



Wisconsin's Smoking Ban Takes Effect

By Sally A. Piefer

Wisconsin's new indoor smoking ban took effect on July 5, 2010. The ban affects many indoor areas, including private places of employment and areas open to the general public. If you have not yet posted the Smoking Ban poster, please download a copy from the TSG website @ www.tsglaw.com.

No COBRA Subsidy Extension Yet

By Sally A. Piefer

A revised tax bill in mid-June from the Senate Finance Committee did not include an extension of the COBRA premium subsidy. The Senate had previously approved a bill, H.R. 4213, which would have extended the subsidy to employees who were involuntarily terminated through the end of 2010.

An amendment to the tax bill has already been proposed which would extend the subsidy to employees involuntarily terminated through November 30, 2010, but the full Senate has not considered the amendment yet.

For now, the COBRA subsidy will only apply to employees who were involuntarily terminated through May 31, 2010. Employees who lost employment after May 31, 2010, are not at present eligible for the subsidy. Employers should ensure that they are using the proper COBRA notification forms to avoid any confusion for terminated or laid off employees.

The Perils of Stray Remarks in Employment Discrimination Litigation

By Sally A. Piefer

"You fired me because of my age," said 49-year old manager Jackson Smith. The COO called me an "old gray-haired fart" and that proves I was fired because of my age. Human Resources replied, *"You were terminated because you violated the Company's sexual harassment policy and our investigation confirmed the harassment allegations."*

How will a court address the negative comment, if it was made? Will the comment be considered a "stray remark" or will it constitute direct evidence of discrimination? The answer – it depends. The court will consider a variety of factors to determine whether negative statements are "stray remarks," including:

- (1) whether the statement(s) were made by a decision maker or an agent within the scope of his/her employment,
- (2) whether the statement(s) were related to the decision-making process,
- (3) whether the statements were vague and ambiguous or clearly reflective of discriminatory bias,
- (4) whether the statements were isolated or part of a pattern of biased comments, and
- (5) whether the statements were made close in time to the adverse employment decision.



The closer in time the comment is proven to have been made to the adverse employment decision, the more likely it is that a court could find the comment is evidence of discrimination. It is important to train managers and supervisors to avoid loaded comments about protected characteristics – either in verbal form or in written form, including e-mails or text messages. Managers and supervisors should also be trained that their comments can legally bind your Company.

Department of Labor Issues Interpretation Letter Expanding Employee Eligibility for FMLA Leave

By Sally A. Piefer

On June 22, 2010 the Department of Labor's Wage and Hour Division expanded employee eligibility for time off under the federal Family and Medical Leave Act (FMLA). The DOL said that the law covers not only parents who request leave for children such as biological or adopted sons and daughters, stepchildren, and foster children, but that it also applies to employees who lack those direct ties but who intend to assume a parental role and have day-to-day responsibilities to care for or financially support a child. An employee in this situation would be eligible for FMLA leave even if a biological parent is in the home.

Employers should be diligent in getting all necessary facts before granting – or denying FMLA leave. In addition, a legal or biological relationship is not necessary to take FMLA to care for a child. Whether an individual will satisfy the *in loco parentis* standard will depend on all of the particular facts involved.

The DOL's opinion letter confirms that employers can still request reasonable documentation from these employees to confirm their family relationships. As always, the question is what documentation will be considered "reasonable."

If you have questions about whether an employee's relationship to a child is covered by the FMLA, you should consult with one of TSG's employment attorneys.

Employers Must Compensate Employees for Time Spent in Donning/Doffing Protective Gear

By Sally A. Piefer



On June 16, 2010, the Department of Labor's Wage and Hour Division issued an administrative interpretation clarifying that time spent in putting on and taking off ("donning and doffing") protective equipment which is "required by law, by the employer or the nature of the job" is compensable time.

Although the FLSA permits an employer to exclude time spent changing clothes or washing at the beginning or end of a work day if the time is excluded by "the express terms of or by custom or practice under a bona fide collective bargaining agreement," this exclusion does not extend to protective equipment worn by employees.

If you have employees who wear "protective equipment," you should ensure that your pay policies comply with the new interpretation.

Are You Ready if OSHA Comes Knocking?

3

By Sally A. Piefer

The word is that OSHA is ramping up its investigations and looking to crack down on employers who do not have safe workplaces.

In addition, a recent court ruling held that OSHA can cite employers or controlling contractors for the safety violations ***of its subcontractors***. The average penalty per violation could run as high as \$4000, with extra penalties cited for each "egregious" violation.

We have five tips for creating an effective safety program:

- Document your safety program
- Train employees – including annual refresher training
- Analyze your accidents
- Conduct mock OSHA audits
- Go beyond OSHA requirements to ensure your safety program is more than adequate and include motivational training to ensure employee buy-in

Please do not hesitate to contact us if you have questions about OSHA compliance or conducting a mock OSHA audit.



CONGRATULATIONS!

We at The Schroeder Group, S.C., Attorneys at Law, are proud of our ongoing commitment to excellence, innovation and integrity. Every day, we dedicate ourselves to maintaining our reputation, case by case, client by client. We have long thought our attorneys and staff are superb, and now we have proof. We trust you will recognize a name or two. Please join us in congratulating the following staff:

- **Cindy Fryda** was named a **2010 Up and Coming Lawyer** by the *Wisconsin Law Journal*.
- **Joni Jakubowski** was named **2010 Legal Professional of the Year** by the *Greater Milwaukee Association of Legal Professionals*.
- **Sally Piefer** was named a **2010 Woman in the Law** by the *Wisconsin Law Journal*.

The Schroeder Group, S.C.,
Attorneys at Law
Crossroads Corporate Center
20800 Swenson Drive
Suite 475
Waukesha, WI 53186
Main Phone
(262) 798-8220
(800) 372-3020
Facsimile
(262) 798-8232
www.tsqglaw.com

Sally A. Piefer
sap@tsqglaw.com
Direct Dial: (262) 754-1325

Cindy L. Fryda
clf@tsqglaw.com
Direct Dial: (262) 754-1332

PLEASE JOIN TSG IN WELCOMING. . .

Charles David Schmidt recently joined The Schroeder Group. Charles has 10 years of civil litigation and appellate practice experience. He has successfully handled a broad array of novel and complex legal issues, including the following practice areas: business and corporate, civil rights, commercial, consumer protection (including consumer class action), copyright and trademark, environmental, insurance coverage, non-profit, personal injury, professional malpractice, admiralty and maritime, and real estate law in matters valued in excess of \$100,000,000.

For more information on Charles or to contact him directly, please visit <http://www.tsqglaw.com/people/schmidt.cfm?ID=30>.

*If you have questions about the subjects discussed in this Issue, or if you need help with any employment matters, please contact your TSG attorney or one of the members of our Employment Law Team: **Sally Piefer** at (262) 754-1325, or by e-mail at sap@tsglaw.com; **Cindy Fryda** at (262) 754-1332, or by e-mail at clf@tsglaw.com.*

The Schroeder Group, S.C., Attorneys at Law provides comprehensive services covering all aspects of employment, employee benefits and labor relations law to closely-held businesses and companies. *This document is a publication of The Schroeder Group, S.C., Attorneys at Law and is intended to provide information on recent employment law developments. This document should not be construed as legal advice or an opinion on specific situations. You should consult with legal counsel before taking action to ensure its applicability to your particular situation.*

© The Schroeder Group, S.C., Attorneys at Law 2010
Entrepreneurs Providing Legal Advice to EntrepreneursSM