide information to the IRS regarding the terms and conditions of health plan coverage offered to their full time employees. (Form 1094-C) Additionally, the employer is required to provide each employee with a written statement that includes information related to that employee and their dependents that is required to be reported on the IRS returns. (Form 1095-C) The information the employer is required to provide on these forms includes EINs (employer identification numbers), TINs (taxpayer identification numbers), addresses, employees full-time status, length of time of the employee's full time status, proof of minimum essential coverage offered, coverage dates and employees' share of coverage premium costs.

Section 6055 provides additional reporting requirements for health insurance issuers and sponsors of self-insured plans. Under this section, employers with self-insured health plans must provide information to the IRS on each individual provided with coverage. The information to be reported includes names, addresses, EINs, and TINs.

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Large employers with self-funded plans are required to comply with both reporting obligations under Sections 6055 and 6056.

Section 6055 and 6056 returns must be filed by February 28th (March 31st if filed electronically) of the year after the calendar year for which the returns relate. The written statements must be provided to employees no later than January 31st of the year following the calendar year in which coverage was provided. This means the first returns and employee statements will be due in 2016 for health plan coverage provided in 2015.

ACA reporting is essential. Employers who do not comply with the reporting regulations will face penalties. According to Sections 6721 and 6722 of the Internal Revenue Code, employers will be subject to penalties of up to $100 per return for failing to timely file returns or failing to furnish statements to employees.

For questions about the ACA or the employer reporting requirements, please contact FHKA.

THE SUPREME COURT TO DECIDE ISSUES RELATING TO PREGNANCY DISCRIMINATION ACT

On December 3, 2014, the U.S. Supreme Court heard oral arguments on issues related to the Pregnancy Discrimination Act. The issue the court will decide is: "Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'"

As discussed in FHKA's October issue, the U.S. Equal Employment Opportunity Commission ("EEOC") released a number of guidelines regarding the Pregnancy Discrimination Act ("PDA") in July of this year. The Guidelines require that employers treat employees affected by pregnancy, childbirth, or a related medical condition similarly to other employees who are not pregnant but are similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or other benefits. According to the Guidelines, employees with pregnancy-related conditions are required to have equal access to benefits as other employees with similar abilities or inabilities.

The question before the Supreme Court arises out of a case out of the Fourth Circuit, *Young v. United Parcel Serv., Inc.*, No. CIV.A. DKC 08-2586, 2011 WL 665321, (D. Md. Feb. 14, 2011) aff'd, 707 F.3d 437 (4th Cir. 2013). In 2006, UPS denied light duty accommodations to a pregnant employee citing their policy of only extending light duty or reassignment to employees who were injured on the job or to employees qualifying as disabled within the meaning of the ADA. The 4th Circuit held the employee was not entitled to accommodation, finding that she was not disabled under the definition of the ADA nor was she "regarded as" disabled under the Act. UPS announced earlier this year that as a result of the EEOC Guidelines, effective January 1, 2015, the company would be extending light duty assignments to pregnant employees.

Currently, 6th Circuit precedent is inconsistent with the EEOC guidelines in regards to light duty. See *Reeves v. Swift Transportation Company*, Inc., 446 F.3d 637 (6th Cir. 2006). Based upon 6th Circuit precedent, employers are not necessarily obligated to provide light duty to a pregnant employee making such a request even though the EEOC Guidelines state otherwise. Rather, employers must continue to consistently follow existing policies and practices. Therefore, if an employer offers "light duty" only for an on-the-job injury through a wage continuation program, employers do not need to change their eligibility requirements, policies and/or practices.

The Supreme Court's decision may change how the 6th Circuit addresses issues pertaining to light duty and could have a significant impact on entities required to make these accommodations.

SUPREME COURT FINDS WAREHOUSE WORKERS NOT ENTITLED TO PAYMENT FOR TIME SPENT WAITING

On December, 9, 2014, the court issued its decision in *Integrity Staffing Solutions, Inc. v. Busk*. The Court ruled that the employer need not compensate warehouse workers for time spent passing through security screenings at the end of their shifts. The employer required its warehouse workers who retrieved inventory and packaged it for shipment, to undergo an antitheft security screening before leaving each day. Federal law requires all employees to be compensated for time that they work for the employer. However, federal law exempts employers from compensating employees for activities which are "preliminary" or "postliminary" to employees' "principal activities."

The Court found that the security screenings at issue were non-compensable postliminary activities. The screenings were not the principal activities which the employees were employed to perform. Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve

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products from warehouse shelves and package those products for shipment to customers. Further, the screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work.

The Court clarified that time is not compensable simply because the employer "required" the activity. Rather, to be compensable, the activities must be integral to the employee's "principal activities." Employers are well-advised to make sure written job descriptions are up-to-date and specific about required job duties.

COLORADO SUPREME COURT CONSIDERS WHETHER EMPLOYERS MAY FIRE EMPLOYEES FOR MEDICAL MARIJUANA USE

Colorado's Supreme Court is considering whether employers may fire workers for using medical marijuana. Brandon Coats, the Plaintiff, was fired by Dish Network in 2010 from his job as a customer service representative. Coats is licensed by the state of Colorado to use medical marijuana which is legal in the state. Dish Network fired Coats after he tested positive for marijuana, a violation of Dish Network's drug policy. Coats claims he never used nor was under the influence of marijuana while on the job.

Coats sued Dish Network claiming that his termination violated Colorado's Lawful Activities Statute. That statute prohibits an employer from discharging an employee for engaging in any lawful activity off work premises during nonworking hours. Coats acknowledges that medical marijuana is illegal under federal law, but argues that his use was nonetheless legal under state law and that the statutory term "lawful activity" refers only to state, not federal law. Therein lies the crux of the case: is medical marijuana, which is legal in Colorado, but illegal federally, actually lawful under Colorado's Lawful Activities Statute. Two lower courts have said no. The case is now before the Colorado Supreme Court.

Coats is asking the court to consider only state law in deciding what is lawful under the state's off-duty activities statute. Opponents argue that limiting the off-duty activities statute only to Colorado law could bring absurdities, such as having someone convicted of a serious federal crime not being able to be fired from their job in Colorado.

Despite the legalization of both medical and recreational marijuana, Colorado law does not require employers to allow marijuana use or to accommodate the use of medical marijuana. Dish Network argues that Colorado's medical marijuana law doesn't even guarantee patients the right to use marijuana. Rather, Dish Network points out that it is merely an affirmative defense or an exception to state criminal laws, not a broad right.

Although the outcome of this case will not set precedent in Ohio, the case has received national attention. Currently, 23 states plus the District of Columbia have laws allowing the use of medical marijuana. If you have any questions about this case, please contact FHKA.

DUAL-PURPOSE DOCTRINE DOES NOT APPLY WHEN DETERMINING ELIGIBILITY FOR WORKERS' COMPENSATION

When an employee is injured while traveling for both business and personal purposes some states recognize a dual-purpose or dual-intent doctrine. The Ohio Supreme Court recently addressed the issue of whether the dual-purpose doctrine is applicable when determining eligibility for workers' compensation in Ohio. The Court held that the dual-purpose doctrine does not apply in Ohio. *Friebel v. Visiting Nurse Assn. of Mid-Ohio*, Slip Opinion No. 2014 Ohio 4531.

Ms. Friebel was employed by Visiting Nurse Association of Mid-Ohio ("VNA") as an in-home nurse to provide services to VNA clients. Nearly every workday, Ms. Friebel traveled in her personal vehicle from her house to the patient's home. On Saturday, January 22, 2011, Ms. Friebel decided to transport her children to a shopping center on the way to a patient's home. Ms. Friebel's car was struck from behind while stopped at a traffic light. Ms. Friebel sought workers' compensation for a neck sprain sustained in the accident.

An injury is compensable under Ohio's Workers' Compensation if it occurs "in the course of" and "arising out of" an employee's employment. The appellate court concluded that Ms. Friebel was entitled to workers' compensation because she had not yet diverted from her employment purpose when she was injured because she was on the route to a patient's home.

The Ohio Supreme Court reversed the appellate court evaluating that an employee's subjective intent regarding her dual purposes over an objective review of the employee's actions and nature of employment distracts from the core analysis. Rather, the proper analysis, even for traveling for both personal and work purposes, is to apply the "in the course of" and "arising out of" based on the totality of the circumstances.

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Employers should closely review all factual and legal issues regarding an employee's automobile accident to ensure the employee's travel was not for a dual purpose. The Court's holding clearly establishes that an employee's injury must occur "in the course of" and "arising out of" their employment to be compensable, not the subjective dual-purpose of the employee's activities. It is conceivable that future workers' compensation claims involving automobile accidents will be more closely analyzed by the Bureau of Workers' Compensation and courts. *Friebel* provides a strong defense to an employee's application for workers' compensation premised on a dual-purpose theory.

FEDEX SUED BY DRIVERS CLARIFIED AS INDEPENDENT CONTRACTORS

Thousands of FedEx drivers all over the United States sued or are currently in the process of suing FedEx for classifying these drivers as "independent contractors", as opposed to normal employees—and many are winning.

Specifically, the FedEx Ground division offers small package pick-up and delivery services in the United States, through a network of nearly 32,500 FedEx-uniformed drivers. These workers all executed some type of "Pickup and Delivery Contractor Operating Agreement" ("OA") with FedEx, which classifies these drivers as independent contractors and not employees.

Accordingly, the OA allows FedEx to potentially save money in a number of areas, including: health benefits, unemployment insurances, retirement accounts, and overtime pay. In the majority of these actions, the Plaintiff-Drivers are alleging that they were misclassified as independent contractors when they were in fact employees; thus the Plaintiff-Drivers are seeking reimbursement of business expenses and back pay for overtime.

In general, the most significant factor any court will examine for determining whether a person is an employee versus an independent contractor is the "employer's control." If the employer has a right to control the *means* and *manner* of a person's service—as opposed to controlling only the *results* of that service—the person is an employee and not an independent contractor.

In determining whether a worker is under the "employer's control", Courts typically look for: (1) the extent of the employer's control, (2) the actual exercise of the employer's control, (3) the duration of the employment, (4) the employer's right to discharge, (5) the method of payment, (6) how the employer furnishes the employees' equipment, (7) the employer's control over regular work business, and/or (8) the employment contract.

Generally, FedEx requires its drivers to wear a FedEx uniform. Also, FedEx somewhat monitors the drivers' route, and FedEx cannot discharge its employees at will (as an employer can do in a standard employer-independent contractor relationship). Some drivers have worked for FedEx for years. It is true that FedEx's drivers provide their own trucks and equipment; however FedEx is heavily involved in the purchasing process, providing funds, and recommending vendors.

The company is currently facing 30 active lawsuits from former contractors in several states. Moreover, FedEx drivers already won some significant legal battles in Oregon, Missouri, California, Connecticut, and Kansas courts, which all concluded that FedEx Ground drivers fit the legal definition of an employee.

To combat these issues, FedEx Ground changed its policy in 2011. The drivers are still not FedEx employees, but now FedEx contracts with incorporated businesses that agree to treat staff as employees. In turn, drivers get basic protections required by law, e.g. workers compensation coverage and unemployment insurances. Still, it is the incorporated businesses providing the contractors with these protections—and not FedEx. FedEx's current legal battle is a good reminder to make sure employers correctly categorize their workers in order to avoid potential liability.

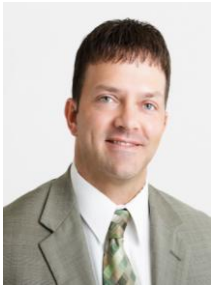
DON'T FORGET ABOUT FREE FRIDAY'S

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

Does a legal question have you stumped? We have the solution. For our next "Free Friday," let Melanie Williamson be your guide – and it's on the house. You can submit your questions to Melanie Williamson on Friday, February 6, 2015 from 9 a.m. - 4 p.m. by calling (614) 221-1216. Please no emails as we will only be accepting and responding to phone calls. Be sure to check out our Events Calendar for future "Free Friday" dates by visiting www.fishelhass.com

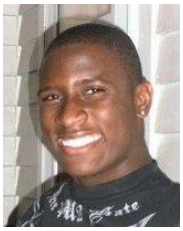
WHAT IS HAPPENING AT FISHEL HASS KIM ALBRECHT LLP:

FHKA is pleased to announce….



Brad E. Bennett has been named Partner in the firm as of January 1, 2015. Brad focuses his practice on aspects of civil litigation, labor and employment law, collective bargaining, civil service law, human resource compliance and audits, public sector agency administration, construction law, and small business consulting and formation. Brad is also a sought after speaker and trainer who frequently lectures and conducts training and seminars throughout Ohio. Brad was recently named to the Ohio Super Lawyers list for his outstanding work in the areas of Labor and Employment Law and Litigation.

Please Welcome Lorenzo Washington to FHKA



Lorenzo Washington joined FHKA last month as our new law clerk. Lorenzo is currently attending The Ohio State University Moritz College of Law. Lorenzo is actively assigned to a couple of leadership positions such as Diversity and Inclusion Officer of the Student Bar Association and Co-Counsel for the Moritz Orientation and Mentoring Program. Lorenzo graduated, *cum laude* from Ohio University with a B.S. in Journalism. Lorenzo can be reached at lwashington@fishelhass.com.

FHKA Named to the U.S. NEWS-BEST LAWYERS® "BEST LAW FIRMS"

Fishel Hass Kim Albrecht was once again named to the Best Law Firms list by U.S. News Media Group and Best Lawyers® for 2015. The firm's employment, labor and litigation practice areas were recognized. Marc Fishel, Benjamin Albrecht, and Daniel Downey were also named as Best Lawyers in their respective practice areas.

FHKA Attorneys Named as 2015 Ohio Super Lawyers and Ohio Rising Stars

Several FHKA attorneys have been selected as 2015 Ohio Super Lawyers and Ohio Rising Stars by Super Lawyers magazine. Congrats to Marc Fishel, Ben Albrecht, Dan Downey and Brad Bennett for being named Ohio Super Lawyers. Congrats to David Riepenhoff and George Limbert for being named as Ohio Rising Stars.

FHKA Attorneys Win Federal Jury Trial

On November 14, 2014, David Riepenhoff and Daniel Downey received a jury verdict in favor of two Licking County, Ohio Sheriff's Detectives. The case was Jacqueline Valentino v. Jeff Packard, et al. In the case, Mrs. Valentino alleged the officers violated her Fourth Amendment rights and Indiana Law when they interviewed her as part of a murder investigation. The case was tried in the U.S. District Court for the Southern District of Indiana, Indianapolis Division. …***To read more about this case, please visit our website at www.fishelhass.com.***