

Fine Print

A Quarterly Publication of the Ohio State Bar Association
and Our Members

Issue 5 • Fall, 2000

A STATE TAX TIME BOMB

By David L. Chilcoat

You just finished reading a memo from your company's treasurer advising you that a southern state had billed the company for six figures worth of back taxes, interest and penalties dating back to 1989. To make matters worse, he told you that the company had also received questionnaires from two more state revenue departments indicating that they thought your company may be "doing business" in their states.

How can we owe money to these states? We don't have offices or employees in those states. Didn't one of our advisors tell us that we were engaged in interstate commerce and, therefore, not subject to such taxes?

The situation becomes more complex over the next few weeks as the company receives questionnaires from several more states. Another state has sent you a bill, which is larger than the first. How far back can they go

and how do they know about us?

Unfortunately, many small companies are beginning to experience events similar to what has just been described. What formerly was a non-issue for small and medium size businesses has become an expensive and frightening nightmare. What is going on and why does it seem to be getting worse?

As in every other area of life, state and local governments require money to operate. In order to effectively increase revenues, governments must either increase tax rates or do a better job collecting taxes that it believes are owed. Accordingly, over the last few years, two trends have occurred with regard to business taxes. State and local governments have pressed for court interpretations that would allow them to tax companies doing business in interstate commerce. At the same time, these governments are devoting more resources toward collecting their taxes.

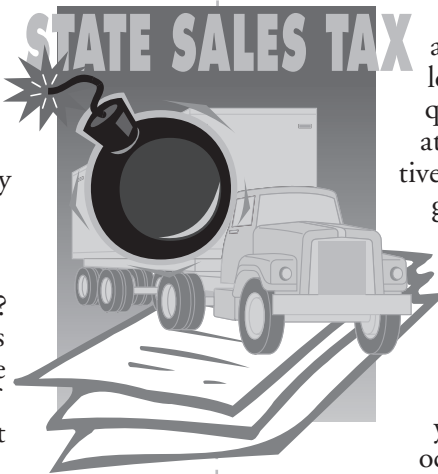
Courts appear to be moving in the

direction of allowing states to tax companies based upon "economic presence," using very limited interpretations of the physical presence rules.

For example, if a company ships its products into a state in trucks the company does not own, most courts have held that "nexus" (a connecting link) is not present; therefore, the state does not have the power to tax. However, if the company allows its own trucks or employees to deliver the product into the state, most state revenue departments will attempt to tax the company, and the state may have support from its courts.

Situations where your employees train the customers or lease products to customers in other states, as well as many other examples, may cause a state revenue department to attempt to tax your company. At the very least, companies doing business of any kind across state lines should obtain the services of a multistate tax professional to assist them in making an analysis of the company's methods of business and its tax exposure.

OSBA member David L. Chilcoat is with Campbell, Hornbeck, Chilcoat & Veatch.



ASSERTING EMPLOYERS' RIGHTS TO MANAGE EMPLOYEE LEAVE

By D. Lewis Clark Jr.

One of the most challenging issues facing employers is how to effectively manage employees' absences in a way that maximizes productivity on the one hand and minimizes the potential for legal liability on the other. The Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees with 12 weeks of unpaid maternity leave and for the employee's or an immediate family member's serious health condition. Even employers not covered by the FMLA may be required by the Americans with Disabilities Act to provide a leave of absence in certain circumstances as a reasonable accommodation of an employee's disability. State law also may require employers not covered by the FMLA to allow employees to take maternity leaves.

The FMLA requires employers to determine when an employee is permitted to take time off. Employers' challenge is to lawfully limit employees' time off to only what the law requires. Following are some ways that employers can address this challenge:

■ Develop a written policy. Have a policy in your employee handbook that complies with the FMLA. The policy should

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SHOPLIFTING AND LOSS- PREVENTION PROGRAMS

by Honorable Richard M. Wallar

Shoplifting can cost a storeowner a bundle considering merchandise loss, apprehension costs and litigation. There are several Ohio statutes regarding theft and shoplifting offenses. Knowing the general elements of the laws (and their practical application) is essential to an efficient loss-prevention program.

Ohio's Shoplifter Detention Law permits merchants and/or their employees to detain shoplifting suspects. If a merchant, or employee or agent, has probable cause to believe that store property has been shoplifted, he or she can detain the suspected thief in a reasonable manner for a reasonable length of time in the store or in its immediate vicinity for the following reasons: 1) to recover the stolen property; 2) to facilitate an arrest by a peace officer and/or; 3) to obtain an arrest warrant. The statute does not permit

the merchant or its employee to search the suspect or seize any property belonging to the suspect without the suspect's consent, or to use undue restraint.

The Ohio Shoplifter Detention Law is a reasonable response to a real need, however it does not provide absolute immunity to a merchant and/or its employees for a wrongful detention or alleged harm to a suspect. In 1991 a Franklin County jury awarded a shoplifting suspect over \$12 million in damages for permanently disabling injuries sustained during a shoplifting arrest. The suspect was accused of stealing four "AA" batteries.

Merchants clearly have a legitimate interest in maintaining a loss-prevention program and training employees to aggressively reduce shoplifting losses. However, the use of physical force or unreasonable detention of shoplifting suspects can be

expensive for the merchant - whether the suspect committed the offense or not. A merchant can be sued and, regardless of the ultimate court decision, may incur considerable costs.

As part of a comprehensive loss-prevention program, a merchant should consult with an attorney and other merchants to determine the most efficient, cost-effective loss prevention

The use of physical force or unreasonable detention of shoplifting suspects can be expensive for the merchant...

program to meet the stores' needs. Civil and criminal litigation can require many employee hours, store resources and potential legal fees. Additionally, damages may be awarded to a shoplifting suspect should a court or jury find that an arrest or detention was unwarranted and/or unreasonable. All

such costs should be factored into the loss-prevention plan.

Hon. Richard M. Wallar is a municipal court judge in Hocking County and member of the OSBA Board of Governors.

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correctly define who is and who is not eligible for leave under the FMLA and the circumstances under which leave can and cannot be taken. The policy also should list the employee's obligations for requesting leave and verifying the need for the leave. To prevent employees from stacking paid leaves provided by the employer on top of unpaid leaves provided by the FMLA, the policy should state that the employee may have to take any paid leave, such as vacation or paid sick leave, at the same time as the unpaid family or medical leave.

■ Determine whether the employee is eligible. Not all employees are eligible for leave under the FMLA because they may not have worked enough hours for the employer. When an employee requests time off, the employer first should determine whether or not the employee is actually eligible for leave under the FMLA.

■ Request medical information. The employer should require the employee to have his or her doctor give the employer the information needed to correctly determine whether or not the employee has a medical condition that entitles the employee to the leave.

■ Notify the employee that the leave is family or medical leave. If the employer determines that the employee is eligible for the leave and the leave qualifies under the FMLA, the employer must notify the employee in writing of that determination, even if the employee is entitled to take paid time off under the employer's sick leave policy or some other policy. Otherwise, the leave will not count against the employee's 12-week leave allotment.

■ Do not count absences as "occurrences" under no-fault attendance policies. The FMLA prohibits employers from penalizing employees for using the leave the law allows them to use. The U.S. Department of Labor takes the position that policies that assess "points" against employees for absences regardless of the reason violate the law when an employee is assessed a point for an absence he or she was allowed to take under the FMLA.

Employees' rights under the FMLA are not without limits. To effectively manage employees' absences, employers should learn not only what rights the FMLA gives to employees, but also, what rights the FMLA does not give to employees.

D. Lewis Clark Jr. is an OSBA member and is with the Columbus office of Squire, Sanders & Dempsey.



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Funding for Fine Print provided by the Ohio State Bar Foundation.