INSIDE THE
LAW JOURNAL

ALL THINGS EMPLOYMENT
Our special report continues with columns on biometric tools and severance agreements, plus a look at state and federal guidelines on how to deal with employees on leave.

CHRIS’S CHOICE
 Erie County Executive Chris Collins introduced Cheryl Green, who has been practicing at Lustig & Brown, as his pick for the county’s top lawyer.

UNWANTED ATTENTION
 Fort Drum plans to publish the names and photographs of all soldiers charged with alcohol-related offenses in the past.

IN WITH THE NEW
 The Bar Association of Erie County has extended a warm welcome to Western New York’s newest legal eagle in a Wednesday night reception at Harry’s Harbour Place Grill.

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INSIDE THE
LAW JOURNAL

STAFF REPORT

LABOR & EMPLOYMENT LAW

SPECIAL REPORT

Test workers before you hire them

BY TERRI PARSELL HILMARY

More and more, companies are finding that it’s no longer good enough to simply hire a certain number of people to perform a certain amount of work. Haphazard hiring can result in such inconveniences as a high turnover rate, low morale and low productivity—or such devastating consequences as expensive lawsuits or harm to customers or employees.

Many employers seek to improve their productivity and limit human-resources headaches through pre-employment testing and smart hiring practices. The methods of hiring vary as much as the types of people they are designed to screen, but there are some systems that can be used effectively, depending on the type of person being screened.

Members of the United Auto Workers union, an AFL-CIO affiliate, picketed American Axle & Manufacturing Holdings Inc.’s Tonawanda forge plant March 4 as a UAW strike against two area plants and facilities in Michigan entered its second week.

Experts evaluate local impact of union schism

BY THOMAS HARTLEY

The beginning of the 2005 split in the AFL-CIO that created a new 6 million-member international organization called Change to Win was a non-event locally. Some say that is still true.

"It was a national event that I don’t think has made any perceptible difference in Western New York," said Richard Lipsitz, business agent for Local 264, International Brotherhood of Teamsters, one of seven unions that formed Change to Win. The stance of organized labor is echoed by Kevin Donovan, assistant regional director of the United Auto Workers union, who says, "It’s like a family. Everyone has problems, and you work it out in the family and don’t advertise it outside your house."

There is some evidence, however, that the three-year-old intra-union dispute might now have a trickle-down effect. Under the former set-up, in which Change to Win unions were part of the AFL-CIO, each was bound not to raid the other’s territory for new members. If a conflict arose, a mechanism existed to arbitrate the differences and settle the issue. Usually, one union agreed to back off.

However, that might be changing, said one Buffalo-area union spokesman.

Example: A recent organizing effort to represent UPS.

Setting a standard: Assessing the FLSA at 70

BY JOHN SOKOLOWSKI

Since the Fair Labor Standards Act was signed in 1938, the law, which established a minimum wage and guaranteed overtime pay in certain circumstances, has continually evolved to keep up with the current social, political and economic climate. Those amendments are about "trying to strike the right balance of increasing the minimum wage, but not so much that you damage the economy and stifle job growth, protecting the inherent dignity of workers and paying them what they’re worth," said Paul DeCamp, a partner in Jackson Lewis LLP’s Washington, D.C., office and national co-chair of the firm’s wage and hour practice group.

DeCamp has his finger on the national labor pulse; he’s a former administrator of the U.S. Department of Labor’s Wage and Hour Division, which interprets and enforces the FLSA, the Family and Medical Leave Act and many others.

He said that while the FLSA gets revised occasionally, it will never be

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**TESTS: Include Jung, Kiersey tools**

FROM PAGE 1

Intelligence tests and background checks. **Put to the test**

There are many versions of the pre-employment test. Examples are the Jung Typology Test and Kiersey Temperament Test, both of which appear to describe a person’s personality in foreseeable, measurable ways. “We use a very effective tool, the Predictive Index Management tool — a series of questions we pose to a prospective new hire,” says Jill Tiroe, human-resources manager for Neco Energy Corp. “All of that information is run through a database, and the report that’s generated gives us a good idea how this person is going to perform in terms of their teamworking abilities, their leadership abilities, and the way they’re going to interact with people already on the team.”

But an employer has to be careful about which tests they choose. “For instance,” says lawyer Richard Braden, a partner at Goldberg Segalla LLP, “the Minnesota Multiphasic Personality Inventory, which many firms have used in the past to determine personality traits, was recently found by a U.S. district court to be capable of identifying psychiatric disorders, and therefore,prove to be a medical exam. Employers can’t give medical exams to applicants, they can only give medical exams to employees. So the process can get complicated, and employers have to understand, and keep up with, current legal requirements.”

**INTERVIEW BASICS**

The interview process itself has been increasingly intimate as companies strive to standardize the types of questions posed and to train their interviewers accordingly. The days of a simple back-and-forth exchange and hiring on gut instinct are largely over.

Interviewers have a wealth of questions at their disposal to discover how prospective employees are likely to react on the job, respond to stress, solve problems, set goals, etc. A lot of this preparation also focuses on the intangibles: using body language, or a comfortable seating arrangement, to put the interviewee at ease.

Before they even get in the door, though, prospective employees had better be sure that they’re putting their best foot forward.

“I’ll look at the resume — not to read it for content at all, but to look it over for consistency, punctuation, typos. If anything is incorrect or sloppily put together, it’s a fair assumption that that person might also approach their job responsibilities the same way,” says Tiroe.

“Absolutely,” agrees Karen Bush, senior account executive at AppleOne, an employment agency. “A three-page resume is a red flag. If they’ve been a job hopper, chances are they’re going to stay that way,” she says. And first impressions count. “How professional are they? How are they dressed? Are they on time?”

Plus, she emphasizes, one of the benefits of outsourcing hiring to an agency is being able to hand off many of the human-resources troubles that larger corporations have deal with. “We look into all that. We do all the legwork. And we’re up on all the legal requirements, so the employer doesn’t expose themselves as much.”

**Tooting a fine line**

There wouldn’t be labor-and-employment departments at large law firms if there weren’t so many things for employers to keep track of.

The Equal Employment Opportunity Commission and New York State Division of Human Rights have extremely strict regulations regarding what an employer may ask for test in the interviewing process, and, on the flip side, what an employer may or may not dismiss an employee for.

“It’s a fine line,” says Braden, “because employers need to be on top of their testing and selection procedures to make sure that they’re hiring the best candidates without unintentionally violating the law by, for example, using a process that disproportionately excludes a protected category of applicants. At the same time, many employers need to be concerned about potential liability for negligent hiring. Those employers should strongly consider conducting criminal background checks,”

Braden advises, “especially for positions in which employees are going to have regular contact with the public or with customers, and particularly when the employer will be supervised.”

Employers are finding that the best way to avoid expensive litigation over the termination of a poorly performing employee is to not hire that individual in the first place. Therefore, human-resources departments are using as not only integral to a company’s success, but also as a key factor in a company’s strategic planning.

“Organizing — and strictly adhering to — a structured and lawful hiring procedure can help an employer attract and retain top talent while screening out many problems employees.”

**FLSA: Likely to stand as is for years**

FROM PAGE 1

get repealed because there will never be enough consensus across the political aisle or between labor and business groups.

“The political fight gets played out year after year, but the result is somewhere in the middle,” DeCamp said. “It has to be done with care, but it’s a balancing act.”

**Not enough?**

Buffalo-based Nixon Peabody LLP partner Mark Molloy, who represents employers, believes the amendments haven’t kept up enough with the realities of present-day business.

Molloy started in the Depression, when there was fear among the nation that employers would take advantage of economic problems, he said. “(The act) passed during a time when it served its purpose.”

Robert Boreanzan, a senior partner at the law firm Lipitz Lipitz Green Schne Cambria LLP who represents worker interests, said the goal of the FLSA — the last act of Franklin Roosevelt’s New Deal — was to provide short- and long-term work, thereby maximizing employees’ hours at work.

“The thought was that it would advance society’s quality of life by protecting health and safety and reducing worker injuries and fatigue,” he said. “It would benefit the community by reducing labor strikes and provide more time for employees to be at home or in the community.”

But the gradual increases in minimum wage have not kept up with inflation, Boreanzan said, and Americans are working longer hours than workers in most industrialized nations.

“The intent was to have less work, but we have created so many exemptions to the statute that people are working so much longer than at the start of the act that the impact has been diluted,” he said.

For example, the 2007 amendment to increase the minimum wage to $7.25 continues to be controversial, and President Bush may veto the last two stages of implementation.

**The regulatory seesaw**

That most recent amendment is probably the last change the act will see for years to come, say labor and employment attorneys. “I don’t see any more amendments on the horizon,” Molloy said. “I doubt we’ll see more changes in the near future.”

Still, sources say, the 70th anniversary of the act should remind employers that they need to be more vigilant in complying with its statutes.

“The pressure has already been there, but employers are making sure there are no technical violations that would expose them to a possible employee claim,” Molloy said.

“A new wave” of class-action lawsuits from employees claiming they’re not being compensated for overtime or working through meal and rest breaks — perhaps when an hourly employee eats lunch at his or her desk or takes a fraction of an allotted half-hour break — is prompting employers to make sure workers are taking breaks or to pay them for break time.

That’s a smart course for employers, who may not be aware that workers are not taking their breaks, Molloy said — particularly when plaintiffs’ law firms are actively recruiting class-action participants.

The political atmosphere in Western New York supports worker rights, lawyers say.

“Despite 70 years of the law’s being in existence, you’d be absolutely shocked about how many calls I receive and the Department of Labor receives (about violations of) minimum wage and hour violations. It’s amazing,” Boreanzan said.

That may be so because in a depressed region, and with a national recession predicted, employers have an advantage, he explained.

“There’s a workforce that’s desperate and will tolerate to some degree minor violations. And employers know that,” Boreanzan said.

The labor unions are fighting hard to attract members now so that when the economy rebounds and that seesaw balances, they’ll start to gain.

Employees are becoming less satisfied with what employers are doing, and employers are responding by providing benefits to attract quality employees, Boreanzan said. “The pendulum is swinging in the other direction,” he said.

The outcome of this year’s presidential election will be the determining factor in what comes next.

“If the Democrats win, you can count on a pretty significant upturn in legislation and employee progress,” Boreanzan said. “If not, things will stay in the status quo, where employers have the upper hand.”

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