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Separation Agreements: First Line Of Defense

By William E. Robinson
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Discharging an employee is never pleasant, and, as many West Virginia employers have discovered, offers a risky proposition. Concerns that arise with any firing become heightened when dealing with an employee who has caused trouble in the workplace, who has complained about what he or she believes to be unlawful activity, or with whom the company has failed to document his or her performance deficiencies. Even when you have done everything within your power to ensure that the termination is justified, that all company policies and procedures have been followed, and that the employee's file has been fully and properly documented, the prospect of an expensive lawsuit still hangs over you.

Fortunately, there are self-defense tools that can help you to avoid the judicial system and the risks to your company's bottom line that flow from litigation. Particularly over the past 15 years, many employers have effectively utilized separation agreements, alternatively called severance or termination agreements, as the first opportunity to reduce their legal exposure. In short, the departing employee signs a release agreeing not to sue you,

and in exchange you provide that employee with certain benefits.

Separation agreements can serve many purposes. They can smooth workplace friction often associated with an employee's departure, and thereafter cushion the blow for that employee. They may, in those instances in which an employer believes litigation is likely to follow, provide a means of resolving the dispute. Perhaps most importantly, they eliminate the uncertainty of potentially expensive claims when an employment relationship comes to an end.

Such agreements can be used in virtually any circumstance: layoffs caused by workforce restructuring; a voluntary exit incentive program; as a condition of receiving a severance package; or in connection with individual resignations or involuntary discharges. Some employers prefer to obtain a release in all instances of employee departures, while others will ask only those employees who might have a legitimate legal claim against the company, or who seem especially motivated to sue, to execute an agreement.

Because of the tensions inherent in most severance situations, the manner in which the departing employee is approached

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W.Va. HR Journal Sets Mark As A Quality Publication



Chairman's Column

By: Jim Dissen
Columbia Natural Resources LLC

TIME FLIES. It's hard to believe that this fifth edition of the *West Virginia Human Resources Journal* marks the first anniversary of the Journal.

Over this period of time the members of the Chamber's Human Resources Committee have covered a broad range of business/HR issues including: the Uniformed Services Employment and Re-employment Act (USERRA), W.Va. Wiretapping and Electronic Surveillance Act (and other Privacy Issues), Family and Medical Leave Act (FMLA), Common HR

Mistakes Made by Small Employers, Fair Labor Standards Act (FLSA), Severance Packages and Unemployment Compensation, Non-Union Employee Rights to a Representative in an Investigatory Interview, Age Discrimination in Employment Act (ADEA), S.B. 744—"Deliberate Intent", Behavior Interviewing, and Electronic Mail at the Workplace.

In addition we provided Chamber members with timely articles on: the Study of Public Employment Issues (committee initiated by the Governor), the new Worker's Compensation System, recent state Supreme Court and NLRB Decisions, Identity Theft, Annual HR Audits, and Managing Change in the Workplace.

I am pleased to report that over the past year this publication has received praise and strong interest from a number of

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Unemployment For The Voluntarily Unemployed?

How To (Help) Prevent The State From Subsidizing A Strike

By: Kevin L. Carr

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During the Kroger strike in late 2003, the state of West Virginia awarded thousands of striking workers unemployment compensation. These workers – who went on strike in order to secure additional employer contributions to their healthcare fund – were collectively awarded millions of dollars from the State’s coffers. This article examines the legal underpinnings of West Virginia’s unemployment compensation law as it relates to labor disputes and suggests measures employers facing a labor dispute can take to guard against a State-subsidized strike.

The Underlying Policy: Neutrality

One would hope and expect that the State remain neutral in a labor dispute. In theory, the State should not throw its weight (in the form of unemployment compensation dollars) behind either party to a labor dispute in order to influence the outcome. Instead, the West Virginia Bureau of Employment Programs, Unemployment Compensation Division (the “Bureau”) is required to apply a test to determine whether the employees are on strike or locked out (actually or constructively), resulting in eligibility for the former and disqualification for the latter.

The Legal Framework

In West Virginia, the law on the books provides that employees are not entitled to unemployment compensation benefits if their unemployment is a result of a labor dispute, unless the employees can prove:

1. The employee is required to accept wages, hours or conditions of employment which are substantially less favorable than those prevailing for similar work in the locality; or
2. The employee is denied the right of collective bargaining under generally prevailing conditions; or
3. The employer shuts down its operations or dismisses its employees in order to force wage reduction, or changes in hours or working conditions.

W. Va. Code § 21A-6-3(4). In other words, employees who are not working because of a labor dispute are ineligible for benefits unless they can prove one of these three enumerated exceptions.

The third exception – which has been the subject of the most litigation – is commonly referred to as the “lockout exception.” It is supposed to apply in situations where an employer locks out its employees in an attempt to gain concessions from

the terms and conditions the employees previously enjoyed under the expiring labor agreement. In 1995, the West Virginia Supreme Court examined this exception in *Smittle v. Gatson*, 465 S.E.2d 873 (W.Va. 1995). The Supreme Court construed the exception to require employees to prove both that: 1) the employer acted to shut down the work site; and 2) the shut down was “to force” a change detrimental to the employees.

To demonstrate that the employer shut down the work site, employees must show that the employer did something to deprive them of the opportunity to work, such as locking the gates, refusing to admit workers, or “reject[ing] the employees’ offer to work on a day-to-day basis.” But, “[w]hen the work stoppage assumes the form of a strike, the employees must show that they offered to continue working or that such an offer would have been useless.” In other words, an employee is not required to offer to continue working when the employer has already unequivocally informed him that he cannot continue working.

In order to analyze whether changes are detrimental to an employee, the court in *Smittle* adopted the “status quo” approach from Ohio law. The fact that West Virginia adopted Ohio’s legal test was important in the Kroger case. The Kroger strike encompassed parts of Ohio and the presiding judge in the Ohio unemployment compensation case ruled that the striking workers were not eligible for benefits. That judge applied the same law to the same strike.

Applying a standard adopted from Ohio law, the Supreme Court in *Smittle* held that when making the determination of whether an employer is trying “to force wage reduction” or other changes in benefits, reviewing courts must – if the employees satisfy the first prong of the test – compare the employer’s proposed changes to the status quo embodied in the expiring labor agreement.

Otherwise stated, if the employer’s offer is the same or better than what employees enjoyed under the expiring labor agreement, then employees cannot meet this prong of the test; if the employer’s offer is less, then the second part of the test is met.

How To Minimize The Risk Of State-subsidization

Economic warfare is a stark reality for many of West Virginia’s unionized employers. Often, as a collective bargaining agreement approaches expiration, the threat of a strike looms large.

There are steps that an employer in such a situation can take to help guard against an award of unemployment compensation to striking workers, some of which include:

- *Document everything.* Employers should reduce every offer and counteroffer to writing, particularly the last, best and final offer. Many employers utilize strikethrough and redlining to visibly demonstrate the differences between the terms of the

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Unemployment Compensation Issues To Keep In Mind When Terminating Employees

By: Rodney Bean
Steptoe & Johnson

Occasionally, an employer who receives a notice of future resignation from an employee will ask the employee to leave immediately, rather than at the end of the notice period. Although the resigning employee may perceive this to be a visceral reaction by a scorned employer, there may be solid reasons why an employer may not want to keep a departing employee around the workplace.

The employer may worry that a short-timer would be more likely to flout work rules without concern about repercussions or filch employer belongings or confidential information. As well, the employer may be concerned that keeping a departing employee around might impair workplace morale.

Depending on the circumstances, any of these concerns may be valid and there is nothing fundamentally wrong from a legal standpoint about asking a resigning employee to depart earlier rather than later. Know, though, that if you do so in West Virginia, the employee will be entitled to receive unemployment compensation as if he or she had never tendered a notice of resignation.

Our Supreme Court has held that "an individual who is discharged without cause by his employer after giving notice of his prospective resignation, but before expiration of the notice period, is not disqualified for unemployment compensation benefits after the date on which his resignation would have become effective but for the discharge."

The Court overturned decisions by the Unemployment Compensation Board of Review, which limited unemployment compensation eligibility to the period between the employee's dis-

charge and his or her designated resignation date. The Court wrote, "[w]hen discharge by an employer is the event which in fact causes an employee to leave his work, preventing the employee's voluntary quit from reaching fruition, there is no 'week in which . . . [the employee] left his most recent work voluntarily' -- and consequently, no statutory disqualification."

If you have facilities in other states, be aware that each state's law may differ on this issue. Most states appear to hold that an employee who resigns but is asked to leave before the end of the resignation period is eligible to receive unemployment compensation but only for the period between the date the employee is asked to leave and the date on which his or her resignation would have been effective.

The law on this issue is not uniform, and it is important that you know how the state in which you are operating has resolved the issue.

For West Virginia employers, it is clear that an employee who is asked to depart before the end of his or her notice period will be eligible for unemployment compensation without regard to the fact that he or she tendered a resignation. It is also safest to assume that courts will regard such an employee as having been terminated for other purposes as well. Thus, a prudent employer will analyze the decision using the same criteria that apply to any discharge decision.

Remember also that under West Virginia law, a terminated employee is entitled to receive payment of all sums due him or her from the employer within 72 hours of the termination. Although there are different provisions for final payment of a resigning employee, it is safest to treat an employee asked to depart before his or her designated date of resignation as having been terminated for pay purposes.

W.Va. Chamber, W.Va. SHRM To Host HR Conference

The West Virginia Chamber of Commerce and the West Virginia chapter of the Society of Human Resource Professionals (SHRM) will hold a statewide Employment Law & Human Resources Conference on October 11-12, 2005 at the Charleston Embassy Suites. The two-day conference is designed to provide human resources professionals with strategies to help you meet the challenges of today's workplace.

The Conference will provide large and small employers, managers, lawyers, and/or those responsible for human resources in your organization, a concise look at many employee and job-related issues facing today's work place. This conference brings together legal professionals and expert HR practitioners to discuss key issues facing businesses in the Mountain State.

Covering many of the most frequently encountered employment issues, the conference promises to be one of the best of its kind offered in West Virginia. The W.Va. Chamber and W.Va. SHRM have assembled a talented and experienced pool of presenters. Each is an experienced practitioner in the area of employment law he or she will address. Tap the knowledge and experience of numerous HR professionals and speakers through three seminar tracks covering a variety of topics.

Don't miss this opportunity to learn more about the major issues facing employers today. Register now for this CONFERENCE and put this useful and practical information to work for you. An official course completion certificate will be presented to participants. A conference program and registration form may be obtained at www.wvchamber.com.

Separation Agreements

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about signing an agreement can take on nearly as much importance as its content. In many instances, an employer will unilaterally determine what it thinks is fair and present it to the employee on a “take it or leave it basis.”

However, the employee might be less inclined to consider or accept a separation agreement that would be in the best interests of the company to execute. For this reason, consider allowing the employee to participate in setting at least some of the terms. For example, you can allow the employee to rearrange or make substitutes for certain items suggested by you, as long as the monetary costs do not exceed those you have specified. This has the advantage of drawing the employee into the process of dissolving the relationship, which in turn is helpful in achieving the desired result of getting the employee to sign the agreement.

In any separation agreement, there are some terms that *should* be included. The parties should acknowledge that as of a certain date the employee has been discharged, or that he or she has resigned and that the employer has accepted the resignation. The agreement should include a provision that the parties desire to ensure that they have resolved any possible disputes arising out of or associated with the former employment, and that the employee wishes to release any and all statutory or common law claims associated with the employment relationship and its severance.

A statement that the termination or separation agreement supercedes any and all prior agreements between the parties should be inserted, unless there are certain contracts or agreements that the parties wish to preserve. And, of course, the agreement should specifically set forth the benefits being provided to the departing employee in exchange for the release -- provisions concerning the amount of money being paid and, if appropriate, benefits continuation, outplacement assistance, supplements to retirement programs, the return of the employee's property, and the content of employment references to be provided to prospective employers. The parties might also want to add a confidentiality provision.

Beyond those terms are others mandated by law—provisions that *must* be included for the employee's waiver of his or her right to sue to be binding and enforceable. With the expanded use of termination agreements has come greater scrutiny by Congress, the courts, and, here, the West Virginia Human Rights Commission [WVHRC]. In 1990, Congress amended the Age Discrimination in Employment Act of 1967 [the ADEA] by adopting the Older Workers Benefit Protection Act [the OWBPA], which imposes specific requirements that must be satisfied before an employer can obtain a valid release of claims under the ADEA.

Two years later, the WVHRC published legislative rules that, with slight revision, adopted the federal standards set forth un-

der the OWBPA. Those legislative rules have the force of law in West Virginia, and are designed to provide common criteria in federal and state standards concerning a voluntary waiver and release of rights. They also provide us a specific roadmap to the preparation of a separation agreement that will fully comply with those standards.

Ultimately, the goal of these standards is to ensure that the employee's waiver of rights is “knowing and voluntary” In most instances, a waiver set forth in a separation agreement will be considered knowing and voluntary only if *all* of the following conditions are met:

- The waiver is part of an agreement between the employee and the employer that is written in plain English and in a manner calculated to be understood by the average person with a similar educational and work background as the employee in question. Simply put, the waiver must be clear and easily understood, and should strictly limit, if not entirely eliminate, technical or legal jargon.

- The waiver specifically refers to rights or claims arising under the West Virginia Human Rights Act, the ADEA, and other federal anti-discrimination statutes. While specific waiver requirements have not been adopted in connection with other federal statutes, courts nonetheless will apply a “knowing and voluntary” analysis to any release of rights under those statutes. Thus, a release also should specifically refer to claims arising under Title VII of the Civil Rights Act of 1964, as amended, Section 1981 of the Civil Rights Act of 1866, the Family & Medical Leave Act, the Employee Retirement Income Security Act,

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the Americans with Disabilities Act, and the Vietnam Era Veterans Readjustment Assistance Act.

- The waiver does not extend to rights or claims that might arise after the date the waiver is executed.

- The employee waives his or her rights only in exchange for consideration that is in addition to anything of value to which the individual already is entitled. For example, if the employee already is entitled to severance pay or an extension of certain benefits, the severance payment would have to be increased in value, or the benefits extended for longer duration. The employee is advised in writing to consult with an attorney prior to executing the agreement and is provided with the toll free telephone number of the West Virginia State Bar Association (1-800-642-3617).

- The employee is given a period of at least 21 days, 45 days if the agreement is offered to a group or class of employees, within which to consider the agreement. This does not mean the employer has to retain the employee another 21 (or 45) days, only that the employee must be given that period to make up his or her mind as to whether to sign the agreement.

The agreement provides that, for a period of at least 7 days following its execution, the employee may revoke it in writing, and such agreement shall not become enforceable until the revocation period has expired. In other words, the employee is offered a brief period to reconsider the decision and to change his or her mind.

As noted, the rules are somewhat different if the separation agreement is being offered to a group of employees. In addition to extending the period in which to consider the agreement, the employer is required to provide further information designed to aid the employee's decision making process.

Specifically, if a waiver is requested in connection with an exit incentive or other employment termination program offered

to a group or class of employees, the employer must inform each such employee, in writing "in a manner calculated to be understood by the average individual eligible to participate," as to: (a) any class, unit, or group of individuals covered by the program, its eligibility factors and any applicable time limitations; (b) the job titles and ages of all employees eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program; and (c) the method and/or factors used or considered in arriving at the amount of money and/or other benefits that is offered.

Again, the waiver of rights must be both knowing and voluntary. In addition to including in the written agreement all of the items listed above, be careful throughout the process to avoid even a hint of coercion. An employee's decision to sign a release must be voluntary, or courts will not enforce it. Don't threaten or "talk tough" with your employees to convince them to sign; you won't be gaining anything if your release gets thrown out of court.

It should be noted that a separation agreement, even when drafted in accordance with these standards, does not provide absolute immunity from some types of discrimination claims. Under both the Human Rights Act and the OWBPA, the WVHRC and the EEOC retain the right to enforce the statute and to investigate any complaint before them, and the former employee remains entitled to file a charge with that agency or to participate in a proceeding before it. However, the employee's waiver is considered as evidence that no violation of the statute has occurred and can serve as an affirmative defense.

2006 Meeting Dates For HR Committee

The Human Resources Committee of the West Virginia Chamber of Commerce meets on a quarterly basis. Meetings are held in the Chamber offices, except during the Annual Meeting.

Provided are the tentative dates in 2006 for meetings of the Human Resources Committee:

February 9

May 11

August 31 (2006 Annual Meeting)

November 9

Chairman's Column

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individuals and organizations. It is a testament to the relevance and quality of the articles and the knowledge shared by the human resources experts who serve on our committee.

This fifth edition is no less informative with updates and reminders of federal law regarding the FMLA, incorporating "world class" human resource practices in your business, West Virginia Supreme Court's decision in the Koerner Case, Unemployment Compensation Striker Benefits, and what the Oil and Gas Industry is doing in partnership with the Workforce Development Office and Community and Technical Colleges to develop a program to address the industry's aging workforce, retirements and need for "qualified" replacement employees.

Please contact the Chamber if you are interested in reviewing any past issues of the HR Journal.

Application Of The Workers' Compensation Immunity Bar To Disability Discrimination Claims Under WVHRA

By: Mark H. Dellinger

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An employee's ability to seek recovery under the West Virginia Human Rights Act (WVHRA) for injuries that were compensable under the Workers' Compensation Act (WCA) was at issue in a case decided on July 7, 2005, by the West Virginia Supreme Court of Appeals.

The state Supreme Court applied the workers' compensation exclusivity bar as to injuries for which workers' compensation benefits may be sought, including aggravations and physical and non-physical conditions which flow directly and uniquely from the injury, but did not apply the exclusivity bar to injuries that are caused by the unlawful discriminatory acts of an employer which are not otherwise recoverable under the WCA. The 4-1 opinion in *Messer v. Huntington Anesthesia Group, Inc.* was written by Justice Benjamin, with Justice Maynard dissenting.

The Messer plaintiff, a certified registered nurse anesthetist, sustained a herniated disc from a workplace back injury and had medical restrictions including lifting restrictions and a need to refrain from working over eight hours a day. Because her employer, a medical practice, allegedly ignored her restrictions, she claimed that her physical condition progressed and worsened to the point that she was no longer able to perform her job. She then sued her employer under the WVHRA alleging failure to provide reasonable accommodation for her disability. The employer filed a motion to dismiss based upon the exclusivity provisions of the WCA. The trial court granted the employer's motion, finding that the WVHRA did not create a cause of action for workplace injuries and that such injuries were under the exclusive jurisdiction of the WCA.

On appeal, the Supreme Court affirmed in part and reversed in part the trial court's ruling. The Court reasoned that the plaintiff's cause of action for discrimination is not based on her employer's liability for a compensable work injury within the meaning of the WCA.

Instead, it is based on the employer's alleged subsequent discriminatory conduct that, although incidentally related to the compensable work-related injury, gives rise to entirely separate liability under the WVHRA. Therefore, the Court found that since the Acts seek to remedy two separate harms, physical injury and discrimination, no conflict exists. The injury that the plaintiff seeks to redress under the WVHRA "is the indignity of

"The Messer decision makes plain that any attempt to seek recovery under the WVHRA for compensable injuries covered by the WCA, including aggravations and physical and non-physical injuries flowing from such injuries, are barred by the exclusivity provisions of the WCA."

the alleged discrimination against her because of her disability."

Here, the Court noted that the plaintiff alleged two separate types of injuries. Accordingly, to the extent that her injuries are of the type for which workers' compensation benefits may be sought, including aggravations and physical and non-physical conditions which flow directly and uniquely from such injury, the exclusivity provisions of the WCA prohibit recovery outside the WCA.

However, to the extent that her injuries are directly and proximately caused by the unlawful discriminatory acts of her employer, and are of a type not otherwise recoverable under the WCA, the exclusivity provisions of the WCA are inapplicable.

The Court, therefore, concluded that while an aggravation of the plaintiff's physical injury by the conduct of her employer may be compensable and thus subject to the exclusivity provisions of the WCA, the claim against her employer for violation of the WVHRA and resulting non-physical injuries, such as mental and emotional distress and anguish, directly resulting from such violation and not associated with the physical injury or the worsening thereof are not barred by the exclusivity provisions of the WCA.

The Messer decision makes plain that any attempt to seek recovery under the WVHRA for compensable injuries covered by the WCA, including aggravations and physical and non-physical injuries flowing from such injuries, are barred by the exclusivity provisions of the WCA.

Whether a plaintiff's non-physical injuries will be recoverable under the WVHRA will depend upon whether such conditions are associated with a compensable injury or are related to discriminatory conduct allegedly in violation of the WVHRA.

Human Resource Tips

Tips For Employers Struggling With FMLA ‘Abuse’

By: Elizabeth D. Walker

(formerly Elizabeth D. Harter)

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Large and small employers across the state grapple every day with the challenges presented by employees who are perceived to be “abusing” their rights to leave from work under the Family and Medical Leave Act of 1994 (the “FMLA”).

In response to a loud chorus of concerns from employers across the country (not to mention federal court decisions invalidating and questioning some provisions of the existing FMLA regulations), the United States Department of Labor has promised but not yet delivered clarifying federal regulations. Until such time as better guidance from the Department of Labor materializes, employers have some, but unfortunately not many, practical options for actively managing FMLA leave.

Of course, the first step is to be sure that an employer has effective procedures in place to assure that only eligible employees are permitted to use FMLA leave and that only 12 weeks per year is made available. The eligibility requirements include an employee working in a location where 50 or more employees work within a 75-mile radius, the employee having at least 12 months of service and the employee working at least 1,250 hours during the immediately preceding 12 months. Employers have also learned that selecting the “year” to be used to measure the 12 weeks (i.e., calendar, rolling or anniversary) is crucial and not easy to alter once selected.

Another important task is to be certain that FMLA administration is coordinated with the administration of other leaves of absence programs, including workers’ compensation, short-term disability and leave for illness, vacation and other personal reasons.

If FMLA leave is running concurrently with other forms of leave, which we strongly recommend, any less stringent administrative requirements applicable to those other types of leave may undermine an employer’s ability to rely upon the time frames and other limiting mechanisms applicable to FMLA leave.

For example, the FMLA regulations provide a number of time frames that employees may be required to satisfy in order to be eligible for FMLA leave. In short, employers have the right to delay or deny FMLA leave if these time frames are not met. Employers frequently overlook these time frames and permit “exceptions” in order to accommodate employee needs; in fact, the FMLA regulations recognize that employers may “waive” these time frames.

Recognizing that enforcing these time frames can result in a negative impact on employee relations, which may be a concern in the context of union free strategies, they are nonetheless a tool that employers should consider in battling FMLA abuse.

A brief summary of these time frames is as follows:

Notice of Need for Leave (foreseeable): An employee must provide the employer at least 30 days advance notice of the need for FMLA if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care or planned medical treatment for a serious health condition of the employee or a family member. If the employee does not provide this notice, the employer may delay the taking of the leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave. If the employee misses work during the delay and thus the delay results in disciplinary action and/or termination under a uniformly applied employer policy, the disciplinary action and/or termination is proper.

Notice of Need for Leave (not foreseeable): If the 30-day notice referenced above is not practicable, notice must be given as soon as practicable. Although the regulations do not specify what “as soon as practicable” means (other than to say it means as soon as possible and practical, taking into account all of the facts and circumstances of the individual case, and ordinarily within one or two business days), employees who try to identify past absences as FMLA-qualifying weeks or months after returning to work can be challenged.

Medical Certifications: When an employer requests medical certification of a serious health condition of an employee or an immediate family member, which we recommend in all cases, employees can be required to provide the requested certification within 15 calendar days (unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts or if a medical emergency precludes compliance with the time frame). At the time the employer requests certification, **Recertifications:** The FMLA provides employers with the right to require recertification no more often than every 30 days in many (but not all) circumstances, particularly when the employer receives information that casts doubt upon the continuing validity of the certification. Employees can be required to provide the requested recertification within 15 calendar days.

Status Reports: An employer may require an employee on FMLA leave to report “periodically” on the employee’s status and intent to return to work. The limitation on this requirement is that the employer’s policy on such report may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee’s leave situation. Accordingly, an employer should use caution in using and/or

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New Labor Coalition Means A New Focus On Organizing

By: Mark A. Carter
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In one of the most significant developments in labor history for the past 50 years, three prominent unions have withdrawn affiliation with the AFL-CIO. Beginning on July 24, 2005 the International Brotherhood of Teamsters (IBT) and the Service Employees International Union (SEIU) decided to disaffiliate from the AFL-CIO. On July 29, the United Food and Commercial Workers followed suit. These unions, along with the Laborer's International Union of North America, UNITE-HERE, the United Brotherhood of Carpenters and Joiners and the United Farm Workers have formed a coalition called "Change To Win."

The ramifications of this reorganization could have a significant impact on the nation's employers and employees. Together, the Change To Win coalition represents roughly one-third of the union membership previously represented by the AFL-CIO and accounts for approximately \$20 million in annual revenue to the AFL-CIO.

The Change To Win Coalition, and the three unions that disaffiliated from the AFL-CIO, have pledged to redesignate the funds that had been directed to the AFL-CIO to organizing activity. Bruce Raynor, the President of UNITE-HERE, and his counterparts in Change To Win, have been critical of the AFL-CIO's support of political candidates rather than earmarking those funds for the costs associated with organizing new members.

The disaffiliation will likely have significant internal ramifications for the IBT, the SEIU and the UFCW. On August 11, Change To Win spokesperson Anna Burger released a statement reiterating the union's desire to continue to participate in AFL-CIO's local and state labor councils.

She reported that "... the AFL-CIO has said repeatedly that continued local participation is not welcome and that checks from our local unions to local and state labor councils must not be cashed." The absence of the IBT, the SEIU and the UFCW from local and state AFL-CIO operations could impact the ability of those organizations' ability to collectively impact union, social and political issues in West Virginia.

The Teamsters for a Democratic Union ("TDU") has reported that its International Union has issued a policy regarding "raiding." Raiding is a term applied to a situation where one union seeks to organize a group of employees presently represented by another union, or being organized by that separate labor union. The AFL-CIO maintains by-laws which strictly regulate "raiding" between unions affiliated with the national AFL-CIO. According to the TDU, the IBT will prohibit raiding regarding Change To Win affiliates, but will permit raiding of AFL-CIO affiliates, particularly where the employees have a "substandard" collective bargaining agreement with their employer.

The AFL-CIO has prepared for this potential by approving a four-cent dues increase to build funds "to assist unions in

defeating raids by the disaffiliating unions." Given the millions of affiliated union members, this fund is likely to grow into a substantial sum.

This realignment of America's labor unions will impact both unionized and non-unionized employers as well. It is inescapable that, along with the dramatic increase in funding, employers should anticipate a substantial increase in organizing activity. That effort will similarly be joined by the AFL-CIO, which authorized substantial increases in its organizing assistance budget in July.

The *USA Today* has reported that the key territory for new organizing activity will be in the "south", and given both the Change To Win's and the AFL-CIO's actions, it is clear that

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workers in both non-union and unionized settings will be targeted for organizational efforts. As the *USA Today* has reported, "(i)t will create rival organizations with both trying to prove that they can out organize the other. It's good for unions, bad for employers."

It is reckless to predict precisely what this development will mean for West Virginia employers. Plainly, the IBT, SEIU and UFCW are well entrenched in the Mountain State and represent the employees of important West Virginia businesses.

Moreover, these unions have already been among the most active organizers in the State with the IBT focusing on the over-the-road hauling industry, the SEIU in the health care industry and the UFCW in the retail industry. Those efforts will almost certainly be maintained and are likely to increase. The critical issues will be to what degree the Change To Win unions desire to organize employees outside of their traditional work jurisdictions and whether they attempt to enlist employees already represented by AFL-CIO affiliated unions.

The bottom line is that every employer, whether unionized or union free, is fair game for organizing activity in this new labor environment, and should be prepared for that potential.

Industry, Government and Education Start Well Operator Training Program Throughout West Virginia

By: Jim Pritt, CPA, MBA, PHR
Human Resources Manager, Northeast Theatre
CDX GAS, LLC

The oil and natural gas industry in West Virginia is one of the large employers (10,000 to 13,000 workers), and, like several other major West Virginia businesses, its workforce is nearing retirement age.

Recognizing this looming problem, the industry formed a coalition to address this matter. On June 7, 2004, Governor Joe Manchin III, education leaders and representatives of the state's oil and natural gas industry signed a Resolution that committed these organizations to the continued development of training programs that will ensure a quality trained workforce for the state's oil and natural gas industries.

Among the signatories are Ron Radcliff - Director, Governor's Workforce Investment Division of the West Virginia Development Office, James Skidmore - Chancellor of the West Virginia Council for Community and Technical Education, Charlie Burd - Executive Director of the Independent Oil and Natural Gas Association of West Virginia signing on behalf of Rich Heffelfinger - President of the Independent Oil and Natural Gas Association, and Steve Warnick - President of the West Virginia Oil and Natural Gas Association.

The above organizations have been working on a project over the last few months to develop the initial training program covering the position of Well Operator. The program will be the first of many that will assist the oil and natural gas industry in providing a trained workforce to meet the state's and country's energy needs.

The initiative was started as a result of an aging workforce that is rapidly approaching retirement age. The average age of the Well Operator in West Virginia is 52, and many of these workers will retire between the ages of 58 and 62 due to the physical nature of the job.

As indicated, this program will expand to include other positions in the oil and gas field operations such as Meter Technician, Compressor Technician, Roustabout, Rig Operator, Rig Hand, Tool Pusher, etc. The plan is to monitor the progress of the initial program and make improvements as needed before expanding to other positions.

The team wanted to make sure that positions will be available for graduates so the class size in the initial year was held to 75 in total throughout the state.

Classes will begin in the fall at the following locations in the West Virginia Community and Technical College System - (Boone/Lincoln Campus in Danville and Wyoming/McDowell Campus as part of Southern West Virginia Community and Technical

College, Jackson County Center in Ripley as part of Parkersburg - WVU Community and Technical College, Calhoun/Gilmer Career Technical Center in Grantsville and Lewis County High School as part of Fairmont State Community and Technical College. *(I am pleased to report that the West Virginia's Well Operator Training Program is off to a great start. Seventy-six (76) students have enrolled in the one-year certificate program.)*

By having the curriculum delivered by the Community and Technical College System the team was able to meet the needs of the students and oil and natural gas company operational area concerns.

A real attempt to match the needs of the students with the needs of industry was accomplished with this method of delivering the curriculum. Class sizes will average between 10 and 15 students and will be taught one night a week and some Saturdays.

The curriculum (body of knowledge) will cover approximately 120 hours and will last two semesters. The majority of the classes will be taught by Adjunct Faculty from industry and industry partners as they are job-specific subjects. In addition part of the curriculum (core classes) will be taught by Community and Technical College Faculty.

Oil and natural gas companies that have seen the recruiting potential are providing scholarships for tuition costs, etc. or internships to the students in the classes.

The program will be a great recruiting tool for those companies so inclined (a job preview so to speak). The program will provide an opportunity for companies to recruit students who are interested in the oil and natural gas industry and who will have the required entry-level skills needed to succeed.

This process truly represents a cooperative effort between industry, government and education in order to provide good paying jobs with good benefits for West Virginians.

The Governor's Office, Industry and Education will be closely monitoring the progress of this program and based upon its success will use it as a model to deliver other programs in other industries such as coal, timber, technologies, etc. A number of states that export energy have already inquired about the program and are in the process of setting up programs of a similar design.

All of the those in industry, government and the academic community who worked on this collaborative effort are proud of their accomplishments and stand ready to offer guidance to other industries and companies that are interested in starting a program to meet their workforce needs.

For more information on this program, please contact the Human Resources Committee, through the West Virginia Chamber of Commerce.

HR Business Plan: Recruiting And Retaining Top Talent

By: Fred Dillon, Vice President, Operations
Simpson & Osborne A.C.

I spent a portion of my time during our past “tax season” on development of an ‘HR Business Plan’ for the future of my employer. The purpose was an attempt to identify what it would take to incorporate ‘world class’ HR practices into firm operations. With the pending wave of baby boomer retirements, have you thought about what it will take for you to recruit and retain top talent for your business?

This article offers my assessment of HR Best Practices in a professional services firm. HR managers should compile a similar document for their business or industry.

The next step is to compare your current HR practices with them and then include some recommendations on how to address any differences between your practices and best HR practices. In describing best practices, I reviewed a number of the resources I have accumulated over the years, and I ‘surveyed’ some top administrators, CPA firm partners and a variety of consultants, both those who deal primarily with accounting firms and those with larger constituencies.

Here are general comments that help to showcase what I developed for Simpson & Osborne. They may be helpful for other businesses interested in doing their own evaluation and planning.

Overview

We have four general strategies to move our firm forward:

1. Continue to raise the overall level of expertise in the firm
2. Assure processes for collaborative delivery of expertise to clients
3. Improve productivity
4. Build revenue by attracting the ‘right’ business

The HR functions of the firm need to support these strategies, and enhance our ability to deliver the desired results, both internally, and in the delivery of services to clients.

My approach to reviewing our HR functions was to break them down into the following components:

- Recruitment/Selection
- Orientation/Absorption(assimilation)
- Technical Training
- Professional/Career Development and Performance Appraisal
- Compensation & Benefits
- Retention

The first step in my review of each area was to describe best practices in general terms, based on my review of literature, accounting industry surveys, the MAP handbook and other information sources to identify best practices. I briefly reviewed

our current practices and described some steps required to incorporate them into S&O operations. I can then provide an estimate of the cost of adopting any improvements actively considered by firm management. Again, for the purpose of this article, I removed all references to internal changes.

Here are my initial thoughts on best practices:

Recruitment/Selection – The objective here is to improve our ability to get the best high potential staff members into the firm, whether we are adding at the entry-level, or recruiting experienced professionals.

Best Practice: The ideal recruiting process assures that we are getting access to the top candidates in the programs where we recruit. Components of a top recruiting process include high visibility of the firm on campus, good relationships with accounting professors, a clear, compelling story for recruits on their opportunities with the firm, a high level of participation by partners and other top professionals, and timely and personal follow-up with candidates of interest. Recruitment is a sales process, with the goal of convincing top professionals that they have significant career potential with us as their employer.

Orientation/Assimilation – Our objectives in this process are to create a great first impression, and then to assure each new staff member is fully assimilated into the culture and practices of the firm.

Best practice: First class orientation programs contain at least the following components:

- Regular contact – Keeping in touch with candidates after they have accepted until they actually begin.
- Preparation – Their work space is ready for them the day they begin.
- Mentor – A mentor is selected in advance of their arrival, and is prepared to assist them with questions, training, introductions to staff, etc.
- Focus on basics – The new staff person receives an introduction to all of the basic information they will need to understand their responsibilities and to be successful in their new position.
- Self direction – The new person has some responsibility for their own orientation, including self directed learning.

Technical Training: This relates to ongoing training for professional staff, after their orientation period is completed. The objective is to assure that ALL firm members continue to develop new skills that lead to deeper expertise.

Best Practice: I found very little information related to best
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practices in the training area while conducting my research. I believe that a world class training program is one that is directly connected to the firm's strategic initiatives, assures that staff receive comprehensive and relevant training in the firm's practice areas and where there is a regular progression in the development of professional expertise.

Staff must know how to use our technical resources, and understand the full capabilities of the tools we provide for them. Technical training is considered an investment in the future of the firm, not just an expense that must be minimized.

Over time, the emphasis of each person's training shifts from an orientation towards technical training to development of client service and practice development skills, leadership development, and people development, the skills needed for eventual ownership.

Professional/Career Development and Appraisal: Our focus here is to create alignment between the needs of the individual and the needs of the firm. We try to create an environment where each person gets the feedback necessary to make progress in their career. It is critical to have feedback mechanisms and processes in place that relate directly to the attributes we believe are essential to individual success. It is also important to develop the future leaders of the firm, and make sure they have the skills they will need to lead.

Best practice: The best organizations have created a clear alignment between their mission, strategy, values and objectives, and take steps to assure that individual goals and objectives are consistent with company objectives. The goals of the staff and the firm must be SMART (specific, measurable, achievable, realistic and with a time frame), with action steps that are clear and short-term. Individual firms members must have time, access to resources, and training, if necessary, to help reach their goals.

In addition, evaluations of progress must be done on a regular basis, as frequently as possible. An ideal process includes evaluation at four levels - by supervisors, by subordinates, by peers and by clients. Input from all constituents allows for a full and complete assessment of individual performance. Anonymous assessment is most likely to provide candid feedback.

Compensation & Benefits: The current environment in public accounting is one of extreme competition for top talent. Declining enrollment in accounting programs has been well documented. While technology has helped to offset the shortage of staff by reducing time required to complete basic tasks, the effect of Sarbanes-Oxley, and the additional compliance requirements it created, has further intensified demand for accounting staff. In order to compete for top talent, we have to offer competitive compensation and benefits.

Best Practices: The best systems include performance based compensation programs, supplemented by top benefits. These systems include a clear connection between performance and rewards, while providing benefits at a level that helps attract and retain talented staff.

The challenge is to determine when to reward efforts and when to reward only for results achieved. Performance based compensation systems include competitive, fixed base salaries and some variable performance-based compensation components, typically equity (stock options), bonuses, and some form of profit or gain sharing. Benefits include low deductible health insurance, with other components like vision coverage, dental coverage, short-term and long-term disability insurance, and lucrative retirement options. It is important to note that according to SHRM research, employees have consistently rated benefits among the top factors in job satisfaction.

Retention: One way to assure that clients/customers receive the kind of attention and service they expect is for S&O to provide its services through competent, experienced staff. The easiest way to do that is by holding on to our best performers, while investing in enhancing their skills.

Best Practice: The simplest way to hold on to staff is to make sure they are engaged at work, i.e., they like their jobs and feel motivated to give their best effort. Successful organizations convey a consistent organizational mission and a sense of direction that allows individuals to see themselves as an integral and contributing part of the firm. The best organizations use five strategies to hold on to staff:

- They provide clear direction to employees on what is expected of them and they provide regular feedback.
- They give employees challenging work and then allow them control over how they do that work.
- They create a positive and supportive work environment.
- They provide ongoing opportunities for learning and for growth.
- They show employees they matter to the organization by listening to and acting upon their concerns.

Summary:

There is a consistent thread that runs through all of the best practices discussed in this article. A clear and consistent vision, supported by appropriate investments, will help to create a positive HR environment at your company. We need to keep doing the things we've done effectively in the past, while always seeking to improve. By integrating HR practice into our strategy, we can maintain a world class environment where we:

- Invest heavily to retain top talent.
- Implement effective recruitment, training and retention programs.
- Provide tools that allow staff to deliver improved service to clients.

Annual Meeting HR Symposium

A symposium on employment law and human resource issues will be held as part of the upcoming 2005 Annual Meeting of the West Virginia Chamber of Commerce.

The symposium, organized by the Chamber's Human Resources Committee, will be held Thursday morning, September 1 at The Greenbrier. Two speakers will provide presentations during the symposium.

First, Mark Carter, a labor relations specialist and partner with Dinsmore & Shohl LLP in Charleston, will discuss the impact of the nation's recent labor movement disaffiliation (see article on page 9). This summer, three major labor organizations split with the AFL-CIO.

Following Carter, Ivin Lee, Executive Director of the West Virginia Human Rights Commission will provide an overview of her agency and discuss current topics.

FMLA Tips

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the employer must also advise the employee of the anticipated consequences of failure to provide adequate certification. The employer must also advise an employee whenever the employer finds a certification incomplete (for example, blanks in the form or lack of signature) and provide the employee a reasonable opportunity to cure any such deficiency.

In the case of leave that is not foreseeable, if the employee fails to provide timely certification, the employer may delay the continuation of the leave. If the employee misses work during the delay and, thus the delay results in disciplinary action and/or termination under a uniformly applied employer policy, the disciplinary action and/or termination is proper. If the employee never produces the certification, the leave is not FMLA leave.

Chamber's HR Publications Valuable Guides For Employers

The West Virginia Chamber of Commerce has published two new human resources publications for members. The publications are: [West Virginia Employment Law Handbook](#) and [West Virginia Human Resources Guide to Hiring & Firing](#).

The [West Virginia Employment Law Handbook](#) contains a wealth of information to assist employers in their efforts to understand and comply with the numerous and complex laws affecting operating a business in West Virginia. Chapters cover labor laws, Family and Medical Leave Act, discrimination, safety, workplace violence, labor relations, FLSA, dispute resolution, and arbitration.

The [West Virginia Human Resources Guide to Hiring & Firing](#) is a practical guide that covers specific matters and issues

Prevent State-subsidization

(From page 3)

expiring labor agreement and the final offer.

- *Offer work in writing.* Employers should extend a written offer to continue working beyond the expiration of the labor agreement. The terms of the offer should be at least as favorable as those enjoyed by employees under the expiring labor agreement (i.e., no reductions in wages or benefits, elimination of vacation days, increased employee premiums, etc.).

- *"Annotate" strike preparation.* A prudent employer facing a possible strike will engage in strike preparation planning. Often, this includes taking very visible steps (signing a contract with a labor supplier, erecting a fence, notifying customers of an impending labor dispute, etc.). An employer should carefully document (internally as well as on all documentation given to the public, customers and vendors) that the steps are being taken in order to prepare for a strike, if it should materialize. These "disclaimers" should note that the planning is contingent and that work will be made available to employees. If the employer anticipates closing its operations during a strike, it should include a similar disclaimer in its notices to suppliers, vendors, the public and its employees.

When To Think About This

An award of unemployment compensation during a strike may embolden employees and provide them (and their union) with the fiscal wherewithal to prolong a work stoppage. To effectively mitigate this risk, an employer must address this issue early and often. The impact of every move at the bargaining table, employee communication, press release and vendor notification must be considered before it is made.

Prudent employers will consult with their labor advisor or counsel on this issue during the formulation of its bargaining strategy and throughout negotiations. With this issue – like so many issues in traditional labor law – an ounce of prevention is worth a pound of cure.

associated with employment practices and laws governing hiring, disciplinary action and termination.

The publications are available to Chamber members at a cost of \$95 per book, or \$150 if both are ordered (plus taxes and shipping).

For more information, please contact Maggie Poling at the Chamber office – (304) 342-1115.

