

October 2004

www.tnchamber.org

Business Tax Incentives Challenged

★ *Special to the Business Insider* ★

Mike Stewart, Esq., and Charlie Trost, Esq., of Waller Lansden Dortch & Davis

The Tennessee Chamber of Commerce & Industry filed a friend of the court brief last month asking the Sixth Circuit U.S. Court of Appeals, which has jurisdiction over Tennessee, Kentucky, Ohio and Michigan, to reconsider a recent decision that calls into question the constitutionality of tax credits and incentives routinely used by Tennessee and other states to attract investment in new plants and equipment. In *Cuno v. DaimlerChrysler, Inc.*, a group of plaintiffs organized by Ralph Nader challenged the incentive package offered to DaimlerChrysler Corporation in connection with its construction of a \$1.2 billion automotive manufacturing facility which provided several thousand jobs to the Toledo, Ohio, area. The plaintiffs challenged both a franchise tax credit for purchases of manufacturing machinery for use in Ohio and a 100 percent property tax exemption.

The Court upheld the property tax exemption but invalidated the credit for in-state purchases of machinery. That credit is generally 7.5 percent of “the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment in that county,” rising to 13.5 percent in certain economically depressed areas. To obtain a credit in excess of \$1 million, a business must show that it increased its total ownership of Ohio property during the year for which the credit is claimed.

In addition, the Court determined that the Ohio tax credit violated the “Commerce Clause” of the U. S. Constitution because it discriminated against interstate commerce. Reviewing recent decisions by the U. S. Supreme Court invalidating four incentive statutes since the late 1970s, the Court of Appeals read those cases as broadly prohibiting incentives which provide tax reductions to induce in-state investment. “Discrimination,” the Court observed, “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” Because “the investment tax credit at issue...encourages the development of local business through use of Ohio’s power to tax an in-state operation as a means of requiring other business operations to be performed in the home state,” the Court noted, it was plainly discriminatory. Accordingly, the Court prohibited further use of the credit in Ohio, placing DaimlerChrysler’s incentive package in jeopardy.

While the Court of Appeals stopped short of declaring all tax incentives unconstitutional, its decision in *Cuno*, whether ultimately deemed valid, will cast doubt on the constitutionality of numerous credits for jobs or investments which in many instances have figured heavily in corporate re-location and expansion decisions. Businesses relying on those incentives may find them challenged, as in *Cuno*, by competitors, or by state departments of revenue unwilling to provide credits under statutes they deem unconstitutional. Either way, Tennessee businesses will have to think twice about relying on many long-standing incentive programs if the *Cuno* decision is not successfully challenged.

Immediately after reviewing the *Cuno* opinion, the Tennessee Chamber retained counsel to prepare a friend of the court brief supporting DaimlerChrysler’s request that the Court of Appeals reconsider its opinion. Ultimately, the Chambers of Commerce of Kentucky, Ohio, Michigan, and the City of Detroit, after reviewing the Tennessee Chamber’s brief, agreed to join the brief as additional parties. Generally speaking, the Court reconsiders its opinions when they address issues of great importance. By lining up the lead business organizations in all of the states directly affected by the Court’s decision, the Tennessee Chamber underscored the critical need for of business incentives.

Mike Stewart and Charlie Trost are members of the law firm of Waller Lansden Dortch & Davis. They can be reached at 615-244-6380 or mike.stewart@wallerlaw.com / charlie.trost@wallerlaw.com.



Get Out the Vote!

Deborah K. WoolleyPresident ★ deb.woolley@tnchamber.org611 Commerce Street
Suite 3030
Nashville, TN 37203-3742
615-256-5141
615-256-6726 Fax
www.tnchamber.org

Leadership

Board of Directors Chair
D. Lynn Johnson**President**
Deborah K. Woolley**Assistant to the President**
Judy Haggard**Vice President**
Environmental Affairs
Wayne K. Scharber**Vice President**
Employment Issues
Bob Gaskill**Director of**
Government Relations
Roland Myers**Director of Membership**
Doug Fouts**Director of Events**
Suzie Lusk**Director**
Tennessee Scholars
Ruth Woodall**Receptionist**
Juanita Storz

In less than five weeks, we all will know who will be president for the next four years and who will be representing our interests in the U.S. Capitol and the Tennessee Statehouse. The results will affect how we do business.

It is a result we shouldn't leave to chance. We talk at length about impacting the legislative process--about having a viable grassroots effort, about having a professional lobbying effort, even about having a strong and effective Political Action Committee strategy. What we don't talk about as much as we should is having a strong election strategy.

We all know about the high costs of elections. We know about the enormous amounts of money that go into each and every campaign; after all, we get asked to donate a lot of it. What we can't ever forget is the real purpose of that money. It is simply this: to get people to vote. That is how we, as employers, can impact elections most directly.

In political slang it is called GOTV--*Get Out The Vote*. It is the most simple of all concepts. There is no vote to count if a person doesn't go to the polls and cast it. As employers, we have a distinct advantage over organized labor, political parties, and other special interest groups.

First, we have easy access to our employees. Second--and most important, our employees trust us. Third, we can make the information available in a timely manner. Lastly, the issues we care about are the issues our employees care about: education, healthcare, economic prosperity and the environment. While we all have our personal favorites among candidates and we all want a pro-business victory, the bottom line is that how a person votes is not as important as ensuring that more Americans take the time to vote.

We as employers can facilitate that. Companies that encourage employees to vote send a strong, positive message that the company values civic participation. It means that the company values responsible citizenry and information sharing. It means the company is rewarded with an employee base that is active in the community and the issues that impact it.

Encouraging employees to register and vote is simple. It requires communications--through e-mail, regular mail, posters, intranet, paycheck letters--that reminds each employee that voting is an important right and you, as an employer, support strongly their opting to exercise it. Voter registration forms, address change forms, early voting information, are available on the Tennessee Chamber website at www.tnchamber.org. Simply click on the red, white and blue www.voteforbusiness.com graphic. Information is available for you to hyperlink, print and distribute, or for migrating people to your organization's website.

Many employers hesitate to talk to employees about elections--about voting--and exercising their responsibility as citizens. I remain confused as to why. We all know that our citizens are not voting. In Tennessee, according to the U.S. Census Bureau, in the 2000 presidential election, only 52.3 percent of our citizens voted. That number sounds even worse when you realize that only 62.1 percent of our eligible citizens were registered.



A Growing Workplace Concern -- Religious Accommodation

★ *Special to the Business Insider* ★

Karen L.C. Ellis, Esq., and Leslie Goff Sanders, Esq., of Bass, Berry & Sims

A recent U.S. District Court case in Nashville involving Muslim factory workers illustrates the challenges confronting employers in today's multi-cultural workplace. In *Dahir v. Whirlpool*, multiple Muslim plaintiffs alleged, among other issues, the existence of a religiously hostile work environment and a refusal to accommodate their request for prayer. The central prayer issue was the plaintiffs' request to leave the production line to pray at sunset each day. Whirlpool successfully asserted that it was unable to accommodate this request without undue hardship.

Knowing the parameters of the duty to accommodate is critical to today's employers. It is the employee's duty to inform the employer of a need for an accommodation. Once an employee makes the employer aware of such a need, the employer should determine whether the employee holds a sincere religious belief. If that issue is resolved in the employee's favor, then the employer has a duty to make a reasonable accommodation for the employee. What may be a reasonable accommodation for one employee at a particular job may be an undue burden when applied to another employee at another job.

The law does not require employers to provide an accommodation that would cause an "undue hardship." An undue hardship is something more than a minor cost to the employer. When determining whether a proposed accommodation imposes an undue hardship, an employer may examine hypothetical impacts of proposed accommodations. For example, a company is not required to deprive employees of their contractual rights under a collective bargaining agreement or a *bona fide* seniority system in order to accommodate the religious needs of others.

Employers who explore accommodation requests with the employee and who make reasonable efforts to accommodate religious beliefs position themselves to be in compliance with the law.

Karen Ellis and Leslie Goff Sanders are members of the law firm of Bass Berry & Sims. They may be reached at 615-742-6200 or kellis@bassberry.com / lgoffanders@bassberry.com.

Regardless of your location or industry,
Compensation Data has the answers.



Compensation Data - Kentucky/Tennessee
The largest pay & benefits survey in Tennessee

Order today! • (800) 300-9570 • www.compdatasurveys.com



**Compensation Data 2004—
Kentucky/Tennessee** is available for \$729, with major discounts available for Chamber members who agree to submit data in next year's survey. Companies interested in participating in next year's survey can buy a two-year subscription and receive the 2004 survey for \$419.

To order a copy, contact Compdata Surveys at 1-800-300-9570.



Prescription for a Medical Fee Schedule

Bob Gaskill

Vice President of Employment Issues ★ bob.gaskill@tnchamber.org

One of the many elements of the workers' compensation reform law now being crafted is the medical fee schedule. This schedule (or table) will set the maximum fees that all providers can charge for their services in workers' compensation cases. The Medical Care and Cost Containment Committee has been receiving testimony from all providers as well as business and industry during the summer. The Tennessee Chamber was represented before the Committee with testimony from the Chamber's Human Resources Committee member Bill Musick. Musick is Director of Human Resources for Altrista Zinc Products, Co. in Greeneville. His comments (*see below*) stressed the need for fee levels that did not discourage quality providers from participating in the system. Musick also expressed concern that the fees not be so high that providers, who currently charge less than the proposed new fee schedule, are encouraged to raise their fees to the new maximums thereby increasing the cost of medical care.

Two members of the Committee were appointed from a list of candidates submitted by the Chamber to Department of Labor and Workforce Development Commissioner Jim Neeley. Dr. Sharon Stewart is the medical director at Saturn Corporation in Spring Hill and Quency Holmes is the Human Resources Manager at Robert Bosch in Gallatin. Their input to the Committee's deliberations has been valuable.

The Labor Department must have a proposed rule in place by December 31, 2004. The Committee's recommendations will be helpful to Commissioner Neeley, but he is not bound by their proposal. Their comments, like those of all committees involved with the rule-making process, are strictly advisory in nature. He will have to consider the costs of any data base--and there are numerous versions available--that could be used to create a fee schedule. The Committee has been provided information concerning fee schedules and experience with them from the 40 other states that utilize them. There is no thought being given to just adopting one from another state. Each state's workers' compensation laws are unique, as are each state's medical practice patterns. Looking at the experience in other states has been instructive. For instance, Florida's initial attempt at a fee schedule created fees so low that quality occupational physicians and other providers opted not to participate in treating injured workers.

CONTINUED ON PAGE 7

The Employer and Panel Physician: An Important Relationship

Bill Musick

Director of Human Resources, Altrista Zinc Products, Co.

(Excerpt of September 7, 2004 Testimony Before the Medical Care and Cost Containment Committee)

I think that I can speak for most employers in Tennessee when I say that I applaud the Legislature and Governor's efforts to reduce the burden of workers' compensation costs on employers. Hopefully, the changes already made will slow the migration of manufacturing jobs away from the state and actually make our state more attractive to new business.

As we look at the provision in the new legislation to consider medical fee scheduling and cost containment, I compared our [Altrista's] workers' compensation benefit costs with our general medical benefit costs. Comparatively, for an employee who seeks medical care for a non-work related accident or illness, the doctor's visit cost is capped at \$41.98 as a result of our PPO pricing arrangement. However, for the same visit for a work-related accident, our company normally pays \$46.80, a difference of \$4.82 per visit.

At face value, one may argue that we are being overcharged by the physician who treats work related injuries. However, as an employer, I am not averse to compensating our workers compensation panel physicians more for the same or similar work than for regular medical care for several important reasons.

CONTINUED ON PAGE 7



Building a Better Employee for Business

Ruth Woodall
 Director of Tennessee Scholars Program
ruth.woodall@tnchamber.org

The Tennessee Scholars program is a rewards and recognition program for high school students, sponsored by the Tennessee Chamber of Commerce & Industry. Tennessee Scholars are high school students who complete a rigorous curriculum and reach a high level of skill in several areas so they are ready for the labor market or higher education.

Because of a majority of jobs now require some type of post secondary education all students need to complete a more rigorous academic course of study that includes math, lab sciences, English, social studies, and foreign languages to be competitive in the workplace. Students who complete this coursework have better and more options after they graduate, they are better equipped to advance to higher education, succeed in the workforce and military training programs. They are also better prepared for career changes later in life.

There is a strong link between courses completed in high school and postsecondary achievement. The U.S. Department of Education found that students, who complete rigorous academic courses like the Tennessee Scholars Program, enjoy on average a 13.1 percent wage advantage nine years after graduation, an effect that occurred regardless of whether or not the student attended college.

Nine Tennessee counties are participating in the program, including the recent additions of: Dyer County Schools, Dyersburg City Schools, Lake County Schools, Humboldt City Schools and Wilson County Schools.

Tennessee Scholars in the Community Means...

- Students are better prepared to go to college, technical school or the military.
- Students learn skills necessary for jobs in today's market.
- Greater economic prosperity for Tennessee.
- A better prepared workforce.
- Schools enjoy better attendance and more discipline.
 - Parents, business people, community leaders, and school officials work together toward a common goal.
- Student drop-out rate is lowered.
- ACT, SAT, college entrance exams and Gateway test scores are higher.
 - Greater earning potential for students.
- Students have more flexibility in their career choices.

Cornerstone membership is all about leadership. The *Cornerstone of Leadership* recognizes members who are investing at exceptional levels. These leading companies shape the future of Tennessee and help make the state a better place to live and work. They have chosen to strengthen their commitment to the Tennessee Chamber by investing in the Cornerstone of Leadership, a program that maintains the highest possible level of service. Cornerstone leadership takes our 90-year heritage and provides the foundation for the next 90 years. We thank these leaders for providing the seed capital to build the future.

CAPSTONE (\$20,000-29,999): ALCOA, Inc. ♦ BellSouth Telecommunications ♦ BlueCross BlueShield of Tennessee ♦ Eastman Chemical Company ♦ Ingram Industries, Inc. ♦ Nissan North America, Inc. ♦ TVA

KEYSTONE (\$10,000-19,999): AmSouth Bank ♦ Bridgestone Americas Holding, Inc. ♦ Brother International Corporation ♦ DuPont ♦ FedEx ♦ Murray, Inc.

FOUNDATION (\$5,000-9,999): Bowater Newsprint Calhoun Operations ♦ CSX Transportation ♦ Carrier Corporation ♦ Caterpillar, Inc. ♦ Cendant Corporation ♦ Gaylord Entertainment ♦ Jacobs-Sverdrup Technology, Inc. ♦ King Pharmaceuticals ♦ La-Z-Boy ♦ Maytag /CCP ♦ McKee Foods Corporation ♦ Mountain States Health Alliance ♦ Packaging Corporation of America ♦ Pilot Corporation ♦ Procter & Gamble Company ♦ State Farm Mutual Automobile Insurance Co. ♦ Tennsco Corp. ♦ Toyoda-KOKI Automotive NA, Inc.



Cast Your Vote for Business!

November 2 is Election Day in Tennessee this year, and it is your opportunity to help shape business-related legislation and regulation by electing pro-business lawmakers. The Tennessee Chamber encourages you and your employees to vote. The steps to voting are simple:

- ★ Be registered to vote with your local election office.
- ★ If you have never voted, you must vote in person the first time.
- ★ If you cannot vote on November 2, contact your local election office for an absentee ballot. *(You may not vote on-line or by e-mail.)*
- ★ Your local election office will give you a list of local polling stations.
- ★ Typically, stations open early in the morning and close several hours after 5 pm to allow people to vote before or after the workday.
- ★ Once at the polling station, review the list of local, state and national candidates.
- ★ Carefully consider where each candidate stands on the issues that affect you, your family and your workplace, issues such as: health care, education and taxes.
- ★ **Cast your ballot!**



Employer: Please post this information in a prominent area for employees.

Chamber Voices Concerns at NSR Meeting

In late September, the U.S. Environmental Protection Agency (EPA) issued this statement: *Total emissions of the six principal pollutants identified in the Clean Air Act dropped again in 2003, signaling that America's air is the cleanest ever in three decades.*

Despite that positive news, there is more that can be done to further air quality improvement in Tennessee. Last month the state Air Pollution Control Board met to initiate the rule-making process for the New Source Review (NSR) rules. Tennessee must now adopt its own NSR rules and submit a State Implementation Plan (SIP) for EPA to approve. The state is required to have its SIP for the NSR rules to EPA by January 2006.

The Chamber was represented at this meeting by eleven manufacturers. TDEC Commissioner Betsy Child and the Board learned that the Chamber's position is that these rules are extremely important to manufacturers across the state and that while it was the Chamber's desire that this rule-making process be started many months ago, the delay did provide time for all Board members to become better informed.

These rules will provide certainty and clarity to Title V permitted sources. They are not standards for air quality. Compliance with the MACT, CAIRS, NAAQS, and NOx SIP Call, etc. will provide further improvements to air quality. The Chamber also recommended that industry needs certainty and clarity in the rule-making process and does not need a more restrictive process than business and industry in surrounding states. Please visit the Chamber's website at www.tnchamber.org for the latest information regarding NSR.

Agenda Set for Tax and Environmental Meetings

The final agenda and slate of speakers is confirmed for the Tennessee Chamber's Annual Environmental Awards Conference and Business Tax Seminar.

The Environmental Awards Conference is October 26-27 at Montgomery Bell State Park near Dickson, Tennessee. The Business Tax Seminar is November 4 at the Millennium Maxwell House Hotel in Nashville.

The complete agendas and registration forms for both conferences are available at www.tnchamber.org.

ARTICLES CONTINUED FROM PAGE 4

Fee Schedule Recommendations Soon

It is important to understand that the schedule will set the maximum allowable. Many employers and insurers now provide medical care through managed care arrangements with negotiated fees. The fee schedule will not interfere with these arrangements and fees below the schedule will be permissible. The Department believes the law will not allow for payments above the schedule. In contested cases, paying doctors more than the maximum fee allowable according to the schedule could give the appearance that treatment options, return to work decisions, and disability ratings are biased in favor of the employer or insurance carrier. There has been agreement among the Committee members on some general principles. These include:

- *Rural providers should not enjoy higher physician fees than urban providers;*
- *The schedule should include utilization review and compliance assurance components; and,*
- *The schedule should encourage participation by competent and qualified physicians while cutting or curbing the current and future expense of medical care in workers' compensation cases.*

Employer and Panel Physician

First, the relationship in regular medical care is a two party relationship--between the employee and physician of his or her choosing. In workers' compensation cases, the relationship is a three-party relationship between the employee, physician and employer. Not only does the physician provide feedback to the employee, but the physician also provides the same or comparable information back to the employer. It is not unusual that a member of my office receive a telephone call from a treating physician who explains in detail his or her expectations regarding temporary limitations needed to expedite the employee's recovery. I also know that my staff may contact the physician and will get his or her undivided attention in discussing a particular case.

This kind of dialogue is invaluable to us and we are concerned that medical fee scheduling that fails to compensate the physician for the extra dialogue in a workers' compensation case might actually curtail the amount of dialogue that transpires between the employer and physician.

Second, workers' compensation cases are often much more complicated than regular non-work-related medical treatment. The physician is often faced with employees who are seeking secondary gain when they walk into the treatment office. For example, physicians may sometimes deal with an employee who is angry over an unwanted transfer or other change to the working conditions. This anger may be manifested in exaggerated claim of pain, poor effort at rehabilitation or repeated visits to gain "light duty" work opportunities. In these or similar cases, the physician must spend additional time talking with the employee and deal with the hostility before therapeutic treatment can commence. In addition, the physician is also sure to have an additional conversation with the employer. Office notes are often more detailed in workers' compensation cases. Occupational physicians treat every patient as if the case will be litigated (as many are). It is also the physician's responsibility to protect the interest of the company by documenting and ensuring proper care is provided.

The General Assembly and state regulatory and advisory bodies frequently turn to the Tennessee Chamber as a resource for real-world experts in the areas of health care, taxation, insurance and the environment among many others. Bill Musick shares his thoughts on his recent testimony before the state's Medical Care and Cost Containment Committee:

When I testified before the Committee on the medical fee schedule, I was delighted that the Tennessee Chamber provided our company an opportunity to offer input into the Committee's decision making. The Committee was receptive to our comments and asked numerous questions. The experience was much more relaxed and comfortable than I expected; it was easy to present my comments. I'll definitely be available to the Chamber in the future.

CONTINUED FROM PAGE 2

Get Out the Vote

Talking to employees about voting is no more important than talking to an employee about health care issues, safety issues or workplace issues. Facilitating their ability to vote with registration information, voting requirements, voting times and places and other relevant information all helps them in their busy lives. It also shows that their company values the fact that they do participate in the election process.

As an employer, however, you need to start today. Make sure your employees who are registered voters have all the information they need about early voting in Tennessee. Early voting is open to all registered voters October 12 to October 28. All counties conduct early voting at their election commission offices at hours that are determined locally. Provide your employees a link to the early voting information or post it in the workplace. Encourage and recognize employees as they vote. *(See page 6 for a GOTV flyer.)*

Business and industry wins when voting participation goes up among our employees. They know and recognize that the employer is their safety net as the provider of family wages, family and retirement benefits. They know, because you talk to them, about the challenges their business and industry faces and they know what it takes to compete and be successful. They know that if the company fails, their jobs are lost.

2004 Upcoming Seminars

October 5	Safety Programs	Jackson	\$199 / 245 *
October 6	Employment Law Workshop	Knoxville	\$199 / 245
October 8	Employment Law Workshop	Dickson	\$199 / 245
October 12	Benefit Review Conference Workshop	Jackson	\$199 / 245
October 13-14	10-Hour OSHA	Knoxville	\$245 / 295
October 15	Benefit Review Conference Workshop	Nashville	\$199 / 245
October 20	Benefit Review Conference Workshop	Knoxville	\$199 / 245
October 21	Benefit Review Conference Workshop	Kingsport	\$199 / 245
October 26-27	Environmental Awards Conference	Dickson	\$199 / 245
November 4	Annual Tax Update	Nashville	\$199 / 245
November 16-19	30-Hour OSHA	Crossville	\$445 / 495

To register, contact Suzie Lusk at 615-256-5141 or at suzie.lusk@tnchamber.org.

* Non-Member Rate



611 Commerce Street
Suite 3030
Nashville, TN 37203-3742

PRSR STD
U.S. Postage
PAID
Nashville, TN
Permit No. 635