



August/September 2013 Newsletter

Butler/Warren County SHRM The BUZZ

President's Message



Coming Soon – 2013 Ohio HR Conference!!!

For those of you that haven't registered yet, there's still time! The 2013 Ohio HR Conference will once again be held at the beautiful Kalahari Resort in Sandusky, Ohio - September 18-20. Visit the conference website at: http://www.ohioshrm.org/hr_conf/. If you have never attended the conference, now is a great time to take advantage of all that it has to offer including up to 17.5 HRCI Credits (9.25 of which are Strategic) with great learning opportunities, networking and of course, a beautiful venue!

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Interested in Opportunities to Join the BWSHRM Board?

We will soon begin our 2014 planning and would love to know if there are any of our members who would like to become more involved. Please reach out to me personally at 937-833-1883 or at mezerski@brookhavenoh.org if you are interested in learning more about the opportunities on the BWSHRM Board of Directors!

I also look forward to seeing everyone at our upcoming programs! We have a line-up of great topics that I think you will find educational and interesting!

As always, if you have anything you would like to share with the group, we would love to hear your feedback and any ideas you have!

Michelle Exerski

President



**Butler/Warren Society for Human Resource Management and the Ohio Employer Council
Present...**

NEW GENERATION WORKFORCE

Please join us on Thursday September 5th at Wetherington Country Club as Bryan Wempen will discuss how the digital and social age are upon us. He will also discuss how the digital and social age match up with business models to deliver products and services that have been around for 10 or 100 years. The evolution of the workforce will be addressed in this presentation as well navigating the challenges and the opportunities to strategically drive your business.

Bryan Wempen, a 20-year Entrepreneur, has served as a corporate officer in a \$650M public company, founder/founding team of six companies since 2000. He is the co-founder of ceVoke a boutique speaker agency and leading HR industry voice. Bryan also founded and co-hosts HR's #1 internet radio show, DriveThruHR.

Please reserve your seat by [Tuesday, September 3rd](#) by emailing Sherrie Acheson at: SLAcheson@metalcoaters.com or by calling [937-584-3305](tel:937-584-3305).

Directions:

Take I-75 to the Tylersville Rd. exit and turn west. Go to the entrance of Wetherington Homes, which is just past Shell & Meijer, turn right and follow to the stop at the corner of Country Club Lane. Turn right at stop sign and follow road to left. It takes you into Country Club parking lot.

***This meeting is pending approval for HRCI Credit**

Know anyone interested in Sponsoring a BWSHRM Meeting?

The BWSHRM Chapter offers opportunities for sponsorship of our meetings normally held at 7:30 AM on the first Thursday of every month. Examples of topics for our meetings include: safety and security, recruiting, diversity, best practices, legal updates, health insurance updates and many other topics.

The cost for sponsorship is only \$100 and includes:

- Your ad in the monthly *Buzz* newsletter (2 months)
- Recognition at the meeting including a table for your company information or information to be placed on all tables for attendees
- A 5 minute "commercial" to talk about your company's product or service at the beginning of the meeting
- Free breakfast
- An opportunity for you to provide a door prize giveaway and collect business cards

Meeting sponsorship is a great way to get your company's product or service out to the areas Human Resources decision makers. If you know someone who would like to sign up today, simply call Michelle Ezerski at 937-833-1883 or email: mezerski@brookhavenoh.org

EXTENDED UNPAID LEAVE AS A REASONABLE ACCOMMODATION:
THE SNAKE IN THE GRASS

By: Allison D. Michael, Esq.
Marc L. Fleischauer, Esq., SPHR
Coolidge Wall Co., LPA

Employers asking about accommodating a disabled employee are often surprised to hear that under the Americans with Disabilities Act (“ADA”), unpaid leaves of varying lengths – including longer than the 12 weeks allotted by the Family and Medical Leave Act (“FMLA”) – can be deemed a reasonable accommodation that an employer is required to provide under the ADA in some situations. “Some situations” is the key here, as the application of the ADA is nothing if not fact sensitive. The topics of when and for how long an employer is required to provide leave as an accommodation could easily fill a book. This article provides employers with some basics to help employers know when to seek further guidance from employment counsel.

The ADA applies to all employers with 15 or more employees. For those with fewer than 15 employees, Ohio’s equivalent disability discrimination law, O.R.C. § 4112.02, covers businesses with just four or more employees. Unlike the FMLA, both the ADA and the Ohio statute apply from day one of an employee’s employment. Also, both laws require employers to engage in an interactive dialogue with employees requesting accommodations for known disabilities. One such potential accommodation is unpaid leave of varying lengths. Federal courts governing Ohio businesses have frequently determined that such leave can be reasonable and therefore must be granted for certain lengths of time, regardless of whether FMLA is applicable or exhausted. In some circumstances, this leave requirement can last longer than a year.

Unpaid leave is designed to be an accommodation of last resort – to be used only when there is no other reasonable accommodation available that will keep the employee working and earning pay (either in the employee’s normal position or in another vacant position for which she is qualified). As with any accommodation request, an employer is not required to grant a request for unpaid leave if doing so would create an “undue hardship” for the employer. Undue hardship means a significant burden or expense and is determined on a case-by-case basis, taking into account things such as the overall financial resources of a company and the impact of the accommodation on business operations.

While employers have been requesting specific guidance from the Equal Employment Opportunity Commission on the issues of minimum and maximum lengths of leave and what would constitute an undue hardship sufficient to reject a leave request, the EEOC, and courts for that matter, have provided little help. The best employers can rely on, then, are some generalities gathered from years of EEOC decisions and litigation on these issues. Of course, even these rules of thumb are not perfect; it cannot be stressed enough that these are very fact-sensitive, often complex situations that are best discussed with experienced employment counsel. Still, here are some general rules to consider.

Employers are usually not required to grant “indefinite leave.” As with most accommodation requests that do not involve obvious disabilities with obvious accommodation needs, employers may require

**EXTENDED UNPAID LEAVE AS A REASONABLE ACCOMMODATION:
THE SNAKE IN THE GRASS CONT'D**

the employee to provide medical documentation from a treatment provider substantiating the need for leave, the length of leave, and an anticipated return to work date.

Especially if FMLA leave is expired or unavailable, if the doctor states “unknown” or “until further notice,” a strong argument can be made that such leave would be an unreasonable accommodation.

The more low-level the job, the harder it is to deny the accommodation. Employers often fall into a trap when they tell an employee that they cannot leave his job open any longer because of an undue hardship on operations, knowing that they routinely use temporary employees to do that particular job. Most employers are hard-pressed to prove undue hardship merely on the basis of an increased hourly premium charged by a temp agency to keep a body in the employee’s position until his return to work. If the duties are more complex or harder to redistribute, it will be easier to mount an undue hardship defense.

An internal “maximum leave” policy is asking for big trouble. And in this instance “big trouble” means millions of dollars of trouble. In 2009, after years of litigation, the EEOC settled for \$6.3 million with Sears after that company had consistently terminated any employees on medical leave who could not return to work after one year due to their continuing disabilities. The ADA requires interactive dialogue and a case-by-case assessment of each employee. The law does not permit a “one size fits all” approach to medical leave policies – even generous ones like the Sears policy.

The ADA covers employees who are ineligible for FMLA leave. Again, the requirement to reasonably accommodate employees with disabilities applies from day one of employment and covers employers with four or more employees (under Ohio’s equivalent to the ADA).

The mere mention of a need for “leave” due to an employee’s own health condition triggers an ADA inquiry. That inquiry may start with dialogue with the employee about the need for accommodation and may include requiring the employee to provide medical documentation supporting the need for it.

The ADA and FMLA operate independently of one another – whichever offers greater protections for the employee applies. Both the ADA and FMLA have their own eligibility requirements for leave (i.e., “qualified individual” with a disability under the ADA, versus an individual with a “serious health condition” under the FMLA). An employee’s situation should be analyzed under both statutes. Whichever statute offers the employee the greatest protection (including lengthier leave) will apply.

Recognizing when unpaid leave could serve as a reasonable accommodation under the ADA and seeking legal guidance when needed are major steps toward ADA compliance.

Ms. Michael and Mr. Fleischauer are with the labor law department at Coolidge Wall Co., LPA, in Dayton. They can be reached at 937-223-8177, or by email at michael@coollaw.com and fleischauer@coollaw.com.

Diversity Today
Phoenix Rising – Out of the Ashes

By: BK Milburn
8/21/13

Possibly the best place that I ever worked had, just a few years before, been mired in a scandal about retaliation against a whistleblower. The court found the allegations to have basis, and we may all be safer from the threat of industrial accidents because this person was willing to speak.

With the strengthened influence of Human Resources after the incident, that company not only provided a safe forum for people with safety concerns, it became safe to talk about other taboo subjects. Yes, the employees, such as me, did get tired of going to so many training sessions. But it worked!

One of the best examples was when I went into the break room and there were two guys in there, that I barely knew. One of them said something inappropriate (yes; these were my younger days) and the other one told the first one, "Stop." The first one continued on, and the second said, "Leave her alone," noticing my agitation. To which the first one said (a real "brain trust" with this guy), "If she wants me to stop, she will say something." The second guy said that I was "too polite" and would not easily do so, and more or less demanded that the first guy leave the room with him, which he did. Later, when I went by to thank "Second Guy," he was very embarrassed that the whole situation had occurred, indicating that a "Thank You" was almost inappropriate.

Unless someone else said something to HR, or any supervisor, nothing was said to either of them. It was a foolish moment that can occur whenever people are together. However, it stayed at the level it needed to, because someone spoke up. Because someone spoke up, I also did not feel "alone" in dealing with a very awkward situation, thereby significantly diffusing it. "First Guy" was put on alert that at least one of his peers was not going to quietly accept the behavior. All of us were able to return to productive work in just a few minutes. We need a lot more "Second Guys" (and Gals)!

Educated employees can make the HR person's job a lot easier by having employees police themselves. While I was there, I do not remember HR being involved in any "investigations", though I assume there was at least one. HR did provide a lot of training for everyone, however, about the risks involved with not treating each other respectfully. HR can also establish what reasonable boundaries are. An example was that I once asked a blind man at a bus stop, "What bus are you looking for?" – feeling immediately foolish. The HR consultant noted that this is considered typical speech, and the fact that I was sensitive to the inappropriateness, not repeating the behavior was sufficient. If one looks at most employment laws, it appears that at the core is decent treatment of others. It is actually rather sad that it takes laws for some of us to treat others kindly, rather than doing it voluntarily. Laws must be balanced with the responsible use of the courts to address the true injustices that do occur, each day in this country, and every other. It is my hope that Human Resources will be allowed their voices to ensure that all of our workplaces are productive and fair. The best, most productive work that I have done has been at workplaces that have virtually no issues with unfair treatment of others, of any kind. And yes, we had training, with plenty of juvenile eye-rolling about having more training. But I think training and civil treatment is worth it for everyone.

Please Keep Speaking Up!
Brenda

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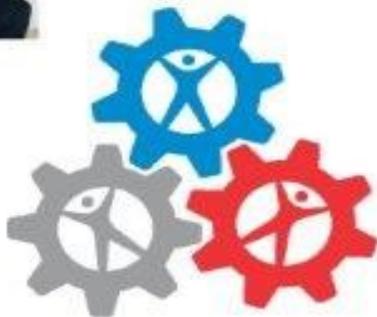
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“The goal of our organization is to provide the Human Resources professional a resource to confidently navigate the issues of the day, and to assist you in making your business the most effective under the circumstances.”
 -Angela Sherrick,
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