EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

The emphasis on diversity training and understanding focuses primarily on differences based upon race, gender, religion and national origin. Overlooked, however, is the diversity among the generations in today's workforce. A recent book, "Generations at Work: Managing a Clash of Veterans, Boomers, Xers and Nexters in Your Workplace" describes each generation as follows:

> Nexters (born since 1980). Currently, there are approximately 70 million in this generation. Defining events for this generation include computers, school violence and t.v. talk shows. The core values for the members of this generation are confidence, civic duty and diversity. This generation is optimistic and thinks in terms of acting collectively. They are willing to work hard.
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> Xers (born 1960-1980). There are approximately 70 million generation Xers. Their defining events include MTV, AIDS, computers and the fall of the Berlin Wall. They tend to be pragmatic and self reliant. They are risk takers and do not define their self esteem through their work. They are cynical and not afraid of change.
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> Baby Boomers (1943 - 1960). There are approximately 73 million baby boomers. Defining events in their lives include television, assassinations, Vietnam and the Civil Rights Movement. They are driven and soul searchers, passionately committed to the culture of the workplace. They tend to have a team orientation and a strong work ethic.
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> Veterans (1922 - 1943). There are approximately 52 million in this generation. The defining events include World War II, the Great Depression and patriotism. They have a strong respect for authority and believe in duty before pleasure and adherence to rules. They tend to be conformers and take a no-nonsense approach to the workplace.

Record low unemployment levels should continue during 2000. Those employers who understand the values and ethics among the different generations and attempt to address

those through workplace policies, benefits and philosophies will be a step ahead of others in attracting and retaining a capable workforce.

EMPLOYER "GOES BARE" IN SEXUAL HARASSMENT LITIGATION

"Going bare" is a term that refers to the lack of insurance coverage. Some employers have considered or purchased employment practices liability insurance, assuming that the policy covers discrimination and harassment disputes. In the case of Midwestern Insurance Alliance, Inc. v. Coffman (Ky. Ct. App., November 24, 1999), the court ruled that the employment practices policy purchased by Coffman Welding and Metal Works, Inc. specifically and clearly excluded damages for harassment claims. The president of the company, William Coffman, was accused of sexual harassment by his former secretary. Coffman and the company were sued, and both won their cases. Coffman and the company sought to have the cost of defending the lawsuit paid for by the corporation's insurance company. In rejecting their claims, the court said that the policy "is perfectly clear in excluding damages arising out of sexual harassment."

If your company has employment practices liability insurance or is considering the purchase of such a policy, be sure there is a clear understanding regarding the claims covered and excluded, the costs covered and excluded, and which individuals and entities are covered by the policy. Do not get caught in a situation where you assume there is insurance coverage for an employment dispute only to find out that you were wrong.

AFL-CIO EXPANDS COMMUNITY ORGANIZING INVOLVEMENT

The AFL-CIO on December 2, 1999 announced a new community organizing involvement program called Voice @ Work. The purpose is to create community pressure on employers to minimize employer opposition to union organizing campaigns. According to AFL-CIO studies, few people understand how employers oppose union organizing, and when they are aware of the employer opposition, they are upset by it.

The Voice @ Work program focuses on voting alliances with community groups that can pressure employers to minimize their opposition to organizing efforts. For example, at certain locations the AFL-CIO will enlist the support of the NAACP and religious organizations. Additionally, Voice @ Work will work with employees who are part of the organizing effort to speak in their community and at their churches to describe their employer's opposition to their unionization efforts. Voice @ Work will also provide employees with outlets to community political leaders if the employee or others at work believe they are mistreated because of their union activity. The essence of the Voice @ Work program is to build community pressure on the employer so that the employer will become inhibited from using its legal rights to encourage employees to remain union-free through small group meetings and one-on-one supervisor dialogues with employees about unions.

REQUIRING MEDICAL TESTS OF DISRUPTIVE EMPLOYEE DOES NOT VIOLATE ADA

The case of *Sullivan v. River Valley School District* (6th Cir. November 29, 1999) involved a teacher who engaged in behavior that was disruptive and abusive. The teacher was asked to meet with the superintendent of schools to discuss his behavior and possible treatment. The teacher refused to cooperate. The superintendent consulted with a psychologist, who stated that the teacher had a possible psychiatric disorder, but that further examination was necessary. Based upon that input, the superintendent suspended the teacher, with pay, pending a physical and mental evaluation.

The employee refused to cooperate with the evaluation, which ultimately resulted in a three year unpaid suspension. The employee claimed that his rights under the ADA were violated, because the employer "regarded" the employee as disabled.

In rejecting the employee's claim, the court said that "given that an employer needs to be able to determine the cause of an employee's aberrant behavior, this is not enough to suggest that the employee is regarded as mentally disabled...a defendant employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled." **The court added that "An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job related functions."**

An employer must have a reasonable basis for doubting an employee's ability to perform the job. Examples include observation of the employee's current behavior, a comparison to previous behavior, the frequency of the current behavior, the disruption that the behavior caused others and whether there is any risk to the safety of either the employee or others.

WAGE AND HOUR AND ERISA CLASS ACTION: FAILURE TO PAY EMPLOYEES FOR PREP TIME

On December 16, 1999, the class action of *Trotter v. Perdue Farms, Inc.* was filed, alleging that employee preparation time was excluded from hours worked. The class action asserts a violation of wage and hour law and the Employee Retirement Income Security Act of 1974 (ERISA). The ERISA claim is premised on the employer's supplemental retirement plan, which provides for employer contributions based upon total employee hours worked. According to the plaintiffs, because the prep time should have been added to hours worked, the employer failed to make retirement contributions based upon those hours.

The employees involved worked at Perdue poultry processing plants throughout the country. They allege that they were not paid for time that they spent each day putting on and removing aprons and gloves and other prepatory activities. The employees are assisted by the United Food and Commercial Workers Union, which represents approximately 30,000 poultry industry employees throughout the country.

For the time spent preliminary or postliminary to work to be compensable depends upon the time, exertion and concentration required. For example, preparing equipment or machinery prior to the start of the workday is compensable, as is the process of dressing into heavy and/or cumbersome protective gear. If the safety gear is incidental in time and exertion, such as safety glasses, ear plugs, aprons and safety shoes, then such time is not considered compensable. Where changing clothes or washing is an integral aspect of the job, then it will be compensable. An exception is at a unionized location where the employer and bargaining agent have agreed that such time would be non-compensable. Employers should review whether their employees engaged in preliminary postliminary activities and whether those activities should be compensated. Although the amount of uncompensated time may appear to be minimal for one employee, the dollars involved become significant when multiplied by the frequency of the activity and the number of employees.

DID YOU KNOW...

. . .**that according to the most recent information from the Bureau of Labor Statistics, on-the-job injuries are at an all time low in the 28 year history it has collected such data?** In 1998, the most recent year released by BLS, 6.7 out of 100 full-time employees reported job related accidents or illnesses. In 1997, the

figure was 7.1. This is the sixth consecutive year in which the illness and accident rate declined. The high was 11 per 100 in 1973 and as recently as 1994, it was 8.4 per 100. The rate for those who spent more than one day away from work due to illness or injury also declined to two employees per 100 in 1998, again the lowest on record. The number of illnesses or injuries that resulted in the need for medication, restricted work or a transfer was 3.1 per 100, compared to 4.1 in 1990.

. . . that male employees have the right to seek damages based upon discrimination against women? In the case of *Anjelino v. New York Times Co.* (3d. Cir., December 2, 1999), the court ruled that "Indirect victims of discrimination have standing to sue under Title VII if they allege a claim of injury in fact that is redressable at law." The men worked in the mail room from an on-call list of employees. They allege that they were "sandwiched" between the names of women on the list. Once the employer reached a fixed number of women for the mailroom, it no longer called anyone from the list. Therefore, the men claimed that the discrimination against women effectively resulted in discrimination against them.

. . .that according to the Bureau of Labor Statistics, those who are classified as contingent employees declined as a percentage of the total workforce? The BLS statistics covers the time frame between February, 1997 and February, 1999. The contingent workforce is defined as those individuals who consider their jobs as temporary. According to BLS, only 4.3 % of employees meet the definition of contingent workforce. In 1995, which was the first year BLS tracked the contingent workforce statistic, 4.9% of those working were considered contingent employees. Approximately 51% of all contingent employees are women. Only one in five of the contingent employees received health benefits. In addition to the contingent workforce, approximately 6.3% of all employees are independent contractors or consultants, and approximately 1.5% are on-call. Only .9% work for temporary agencies.

. . .that the National Labor Relations Board ruled that medical interns and residents are employees who are covered by the National Labor Relations Act? (*Boston Medical Center Corporation*, November 26, 1999). The Board, by a 3-2 vote, overruled prior decisions which ruled that residents and interns were primarily students and, therefore, not covered by the National Labor Relations Act. In concluding that residents and interns are employees, the Board said that they "work for an employer within the meaning of the Act. Further, the interns, residents, and fellows receive fringe benefits and other emoluments reflective of employee status. Workers' compensation is provided. They receive paid vacations and sick leave, as well as parental and bereavement leave. The hospital provides health, dental and life insurance, as well as malpractice insurance..." Approximately 90,000 interns, residents and fellows are now covered by the National Labor Relations Act, according to this case.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Sally Broatch Waudby. Please contact Mr. Lehr, Ms. Waudby, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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