



# Fine Print

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

Issue 48 • Summer 2011

## Can I Have A Job?

By Bob Hoffer

Our country continues to attempt to work its way out of the worst recession in decades. As the job market slowly opens up with new opportunities for the hundreds of thousands of employees who were terminated as a result of the economic downturn, a new set of challenges is on the horizon for employers looking to replenish their workforce. Now is a great time for employers to prepare for the onslaught of applicants and to protect against the attendant exposure to claims arising out of such an employment process. There are a number of steps employers should consider in preparation for expansion of their workforce including amending job descriptions, review of hiring policies, and review of interview guidelines and training.

When employers finally are in a position to replenish their workforce, it is vital that they do so without creating new exposure to employment claims. Because of the large number of highly qualified employees who were downsized in conjunction with the recession, employers will be faced with a plethora of applications once the



job market opens up. Employers should consider reviewing the job descriptions which are presently in place. Many job descriptions contain educational requirements which are unnecessary for the position. The job description should accurately reflect not only qualifications for the position but also the essential job functions. If you want to change the position to expand responsibilities, the job description must reflect the change. In the event of any claim of discrimi-

nation, the Equal Employment Opportunity Commission (EEOC) will review the job description in place to determine whether there was a legitimate non-discriminatory business reason for the decision to hire one applicant over another.

A review of hiring policies is also appropriate to determine whether any revisions are necessary. For instance, does the employer give any consideration to former employees who have been terminated due to lack of work? Many employers prefer to rehire former employees because there are fewer unknowns. However, the policy should not guarantee priority for former employees.

*Cont. on page 2*

## OT Liability? There's an Application for That...

by Jeremy J. Sharp

The U.S. Department of Labor (DOL) recently unveiled its first smartphone application, titled "DOL-Timesheet," an interactive timesheet that will enable workers to track hours, wages, breaks, and overtime easily and efficiently. The free application enables workers to view and email summaries of hours and wages in various formats, and includes a "contact us" feature to put the employee directly in contact with the DOL. In the DOL's

words, the app encourages workers to gather information that "could prove invaluable during a Wage and Hour Division investigation where an employer has failed to maintain accurate employment records." This statement of purpose is consistent with the DOL's increased audit focus regarding wage and hour issues over the past two years.

DOL-Timesheet is available in English and Spanish, and is currently available for use with the iPhone and the iPod Touch. The DOL is considering similar applications for the Android and Blackberry, as well as additional features to track tips,

*Cont. on page 2*

## Legislation affecting small businesses

### Legislation Creates “Common Sense Initiative Office” to Evaluate Rules’ Impact on Businesses

Amended Substitute Senate Bill 2, effective June 7, 2011 (with some provisions effective January 1, 2012), eliminates the formerly proposed or existing small business administrative rule review process. It establishes a new process to evaluate whether administrative rules of state agencies adversely impact businesses and, if so, to reduce or eliminate that impact. The act creates the Common Sense Initiative Office (CSIO) within the governor’s office to evaluate administrative rules in light of their impact on businesses. The Small Business Advisory Council, also created by the act, is composed of small business representatives who advise the CSIO regarding the impact of proposed rules.

The CSIO is charged with developing standards for evaluation and create a public comment system for rules it reviews. State agencies must develop customer service performance standards for the agencies and their officers and employees. The agencies covered by this process include those that are required to file proposed rules for legislative review by the Joint Committee on Agency Rule Review (JCARR). The act gives JCARR the authority to invalidate a proposed rule that adversely affects businesses. The review process does not apply to rules of the governor, lieutenant governor, state auditor, secretary of state, state treasurer or attorney general.

This act’s rule review process applies to any “draft” (proposed) rule that has any of the following effects:

- Requires a license, permit or any other prior authorization to engage in or operate a line of businesses;
- Imposes a criminal or civil penalty, or another sanction, or creates a cause of action for failure to comply with the rule;
- Requires the report of information as a condition of compliance; or
- Requires other specific expenditures as a condition of compliance.

### Can I Have a Job, cont. from page 1

If you have a better applicant, you want to be able to hire that person over a former employee. The policy should state that a person’s service will be considered along with other factors such as experience, training, etc. Hiring policies should be revised to reflect the employer’s hiring practices and philosophy. Obviously, if a collective bargaining agreement is in place, contract terms may dictate rehiring former employees.

Interview guidelines and training of recruiters are additional areas for review. Do the recruiters know what questions are legally permissible and which are not? With the increased number of non-compete and confidentiality agreements in place,

inquiries should be made of applicants as to whether they are under any non-compete or confidentiality agreements. Interview questions should always be job related.

The number of EEOC charges and employment claims are at an all time high. As employers begin to increase their workforce, it is vital that employment decisions and policies are legally defensible. Ensuring that job descriptions, hiring policies and interview guidelines are updated is a terrific risk management step to prevent future employment claims.

*Bob Hoffer is an attorney associated with the Northern Kentucky firm of Dressman Benzinger LaVelle psc.*

### OT Liability, cont. from page 1

commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.

The launch of DOL-Timesheet, when viewed in context with the DOL’s hiring of 250 new wage and hour auditors in late 2009, sends an unmistakable message to employers: continue business with substandard wage and hour systems and records at your own peril. Fortunately, most employers operate with the best of intentions in this area, and thus news of the DOL-Timesheet app is better viewed as the progression of a storm on the horizon rather than a crackdown on current practices.

In light of the DOL’s announcement and increased audit emphasis with respect to wage and hour issues, employers should consider certain action items. First, employers should review

payroll administration and systems, wage and hour policies/procedures, and employee handbooks to ensure ongoing legal compliance. Second, employers that have concerns re-

**The app encourages workers to gather information that “could prove invaluable during a Wage and Hour Division investigation where an employer has failed to maintain accurate employment records.”**

garding their present handling of wage and hour issues, but that had perhaps been forestalling addressing such concerns (for example, delaying payroll system upgrades pending improvement of economic conditions), should consider moving forward with such initiatives. For all employers, the potential risks of the DOL Wage and Hour “audit

lottery” continue to increase and show no signs of abating.

To view the DOL’s announcement regarding the DOL-Timesheet app, visit <http://www.dol.gov/opa/media/press/whd/WHD20110686.htm>.

*Jeremy Sharp is a partner in the Cleveland firm, Walter & Haverfield LLP.*