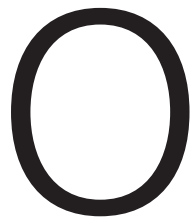


Employment Law Update



Ohio Intentional Tort Update.

In a decision that will minimize employer exposure to workplace injury intentional tort suits, the Supreme

Court of Ohio recently narrowly interpreted what constitutes the deliberate removal of an equipment safety guard for purposes of *Ohio Revised Code 2745.01(C)*. That statute, which is intended to limit employer liability for intentional torts, provides that an employer is only liable for an intentional tort if it deliberately

intended the employee's injury. However, the statute also provides that an employer's deliberate removal of an equipment safety guard creates a rebuttable presumption

that the employer deliberately intended to cause injury. Some Ohio courts of appeal interpreted "equipment safety guard" and "deliberate removal" very broadly, with some courts holding that any safety device, including personal

protective equipment, constitutes an equipment safety guard, and extended "deliberate removal" to include an employer's instructions not to use a safety device.

In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, the Supreme Court of Ohio rejected such a broad interpretation. The Court limited the definition of an equipment safety guard to "a device that is designed to shield the operator from exposure to or injury by a dangerous

aspect of the equipment," and held that "free-standing items..., such as rubber gloves and sleeves, are not an 'equipment safety guard.'" *Id.* at ¶ 18. The Court further held that a deliberate removal is "a careful and thorough decision to get rid of or eliminate a safety guard." *Id.* at ¶ 29. Such a decision does not include an employer's failure to properly instruct an employee on its use or the employer's failure to provide a guard where one did not previously exist. *Id.* The Court did, however, leave



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open the possibility that bypassing or disabling a guard could be deliberate removal of a guard for purposes of R.C. 2745.01(C). *Id.*

While the Court's decision represents a victory for employers, it is important to remember that employers still may face significant liability if an employee is injured where a guard has been removed or disabled.

Criminal Background Checks and Federal Contractors.

On January 29, 2013, the U.S. Department of Labor, Office of Contract Compliance Programs (OFCCP) issued a directive instructing federal contractors and subcontractors on the use of criminal background checks in hiring, among other things. The directive generally discourages contractors and subcontractors from inquiring about an applicant's criminal history. If an employer does, however, request criminal background information, the OFCCP states that the request should be "limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity," and refers to the Equal Employment Opportunity Commission's guidance on criminal background checks in employment. That guidance, which is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm, suggests that an employer make an individualized assessment of a candidate's criminal background by considering several factors, such as the type of conviction, the job duties, and the age of the conviction.

New Family and Medical Leave Act Regulations.

The U.S. Department of Labor's (DOL) new regulations on the Family

and Medical Leave Act (FMLA) took effect on March 8, 2013. Among other things, the new regulations require covered employers, generally meaning those with 50 or more employees, to use a new FMLA poster, new FMLA certification forms, and a new Rights and Responsibilities Notice. These forms and poster are available at the DOL's website at <http://www.dol.gov/WHD/fmla/2013rule>.

The regulations also expand the protections of the FMLA to family members of members of the regular armed forces who are on active duty. Eligible employees may take leave for a "qualifying exigency," which includes leave taken to address issues arising from a short-notice deployment, spend time with the military member who is on Rest and Recuperation Leave, or attend military events, among other things. Additionally, eligible employees may take up to 26 weeks of leave to care for current service members or qualifying recent veterans with a serious injury or illness.

Finally, the regulations clarify the method by which employers must calculate intermittent leave. The regulations provide that an employee must not be required to take more leave than necessary. Accordingly, employers must use the smallest increment of time used for other forms of leave, but must not use greater than one-hour increments.

I-9 Form Changes.

The U.S. Citizenship & Immigration Services has released a new Form I-9, along with more detailed instructions to the form. The new I-9 Form can be used immediately. Older versions of the form can no longer be used by the public effective May 7, 2013.

The newly revised Form I-9 makes several improvements designed to minimize errors in form completion. The key revisions to Form I-9 include:

- Adding data fields, including the employee's foreign passport information (if applicable) and telephone and email addresses.
- Improving the form's instructions.
- Revising the layout of the form, expanding the form from one to two pages (not including the form instructions and the List of Acceptable Documents).

The new I-9 form and detailed instructions are available at: <http://www.uscis.gov/files/form/i-9.pdf>