

# *Employer Responsibility*

## *Chapter 7*

## **Business Owners Shoulder Responsibility for Employed Drivers**

***Q: My company owns several motor vehicles that are sometimes used by my employees. Is the business responsible for all accidents involving these vehicles?***

**A:** An employer's responsibility for the operation of a vehicle by an employee is determined by the principle known as *respondeat superior* (literally, "the superior must answer"). *Respondeat superior* means that an employer should be responsible for the negligence of an employee if the employee's actions fall within the course and scope of the employment.

***Q: Aren't all acts performed by an employee during work hours done in the course and scope of the employment?***

**A:** No. An employee can stray from the scope of employment, and under such circumstances, the employer may not be responsible for the employee's negligence. For instance, a vehicle may be given to an employee with the understanding that he/she will make a delivery and then return directly to the business place. If the employee strays from the delivery and takes the vehicle to perform a personal errand, the employer may not be found responsible for the employee's negligence while on the errand. For instance, if, after making the work delivery, the employee leaves the city to visit his/her out-of-town mother, the employer will not be responsible for the negligent operation by the employee during the unauthorized trip.

***Q: What if I allow my employees occasionally to use a vehicle to drive to lunch?***

**A:** Usually, an employer is not responsible for this kind of trip if the employer is not gaining a special benefit from the employee's use of the vehicle. If, however, the employee is on call during the lunch period, the employer may be found responsible for the employee's negligence. Similarly, if the employee has been instructed by the employer to pick up lunch for other employees, the trip may be determined to be business-related *because* it benefits the employer and the business.

***Q: If I require my employee to drive the vehicle home at night so I do not have to pay for parking, what is the extent of my responsibility?***

**A:** Since the employee is required to drive the vehicle to and from work, the employer is responsible for the employee's negligence in the operation of the vehicle during those trips to and from work. Taking the vehicle home and then back to work is part of the employee's regular duties. The employer would not, however, be responsible for any personal trips the employee might take in the vehicle during the employee's off hours.

***Q: What if the employee lets someone else drive the car? Is the business liable?***

**A:** An employer who does not give the employee permission to allow another to operate the vehicle usually will not be found responsible for the negligence of the non-employee.

***Q: What if I allow an employee to use the company vehicle for his or her own purpose even though I know the employee is a poor driver?***

**A:** Liability for an accident involving an employee in these circumstances would not have anything to do with the employer/employee relationship. Instead, a person giving permission to the unsafe driver to operate a vehicle can be found responsible for the negligence of the employee on a theory of *negligent entrustment*. A person who allows

another to use a vehicle when he or she knows that the driver is incompetent or inexperienced can be held responsible for that driver's negligence.

***Q: If I allow an employee whom I know to be a good driver to operate the business vehicle on that employee's personal errand, will I be found responsible for the employee's negligence on that trip?***

**A:** No. Because the vehicle is being used outside of the business relationship, the principle of *respondeat superior* does not apply. The employer is not responsible for non-business-related acts of an employee. Furthermore, if the employer knows the employee to be a good driver, the theory of negligent entrustment does not create a basis for liability. An employer is not negligent when giving a good driver access to a vehicle. Mere ownership of a vehicle does not create any liability for the independent actions of another.

***Q: Even if the business might be liable for an employee's negligent driving, doesn't that employee also have responsibility?***

**A:** Yes. The negligent employee is also accountable for his or her own negligent acts. Any lawsuit or claim brought by the injured party will likely be brought against both the employer and the employee. Upon learning that a claim is brought, both the employer's insurance carrier and the carrier for the employee should be advised of the claim to determine whether or not more than one insurance policy applies to the claim.

*—by Lynn A. Lazzaro, a Cleveland-area attorney in private practice.*

## **Know the Extent of Your Responsibility for Employees' Injuries**

***Q: I own a business where my employees are occasionally injured on the job. Am I directly responsible for their injuries?***

**A:** Generally, no, as long as you comply with the Ohio Workers' Compensation Law. Participating employers have created and maintained a state fund by paying workers' compensation premiums to the State of Ohio. The Bureau of Workers' Compensation administers the fund, and an employee who is injured in the course of his or her employment may apply for and receive benefits out of the fund from the Bureau of Workers' Compensation. That employee may not make a claim directly against the employer. The two-fold purpose of this system is to insulate participating employers against employees' claims for injuries, while providing benefits to injured employees from an independent fund regardless of fault of either employer or employee.

***Q: Are there any situations where I might still be liable to my injured employee?***

**A:** Yes. You may be held responsible if you do not comply with the Ohio Workers' Compensation Law. Also, you may be liable even if you *do* comply with that law, but have injured your employee by committing an *intentional tort*.

***Q: What is an "intentional tort"?***

**A:** Under current Ohio law, an employer is liable for an intentional tort if the employee can prove the employer committed an act with the deliberate intent to injure the employee.

Ohio law presumes the following are intentional torts: when an employer deliberately removes a safety guard on equipment, or deliberately misrepresents a toxic or hazardous substance, and an injury or illness occurs as a direct result.

However, the law concerning employer liability for intentional torts may soon change. At the time of this writing, the Supreme Court of Ohio was considering a case that challenged current law regarding intentional torts. It is unclear how the court's decision may alter the law. Follow up with your attorney to find out about any changes that may affect your business.

### **Insurance**

***Q: Will the commercial general liability policy I carry on my business cover an intentional tort claim that might be brought by my employee?***

**A:** This depends on the language of the policy, and upon a court's interpretation of that language. Many commercial policies contain provisions that specifically exclude "intentional torts" from the employer's insurance coverage. Some Ohio courts have said the words "intentional torts" mean legally what they say—that they pertain to both definitions of "desired injury" and "substantially certain to result in injury"—and that, therefore, the employer is not insured against an employee's claim under either circumstance. Other courts have said the words "intentional torts" do not specifically refer to injuries "substantially certain" to occur, and thus the insurance company has excluded coverage under the first definition, but has provided coverage under the second

definition. In July 2003, the Supreme Court of Ohio held that a commercial general liability insurance policy that excludes coverage for bodily injury to an employee arising out of or during the course of employment does not provide coverage for an employer's liability for "substantial-certainty" intentional torts.

Recently, some insurance companies have begun including coverage in their policies for intentional torts and "substantially-certain-to-occur" injuries, and have charged a higher premium for this coverage.

Employers should review their current commercial liability policies with their insurance agents and with their attorneys to determine if full coverage exists for such claims.

***Q: I have heard that the workers' compensation benefits are available only for an employee's physical injuries. Can an employee therefore sue my business for purely psychological injuries?***

***A:*** Yes. The workers' compensation laws allow compensation only for bodily injuries. They do not, however, prevent an employee who has suffered purely psychological injuries as a result, for example, of a robbery at her employer's business, from bringing legal action against her employer for negligence.

*—by Jack L. Neuenschwander, retired partner of the Piqua firm of McCulloch, Felger, Fite & Gutmann Co., LPA. It was updated by Douglas J. Schockman, an attorney with the Columbus firm of Lane Alton & Horst.*

## Spousal and Child Support Issues Affect Business Owners

**Q:** *I am a happily married business owner, but I just received paperwork (“withholding notice orders”) instructing me to withhold child support and spousal support each time my employee receives a paycheck. I’ve also been instructed to send the money withheld to the Child Support Payment Central for distribution to the employee’s ex-spouse. Who needs this extra paperwork! Can I ignore the order and/or terminate the employee?*

**A:** No. You must read the orders carefully and you must comply with the orders. There is an address and phone number on the orders of the support enforcement agency to which you may direct any questions you may have. If you fail to withhold income in accordance with the provisions of the notices and orders you receive, you may have to pay the accumulated amount that you should have withheld, and/or you may be found guilty of contempt of court, and/or you may have to face other penalties, including fines. Also, if you fire, refuse to hire, or discipline any employee because support withholding has been ordered, you will be subject to legal penalties, including responsibility for funds that should have been forwarded and fines.

**Q:** *Can’t my employee just arrange to pay the spousal and/or child support directly to his or her ex-spouse?*

**A:** Generally, the employee does not have a choice. The law generally requires that where the *payor* (in this case, your employee) is employed, the withholding process will be used. Also, any support paid directly between the spouses generally will not be counted as payment of the support obligation, but will be considered a gift. The withholding process provides an orderly and accountable way to ensure that support is paid in a timely manner. Spousal support, but not child support, may now be paid directly to a former spouse. Still, if a court order requires wage withholding, the employee does not have the option to pay spousal support directly to the former spouse.

**Q:** *I received withholding paperwork for an individual who performs services for my business in an independent contractor capacity. This person is not an employee, so we do not withhold taxes from her paycheck, and she receives a 1099 tax form rather than a W-2 form. Do I have to withhold and forward support for this individual?*

**A:** No. If this person truly is an independent contractor, she should be considered as *self-employed* and she will need to set up an account at a financial institution from which the support payments can be withheld and forwarded.

If you receive withholding paperwork for an individual who you believe to be an independent contractor, however, do not just ignore the paperwork. Rather, you need to immediately contact the Child Support Payment Central, the individual’s attorney, and/or your own business attorney in order to clarify the situation.

**Q:** *If I receive withholding orders for more than one employee, do I have to forward a separate check for each one?*

**A:** You can combine all of the payments into a single check to the Child Support Payment Central. However, the check should be accompanied by a written list of names, Social Security numbers, case/support order numbers, and the amount withheld for each of your employees.

***Q: I have several employees in the process of ending their marriages. How can I be supportive without becoming involved in the intimate details of their domestic relations dilemmas?***

**A:** Divorce is a difficult lifestyle change even in the most amicable of circumstances. Encourage your employees to consult professional legal counsel and the counsel of a mental health professional to guide them through this difficult time. Many group health insurance policies have resources for these circumstances. You can direct your employee to these resources to keep from becoming too involved. Your employees occasionally may need to be absent from work to attend court hearings, depositions, mediation sessions, and/or appointments with attorneys or counselors.

Your employees may need your assistance in gathering information regarding their salary history and benefits because full disclosure about financial matters is required by the court. Sometimes, a business may be joined as a party to the divorce, and/or may receive a restraining order, and/or may be required to provide information directly to opposing counsel or the court. If this happens, you may wish to consult with either your employee's attorney or your own attorney to learn more about your rights and responsibilities.

*—by Laura S. Zeldin, a Columbus attorney; updated by Pamela J. MacAdams, a partner in the Cleveland firm, Morganstern, MacAdams & DeVito Co., LPA.*

## Who Has Responsibility for Ice and Snow Injuries?

***Q: I own a house and my business owns several real estate properties. I am concerned about business and personal responsibility for slip-and-falls on ice and snow which might occur on those properties. Can I or my business be found liable?***

**A:** Not unless you are found to be *negligent*, or fail to exercise *ordinary care*. Ordinary care is judged by what a reasonable and prudent person would have done under the same circumstances.

Every person has a duty to look out for his or her own safety. A business or individual may also have a duty to look out for the safety of others. This duty can come about by written agreement or by law. Before an injured person can recover damages, that person must show that something the business owner or individual did or failed to do caused the injury. The person must also show that the business or individual “owed a duty” to that injured person.

***Q: If someone slips and falls on ice or snow naturally covering the sidewalk outside my house, can I be held responsible for that person’s injuries?***

**A:** Almost certainly not. People walking on ice and snow in front of your house presumably know that they might slip and fall. Ice and snow are natural hazards in Ohio’s climate. Because snow or ice accumulations are often sudden, it would be impractical to hold responsible every homeowner who failed to clear his or her sidewalk.

***Q: What if a customer slips on ice and snow in the parking lot of my company’s store?***

**A:** It has long been the law in Ohio that a land or business owner does not ordinarily have a duty to remove natural accumulations of ice and snow. This is true even if the person injured is a customer of the business being visited. Furthermore, the business owner does not have a duty to warn customers of any dangers associated with ice and snow on the sidewalks, walkways or parking area. The reason is that, in Ohio’s climate, ice, snow and temperature changes are expected hazards. The courts have found that it is impossible and impractical to place a duty upon a land or business owner to anticipate and at all times correct for these natural occurrences.

***Q: Can the business owner ever be found responsible for a customer’s slip-and-fall on ice and snow?***

**A:** Sometimes. Everyone who has seen an Ohio winter knows the dangers of ice and snow. All customers on a business property in the winter, therefore, must take responsibility for protecting themselves from these dangers. Usually, the business owner has had no part in creating the danger that causes injury to the customer. A business owner cannot insure the safety of all persons coming onto his or her property.

However, when a business owner creates a *greater* danger than was brought about naturally, then the business owner may be found liable for any injuries and damages which result. For instance, perhaps a property owner knows of a broken gutter and allows it to spill water onto a sidewalk in front of the entrance to his or her building. The water freezes and forms an unnatural ice accumulation. In such a case, the owner may be held responsible for this negligence because the ice condition arose artificially due to a gutter that the building or business owner should have repaired.

***Q: What if my company's building is an apartment building? Does the company as a landlord have a greater duty than the other business owners to clear ice and snow from sidewalks for the tenants?***

**A:** Landlords have no greater duty than any other business owner to remove natural accumulations of ice and snow from common walkways and structures unless they have an agreement or provision in the lease agreement that requires the removal. Like other business owners, a landlord will be found responsible if his or her negligence creates a condition which is unnatural. Washing down an entranceway to a building on a sub-zero day would be an example of negligence causing an unnatural accumulation.

***Q: If, by agreement with tenants, the owner of a strip mall agrees to keep sidewalks and passageways open and clear of ice and snow, would that agreement mean the owner/landlord could be held responsible for a slip-and-fall of a tenant or visitor?***

**A:** Possibly. An individual or an entity (such as a business) can be held responsible for injuries which occur when that individual or entity has assumed a duty by agreement to keep sidewalks, parking lots and entrances open. When the individual or business owner/landlord takes on that duty, he or she must take "reasonable measures" to ensure that the job is performed. However, the law does not expect the area to be kept totally free and clear. Rather, the law expects the individual or entity assuming the duty to make "reasonable efforts" to keep the area clear. No amount of maintenance can totally insure against injury and damage.

***Q: What if the slip-and-fall occurs on a public sidewalk in front of the business and the city has an ordinance instructing all landowners to keep their sidewalks free and clear from snow and ice accumulation? Is the business responsible for all slip-and-falls which occur on the public sidewalk?***

**A:** No, not as a result of the ordinance. Although the owner of a property does not own the public sidewalk, the ordinance may require that sidewalks be kept free from snow accumulation and open to the public. This is for the convenience of the city. This does not mean that the business owner is liable for injuries resulting from his or her failure to remove the snow and ice. The ordinance does not create a basis for liability. Rather, the ordinance usually creates a penalty for failure to clear the sidewalk in a reasonable time. Typically, the city would fine the business if it failed to comply with the law.

*—by Lynn A. Lazzaro, a Cleveland-area attorney in private practice.*

## **Individual Supervisors May Be Liable for Violation of Discrimination Laws**

***Q: One of my company's supervisors recently asked me if she could be held liable if an employee should bring a suit claiming discrimination. What should I tell her?***

**A:** Ohio discrimination laws make it unlawful for an employer to discriminate in hiring, firing, and terms and conditions of employment on the basis of race, color, religion, ethnicity, national origin, gender, disability (handicap) or age. According to the Supreme Court of Ohio, the concept of *employer* includes not only the entity that employs a person, but also individuals who make (or sign off on) the employment decisions affecting an employee. In short, if a supervisor's action (or inaction) adversely affects an employee, both the supervisor and the employer may be held liable.

As a result of the Supreme Court of Ohio's decision, you can expect that discrimination suits have been and will be brought against not only the employer company, but also individual defendants ranging from corporate officers to line supervisors. Multiple defendants compound defense costs, and *may* mean a company will need to hire different law firms to represent different employees who have been sued. If the employer has a policy indemnifying the named supervisors or an agreement requiring the employer to defend and pay damages assessed against an employee, then it may be possible to consolidate the various legal defenses so that they can be handled by one law firm. However, the interests of the employer and the supervisor(s) may not be the same. For example, a supervisor may claim to have been acting pursuant to an "unwritten policy" of the employer, a position which the employer denies, but which makes it liable. Conversely, the employer may have a claim against the supervisor. In either case, the individual supervisor must be represented by separate counsel.

***Q: Does my company's liability insurance for employee lawsuits cover my supervisors?***

**A:** It is not likely that such coverage extends to individual supervisors. Unless the supervisors have an indemnification agreement with the employer, they will be required to hire and pay their own lawyer(s), unless they have their own insurance coverage (which is unlikely). However, insurance policies should always be reviewed to determine if any coverage applies. Supervisors should find out from their own insurance agents whether such coverage is available under their homeowner's insurance, an umbrella policy, or a special rider to their existing coverage.

***Q: What should I do?***

**A:** Employers (including officers, managers and supervisors) should do the following:

- 1) review insurance coverage and determine what actions are covered and excluded; for those items covered, the insurance company may require the employer to have certain practices and procedures (including human resources auditing policies) in place;
- 2) conduct periodic training of all management employees to educate them on company policies and procedures, the restrictions imposed by employment laws, and management techniques to lawfully address employee issues;
- 3) review and improve their documentation of employment-related decisions;
- 4) review whether, and to what extent, individual managers and supervisors are, or should be, indemnified for employment decisions;

- 5) define the chain of commands and clarify through written job descriptions the scope of authority of each management position; and
- 6) implement in-house complaint procedures providing for alternate recipients of employee complaints within management, prompt investigation and resolution of complaints, and assurance of nonretaliation.

*–by Linda C. Ashar, an attorney in the Avon law firm of Wickens, Herzer, Panza, Cook & Batista.*

## **Conflict of Interest Policies Are Crucial for Non-Profits**

The non-profit world is changing. The IRS, federal, state and local governments are all taking a closer look at the operation, management and actions of non-profit corporations.

One of the best ways to protect your non-profit organization is by adopting and implementing a conflict of interest policy. Conflict of interest policies provide a way to address the inevitable issues that arise between board members, staff and outside interests.

Many non-profits believe that their board members can never provide services or be paid for providing services to the non-profit organization. While this may be true in very specific contractual relationships with government entities, generally speaking board members are permitted to contract with their non-profit organizations. However, such a relationship may not be in the non-profit's best interest.

A good conflict of interest policy will help a non-profit organization balance the issues of fair market value, independent judgment and faithfulness to the non-profit corporate entity and mission.

At a minimum, a board's non-profit policy should establish a process by which independent board members review and determine whether or not a contract with a board member is in the organization's interest. Not only should interested board member(s) abstain from voting, but they should not be involved in any of the discussions or analysis.

Care also should be taken to ensure that alternative and competitive bids are considered and that non-interested board members are fully informed of all options and costs related to the contract.

A good conflict of interest policy also should address gifts, honorarium, and other things of value given to staff and board members. While it may be appropriate for a staff member to accept holiday cookies from a client, due to the nominal value and unlikely persuasive effect such traditional gifts have, the same would not be true of an all-expense-paid vacation.

The problem many organizations run into is where to draw the line between benign tokens of appreciation and gifts that could raise concern. Some organizations ban all gifts, but this can have the unfortunate effect of offending customers and clients who do not understand why a plate of cookies is refused. A well-considered conflict of interest policy can help avoid these types of issues.

In addition to addressing gifts, a good conflict policy should address business opportunities, intellectual property, trade secret and confidentiality issues, and it should spell out what will happen if the policy is violated.

The policy also should set forth a system for evaluating and approving conflicts. This usually requires staff conflicts to be reviewed by the executive director and board, and executive director conflicts to be reviewed by the organization's audit or finance committee.

Taking the time now to review and update your conflict of interest policy can protect your organization from future problems and better prepare you for the likely coming changes in non-profit oversight.

*—by Jeffrey J. Fanger, the managing member of the Cleveland law firm of Fanger & Adelman LLC.*

## Understand Implications of Ohio's CDL Disqualification Law

Ohio's new CDL disqualification law was passed to comply with a federal government mandate requiring all states to impose more severe sanctions upon commercial drivers for Operating a Vehicle under the Influence of Alcohol or Drugs (OVI) whether or not a commercial vehicle was being driven at the time of arrest. Businesses that employ people to drive commercial vehicles should be aware of these potential penalties and increased insurance costs.

If a commercial driver is arrested for OVI while driving a non-commercial vehicle, and a breath, blood or urine test reveals a blood alcohol content (BAC) at or above the legal limit, the CDL will be suspended under an Administrative License Suspension (ALS) for a minimum of 90 days. A refusal to submit to a breath, blood or urine test will result in a minimum one-year disqualification of the CDL. Lifetime disqualifications may be imposed due to previous convictions for OVI. Although the law provides for limited privileges to drive a non-commercial vehicle, there is no provision in the law that allows for limited privileges to operate a commercial vehicle.

An ALS must be appealed within 30 days of the date of the initial court appearance. If the appeal is successful, driving privileges, both commercial and non-commercial, may be restored. If unsuccessful, the individual cannot drive a commercial vehicle during the period of the suspension. The court may grant limited privileges to drive a non-commercial vehicle after a mandatory period of time (commonly referred to as a *hard suspension*) within which no privileges can be granted.

If an individual is subsequently convicted of OVI, regardless of the outcome of the ALS appeal, the BMV must impose a one-year disqualification of a CDL. A previous OVI conviction may result in a lifetime CDL disqualification.

If an individual is arrested for OVI while operating a commercial vehicle and a blood, breath or urine test reveal a BAC at or above the legal limit for commercial operators (approximately one-half of the legal limit for non-commercial operators), the CDL must be immediately surrendered to the peace officer. A one-year disqualification of the CDL is mandatory on the first offense. A lifetime disqualification is mandatory for a second offense.

A refusal to submit to a breath, blood or urine test upon arrest for OVI has harsh consequences for individuals holding a CDL. The law provides that, in addition to a one-year disqualification for first-time refusals and a lifetime disqualification for a second refusal, the refusal, in and of itself, is a separate criminal offense.

Operating a commercial vehicle with any discernable amount of alcohol will result in the driver being placed out of service for a 24-hour period whether or not OVI charges are filed.

The new law imposes grave consequences upon CDL holders. Just being arrested for OVI, regardless of whether or not a conviction results, can foreclose the ability to return to commercial driving. Business owners will suffer from increased insurance premiums and the costs associated with hiring and training replacement drivers.

*—by Jon J. Saia, managing partner with the Law Offices of Saia & Piatt and chair of the DUI Committee for the Ohio Association of Criminal Defense Lawyers.*

## Anti-Harassment Policies Key To Limiting Employer Liability

Sexual harassment claims and lawsuits continue to multiply throughout Ohio and the nation. Under both Ohio and federal law, however, unlawful workplace harassment is not limited to claims based on sex. Harassment on the basis of race, religion, color, national origin, age or disability is also prohibited. Businesses may be held liable not only for harassment by supervisors and managers, but also for harassment by co-employees, or, even, customers. To combat unlawful harassment, and to minimize their potential liability for such claims, employers should develop and implement effective anti-harassment policies and complaint procedures.

Unfortunately, no anti-harassment policy or complaint procedure will relieve an employer from liability for harassment by supervisors or managers that takes the form of a *tangible employment action*, such as firing, demoting or denying a raise to an employee who resists his or her supervisor's advances. Under these circumstances, the employer will be held strictly liable for the supervisor's actions. Even here, however, the presence of a well-publicized and consistently enforced policy against harassment may at least limit or preclude the employer's liability for punitive damages.

On the other hand, where the harassment does *not* involve a tangible employment action by the employee's supervisor, but merely creates a "hostile environment," an appropriately designed and implemented anti-harassment policy and complaint procedure may allow the employer to avoid liability completely for such "hostile environment" claims.

According to recent federal and state decisions, even in cases where it is the employee's supervisor or manager who is creating the unlawful hostile environment, the employer will not be held liable for such harassment if it can prove:

- 1) the employer exercised reasonable care to prevent and promptly corrected any harassing behavior; and
- 2) the complaining party unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Nevertheless, an employer may be held liable if the harassment incident is severe (such as a sexual assault), even if the incident happened only once and the employer had a policy against sexual harassment and responded immediately and effectively to the employee's complaint. Still, the existence of an appropriate policy and complaint procedure should at least limit the employer's liability for punitive damages in such a circumstance.

Although the law in this area is still evolving, an employer with an effective anti-harassment policy and complaint procedure may enjoy greater protection from liability in cases involving co-employee or customer harassment than in cases of supervisory harassment. Prompt and effective action in response to an employee's complaint of harassment by a co-worker or customer may completely insulate the employer from any type of liability. Indeed, some courts have held that the employer may be liable for co-worker or customer harassment *only* if it knew or should have known of unlawful harassment, and its actions upon learning of the harassment were so inadequate as to show indifference to that harassment.

*—by Bradd Siegel, an attorney in the Columbus firm of Porter Wright Morris & Arthur, LLP and a former chair of the OSBA's Labor & Employment Law Section.*

## **Keep Your Employees—and Your Business—Healthy**

Employers large and small are adopting employee wellness programs. And why not? If the reality even begins to match the promises, employers have everything to gain, from managing health care costs to reducing on-the-job injuries and absenteeism. If that were not enough, intangible benefits, from increased productivity to improved employee relations, have employers jumping on the bandwagon.

When you calculate the possible benefits of starting a wellness program for your own employees, however, you should factor in a possible increase in workers' compensation costs due to employee injuries sustained while engaging in wellness activities. Before starting your own wellness program, you should know what the law says about workers' compensation coverage for employer-sponsored recreational or fitness activities.

Ohio law says that, if an employer sponsors a particular recreational or fitness activity and the employee is injured while performing that activity, the employee's injury will be covered by workers' compensation insurance unless the employee signs a recreational waiver. Most employers understand this potential liability and make sure they ask their employees to sign waivers for activities that are clearly employer sponsored. But what about employer-sponsored wellness programs? Are they considered to be "employer sponsored" for workers' compensation purposes? Should you ask each of your employees to sign a waiver for any and all of these programs?

Employers generally do not think of wellness programs as employer sponsored, and with good reason. After all, many of these are individual, off-site fitness activities, and employers may reasonably assume that waivers are unnecessary. Is it possible, however, that workers' compensation insurance still might cover the injury of an employee who participates in such an activity? After all, the employee might say: "My employer asked me to engage in this fitness activity as part of the company's wellness program. I did not sign a waiver. Therefore, workers' compensation should cover my injury." Does the employee have a valid case?

### **When is an activity "employer sponsored"?**

Typically, an activity is likely to be employer sponsored if:

- the employer paid for or otherwise organized the activity;
- the activity was conducted on the employer's premises (or the employer paid the cost for rental of the premises);
- the employer supervised the activity;
- the employer paid the entry fee;
- the employer received an economic or intangible benefit;
- the employer purchased uniforms or equipment; and
- the activity was made up of only employee participants.

Based on the above factors, it may be unclear whether wellness program activities are employer sponsored in the usual sense. Employers may not be directly supervising, paying for, or housing these activities, buying uniforms or equipment, or even paying entry fees. Most employers, however, do expect to receive tangible and intangible benefits from activities associated with their wellness programs.

**Waivers: Should they be required?**

If an Ohio employer requires an employee to sign a waiver of workers' compensation benefits for recreational or fitness activities, is that employer acknowledging sponsorship of such activities? If the employer decides it is not necessary to require a waiver, what happens if an employee is injured while engaging in a physical fitness activity? Might the employer then be liable for workers' compensation benefits?

What if an employee chooses to take an aerobics class at a local fitness center as part of the wellness program? If the employee gets injured while participating in the class, is the injury covered by the employer's workers' compensation policy because the employee was participating in the class as part of an employer-sponsored wellness program? The employer had no control over the type of activity the employee selected, the employer did not pay for the cost of the class, the employer did not supervise and was otherwise disinterested in the type of activity selected by the employee. Yet, the employee claims that he would not have participated in the class without the wellness program. Will the employer's objective (that of creating healthier employees and improved employee relations) make the employee's selected activity more likely to be considered an employer-sponsored event covered by workers' compensation?

A wellness program may be just what your business needs. By starting such a program, your efforts may pay off in both tangible and intangible ways. You may well see medical insurance cost savings, reduction in absenteeism, and even improved employee morale. As with other business decisions you make, however, it is wise to consider ALL of the ways that wellness programs might impact the employment relationship.

*—by Patricia F. Weisberg, a partner in the Cleveland firm, Walter & Haverfield LLP.*

## Helpful Hints for Office Holiday Parties

***Q: As we approach the holidays, many people will soon be attending office parties. What issues should employers keep in mind when planning these parties?***

**A:** Many employers give office holiday parties for employees or non-employees such as vendors and customers. However, recent years have seen an increase in litigation brought against employers to recover for injuries to employees or those injured by the actions of an intoxicated employee.

***Q: What sorts of issues are associated with these events?***

**A:** While well-intentioned, these events can be a source of claims, including dram shop law violations, harassment claims, workers' compensation claims, and wrongful death actions.

- Dram shop laws allow a person who is injured as the result of another's intoxication to sue the individual or business that sold the alcohol. Generally, employers are not liable under dram shop laws for merely hosting a party. However, liability may be extended if the intoxicated person is a minor or if the employer knew an employee was intoxicated and continued to serve the employee alcohol.
- Harassment claims, and particularly sexual harassment claims, may result when one employee (or even a non-employee) becomes intoxicated and makes inappropriate advances or comments toward another employee.
- Workers' compensation covers only employee injuries sustained within the scope of employment. If an employee is intoxicated, the injury does not necessarily result from actions taken within the scope of employment. If an employer maintains a drug-testing policy that includes testing for cause and otherwise complies with an Ohio statute addressing drug testing issues, there will be a presumption that the injury is not compensable. If attendance at an office party is mandatory, however, some injuries that involve alcohol may be considered work related, and therefore, compensable.
- Wrongful death actions may be brought by the estate of a deceased employee to recover from the person who caused the death. An employer who was responsible for the employee's intoxication while within the scope of employment may be sued for wrongful death.

***Q: How can employers protect themselves?***

**A:** All employers should have a drug and alcohol policy stating that employees will be subject to discipline, up to and including termination, for the use, sale, or possession of alcohol or illegal drugs on company premises or while working. The policy may permit alcohol to be consumed at employer-sponsored functions, but the policy also should specifically state that at no time should alcohol be consumed to excess. Many employers choose not to serve alcohol at holiday parties or have the parties during the day to reduce the expectation that alcohol will be served. Here are a few hints for employers hosting holiday parties where alcohol will be served:

- Remind employees about the company alcohol policy and harassment policy and remind supervisors that they are still responsible for enforcement of both policies.
- Limit the availability and/or amount of time that alcohol is served and stop serving alcohol at least one hour before the end of the party.

- Do not serve “hidden” alcohol such as spiked eggnog or punch.
- Serve starchy foods that absorb alcohol rather than salty or sweet foods that make people thirsty.
- Have a cash bar to avoid using company funds for alcohol and do not allow supervisors to buy drinks for employees.
- Hold events at sites not affiliated with the employer.
- If you elect to have an open bar, hire bartenders to serve the alcohol. Encourage the bartenders to refuse to serve anyone who is intoxicated, and inform a management official if anyone is visibly intoxicated.
- Have bartenders require identification proving that the individual is over the age of 21 and refuse to serve anyone under the age of 21. Employees under the age of 21 should be informed prior to the party that, if they drink at the party, they will be subject to discipline up to and including discharge.
- Provide cabs or establish a designated driver program.
- Do not make attendance at holiday parties mandatory and make sure that employees who attend know they may leave at any time.

*—by James B. Yates, Esq., and Sarah E. Pawlicki, Esq., of the Toledo law firm of Eastman & Smith, LTD..*

## *Can I Say That?*

### **Legal Basics Every Advertiser Should Know**

Whether you advertise a lot or a little, locally or nationally, in print or electronically, on billboards, in newspapers, on the Internet, radio or television, you naturally hope your advertising campaigns will draw attention to your goods or services. But keep in mind that, in addition to gaining the attention of the consumers that you *want* to reach, you may also capture an entirely different and unwelcome audience if you are not careful in developing your message.

Your competitors watch your ads as closely as you watch theirs, and they have some power to keep you on your toes. Short of being sued by a competitor for false claims, though, who else might be watching? The Federal Trade Commission (FTC), the Better Business Bureau, your state's attorney general, the Food & Drug Administration (depending on your business), and various watchdog groups. (These days, if you're in the business of food or drinks for children, many different watchdog, agency, and government groups are paying special attention to you.) These groups are simply trying to ensure that what you are saying is truthful and fair and not harmful to the consuming public.

If you stick with the following general principles, however, all the potential challengers to your advertising will, for the most part, be satisfied:

- Advertisements must be truthful and not unfair or deceptive.
- Claims of fact, survey numbers, statistics and the like must be substantiated, *i.e.*, backed up by competent and reliable data or testing.
- Comparative ads are fine, but do not misrepresent your competition.
- An endorser must be a true user of your product or service and the testimonial must be representative of the typical experience a consumer can expect from use.
- Want to run a special sweepstakes promotion? Know that there are particular rules in each state that must be followed, including some that require registration and bonding.

Of course, many types of industries are specially regulated and their advertising efforts require extra care and compliance. If you are not sure about these requirements, contact your Better Business Bureau or the FTC (or visit [www.ftc.gov](http://www.ftc.gov), which provides helpful guidance), or consult a lawyer familiar with advertising issues. Do not rely on your luck. Not only is it expensive to find out what *not* to do the hard way through litigation or an agency action, it might result in more PR than you planned—though not the positive kind you were hoping to get.

*—by Jill P. Meyer, an attorney with the Cincinnati office of Frost Brown Todd LLC.*