AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

THE BUTLER/WARREN COUNTY BWSHRM

SHRM® SUPERIOR MERIT AWARD 2006 CHAPTER

NOVEMBER 2007

http://www.ohioshrm.org/butler

November 1st – MONTHLY MEETING

SPEAKER: Lauren Ann Bachmann, M. Ed. - Ingle-Bachmann, LLC
COST: $13.00 Members, $15.00 Non-Members
DATE: Thursday, November 1, 2007
TIME: 7:15 AM – Registration/Networking
7:30 AM – Breakfast
8:00 AM – Presentation
LOCATION: Wetherington Country Club

Sponsored by Premium Personnel

Directions: Take 75 to Tylersville & turn west. Go to the entrance of Wetherington Homes, which is just past Shell & Encore Café, turn right and follow to the stop at corner of Country Club Lane. Turn right at stop and follow road to left. It takes you into Country Club parking lot.

TOPIC: How to Work with an HR Consultant

Outsourcing, we've all heard this term. At some point we may all face the need to go outside our companies for help on a major project or to outsource one of our products. How do we know where to find an HR consultant? What questions should we be asking? What outcomes should we expect? These questions and more will be answered in our next meeting on November 1st. Ann Bachmann, a consultant with Ingle-Bachmann will be speaking to us on "How to work with an HR Consultant". Don't miss this information packed meeting.

Ann Bachmann is partner with Ingle-Bachmann, LLC in Dayton, Ohio. She holds a B.A. and a M.Ed. from Florida Technological University and the University of Central Florida. Additionally, her educational background includes extensive postgraduate work in the areas of instructional technology and industrial organizational psychology. As a successful management consultant for over eighteen years, Ann's client base encompasses a diverse range of small owner-operated companies, mid-size, and fortune 500 corporations throughout the United States and internationally. The industries she deals with are widely diverse and include printing, tool and die, manufacturing, healthcare, engineering, insurance, education, and municipal government. Over the past thirty years, she has developed and delivered specialized training programs for more than 14,000 participants.

Please reserve your seat by Monday, October 29th by emailing Kristi Cain at kristi.cain@craneamerica.com or by calling (937) 293-6526.

BWSHRM Local Membership Drive

Once again, we want to challenge our members to participate in another year of growth by inviting a new member to join our chapter. In return for a new member application, you are invited to join us at the next breakfast meeting at no cost to you. Together, we can make it happen!

To request a membership application, please contact our Membership Advocate:
Marc Fleischauer, SPHR – Partner, Porter Wright Morris & Arthur, LLP
1 S. Main St., Suite 1600, Dayton, OH 45402
937-449-6720 or mfleischauer@porterwright.com

Or visit our website at www.ohioshrm.org/butler and click on the membership link for more information. If you are a SHRM National Member, your local dues are only $45 per year. If you want to join our local organization only, your local dues are only $90 per year.

We hope to see you soon!

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President's Message

Peter Newman with The Newman Law Group gave an enlightening presentation on the legal issues associated with employee email, internet use and blogging. Some of the court cases he discussed on these issues were frightening. He left us with practical advice on how to address these legal issues and sample policies. The growth of electronic communication in the workplace makes it imperative that we regulate employee use.

We hope to see everyone at the November 1st meeting.

Kristi Cain, SPHR - President B/WSHRM
Take Pride in how far you have come and have faith in how far you can go

Your Foundation at Work: *Selection Assessment Methods*

Organizations compete fiercely in the war for talent. An enormous amount of time and money are invested in recruiting strategies to attract the best candidates. Yet, when it comes to actually assessing which job candidates are likely to perform effectively and make significant contributions, many organizations fall short. One reason is that executives and HR professionals often have misconceptions about the value of using assessments. However, when you review the research, it is clear that using proven assessment techniques can result in significant productivity increases, cost savings and bottom-line results for your organization. To learn more about which assessment methods are backed by solid research, download the SHRM Foundation's free report *Selection Assessment Methods* at http://www.shrm.org/foundation/1104pulakos.asp.

The SHRM Foundation: *40 Years of Advancing the HR Profession*

Supreme Court: Employee's Work Rule Violation Not a Bar to TTD

On September 27, 2007, the Supreme Court of Ohio reversed its own earlier decision in *State ex rel. Gross v. Industrial Commission of Ohio*, which had denied workers' compensation benefits to employees who cause their own injuries by violating workplace rules. This recent reversal is thought to be more in line with the general rule in Ohio that injured workers are compensated for their injuries regardless of fault.

The plaintiff in the case, David Gross, worked for Kentucky Fried Chicken (KFC). In December 2003, he was injured when he attempted to clean a deep fat pressure cooker by pouring water into the fryer, closing the lid, heating it, and then opening the lid. After the resulting explosion, Mr. Gross received temporary total disability (TTD) through workers' compensation for his injuries. KFC investigated the incident, in which two other employees were also hurt, and determined that Gross had violated both a workplace safety rule and multiple verbal warnings. KFC terminated Gross's employment and sought to deny his TTD benefits. Subsequently, the Industrial Commission terminated Gross's TTD compensation on the basis that he had "voluntarily abandoned" his employment at the moment he so egregiously violated the safety rule.

In its original 5-2 ruling in December 2006, the Ohio Supreme Court agreed that Gross's conduct was a voluntary abandonment of his employment. Apparently parting from the traditional notion of workers' compensation as a "no-fault" benefit, the Court held that Gross was precluded from any continuation of his TTD compensation.

More recently, however, the Court granted Gross's motion to reconsider its decision, and cooler heads prevailed. In its September decision, likewise decided 5-2, the Court reversed its earlier ruling. The Court noted that, on second thought, it had no intention of altering either the no-fault workers' compensation system or the voluntary abandonment doctrine. It therefore held that employees are entitled to workers' compensation benefits even if they cause their own injuries by violating workplace rules.

Authored by Robert Stalter, Esq., and Marc Fleischauer, J.D., SPHR. Marc is a Butler/Warren County SHRM member and an employment lawyer with Porter Wright Morris & Arthur, LLP. Contact him with questions at 937-449-6720 or mfleischauer@porterwright.com.

Recent Sixth Circuit Case Instructive as to How an Employer May Deal with Inadequate FMLA Certifications

A challenge for employers administering FMLA leaves is how to police questionable requests for FMLA leaves, including those involving inadequate FMLA certifications. The recent Sixth Circuit case, *Novak v. MetroHealth Medical,* provides guidance for an employer faced with this challenge.

Novak v. MetroHealth

Donna Novak claimed that her employer, Metrohealth, violated the FMLA when it terminated her under a no-fault attendance policy. 2007 WL 2807004 (CA 6, Sept. 28, 2007). Ms. Novak claimed that some of her absences should have been FMLA protected either because of her own serious health condition (a back injury) or because she needed to care for her adult child who had a serious health condition (postpartum depression). The trial court granted the employer summary judgment finding that Ms. Novak's absences were not FMLA protected and the Sixth Circuit Court of Appeals affirmed.

It was established before the trial court that Ms. Novak sought to have some of her absences excused under the FMLA when she realized that she had too many points under the no-fault attendance policy. She submitted to MetroHealth a medical certification form filled out by a physician who had treated her back six months prior to the absences at issue. MetroHealth reviewed the medical certification and noted that the form was incomplete as it was missing a description of the medical facts and a statement as to the likely duration of the condition. Ms. Novak contacted an assistant at her doctor's office; told the assistant what to write in the incomplete sections of the form; and had the assistant submit the form to the employer without having the physician approved the additions to the form. In a meeting between MetroHealth and Ms. Novak to discuss the applicability of the FMLA to the absences, MetroHealth questioned the authenticity of the medical certification forms and had Ms. Novak execute a release authorizing the employer to contact Ms. Novak's physician. MetroHealth also gave Ms. Novak a week to submit any additional medical certification forms.

MetroHealth contacted the physician and the physician told MetroHealth that he had not treated Ms. Novak in the six month period preceding the absences at issue; that he had no personal knowledge regarding the condition of her back during the pertinent time period; and that he did not complete the entire certification form.

Ms. Novak then spoke with her doctor; updated him on treatment she was receiving from another doctor; and had him fill out a third certification form based upon this second-hand information. Additionally, Ms. Novak submitted a medical certification form which stated that her eighteen-year-old daughter suffered from postpartum depression and yet another medical certification which stated that her newly born grandson was sick and Ms. Novak was needed to help care for her grandson.

After having provided Ms. Novak with additional time to submit additional certifications and having spoken with her treating physician regarding the medical certifications, MetroHealth determined that the "contradictory information" provided did not qualify her absences for FMLA protection and she was terminated under the no-fault attendance policy.

A. FMLA Analysis-Inadequate Medical Certification and Ramifications

Ms. Novak claimed that her back injury was an FMLA-qualifying condition and that her submitted certification forms sufficiently established the existence of the condition to protect her under the FMLA. The Court began its analysis by noting that, while the medical certification provided by an employee is presumptively valid if it contains the required information and is signed by the health care provider, the employer may overcome this presumption by showing that "the certificate is invalid or inauthentic."

The Court found that the medical certifications submitted by Ms. Novak were insufficient to establish the existence of a serious health condition under the FMLA. The first certification submitted was insufficient because it failed to contain the date the condition began, the probable duration of the condition, and the appropriate medical facts within the health care provider's knowledge. The second medical certification was inauthentic because MetroHealth demonstrated that the contents were filled in by an assistant in the office and not authorized by the health care provider. The third medical certification form was unreliable because MetroHealth demonstrated that the health care provider who signed the form did not have personal knowledge of her condition for the pertinent dates.

Recent Sixth Circuit Case Instructive as to How an Employer May Deal with Inadequate FMLA Certifications
(Continued)

Ms. Novak argued that MetroHealth should have told her about the deficiencies and given her a reasonable opportunity to correct the deficiencies. The Sixth Circuit agreed that an employer who finds a certification to be incomplete has a duty to inform the employee of the deficiency and provide the employee with a reasonable opportunity to cure. The Sixth Circuit also acknowledged that some other courts will impose this duty on a certification which is merely "inadequate" rather than "incomplete." However, the Sixth Circuit found that MetroHealth satisfied its obligation by contacting the health care provider to authenticate the previously submitted medical certifications and by permitting Ms. Novak to submit three additional medical certification forms.

B. FMLA Analysis-Employer Not Required to Utilize Second Medical Opinion Process

Ms. Novak also argued that the FMLA requires an employer to utilize the FMLA's second opinion process before an employer may challenge a medical certification and deny an employee FMLA leave. The Sixth Circuit rejected this argument noting that the FMLA permits, not requires, an employer to utilize the second opinion process should an employer doubt the validity of a medical certification. Therefore, MetroHealth's decision not to utilize the second medical opinion process did not preclude MetroHealth from disputing the validity of the medical certifications.

C. FMLA Analysis-Care for an Adult Child as FMLA Qualifying

Ms. Novak alternatively applied for FMLA leave to care for her adult daughter who was suffering short term postpartum depression. The Sixth Circuit noted that the FMLA authorizes a parent to take leave to care for a child over 18 years of age or older only if the child is suffering from a serious health condition and is "incapable of self-care because of a mental or physical disability."

Significantly, the Sixth Circuit ruled that "incapable of self-care because of a mental or physical disability" requires that the adult child be "disabled for purposes of the ADA." The Court noted that a disability under the ADA requires a "physical or mental impairment that substantially limits one or more of the major life activities of the individual" and that the EEOC's regulations specifically exclude from the definition "temporary, non-chronic impairments of a short duration, with little or no long term or permanent impact." Because Ms. Novak's daughter's postpartum condition was not severe and only lasted one or two weeks, absences for Ms. Novak to care for her adult daughter were not FMLA protected.

The Court also noted that the certification relating to the sickness of Ms. Novak's grandchild and the need for Ms. Novak to care for him did not provide protection under the FMLA because the "FMLA does not entitle an employee to leave in order to care for a grandchild." However, a caveat should be noted here. The FMLA does provide for leave for someone who stands "in loco parentis" to a child. The Department of Labor regulations define "in loco parentis" as someone with day-to-day responsibilities to care for and financially support a child" and some grandparents could qualify for leave eligibility under this provision.

Conclusion

MetroHealth Medical Center was successful in administering its FMLA program because it took the time to carefully scrutinize Ms. Novak's medical forms; obtained her permission to speak with her health care provider; spoke with her health care provider; and provided Ms. Novak an opportunity to cure the deficiencies of her medical authorization forms. The case demonstrates that an employer can manage FMLA claims by challenging, where appropriate, inadequate FMLA medical certification forms.

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