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LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

You may have heard cries of "the sky is falling" around July 15, 2004. On that day, the Secretary for the Department of Health and Human Services ("HHS") announced a change related to Medicare's coverage for obesity treatments. Many people, including those in the media, were quick to say that Medicare was proclaiming obesity as a disease, and immediately began debating whether such a thing could be true. In fact, however, the change announced by HHS was remarkably small and has no immediate effect on whether treatments for obesity will be covered under Medicare. However, just because the change was small does not mean it was insignificant.

The Change in Medicare Policy

This change in Medicare policy begins to remove barriers to covering obesity treatments under Medicare, if scientific and medical evidence demonstrate the effectiveness of those treatments. By law, Medicare covers specified medically-necessary services for *illness* and *injury*. In the past, the Medicare Coverage Issues Manual stated that obesity was not an illness; as a result, coverage for obesity treatments was generally denied.

On July 15th, HHS simply removed the language stating that obesity is not an illness. By doing this, HHS will allow members of the public to request that Medicare review medical evidence to determine whether specific treatments related to obesity should be covered. This change in Medicare policy does not have an immediate effect on the coverage provided by Medicare for obesity treatments. Medicare did not declare that obesity is a disease (and any editorials that you've read to the contrary are simply wrong).

Impact on Private Healthcare Plans

The change in Medicare policy certainly does not have an immediate impact on private healthcare plans. However, the change may push private insurers to provide a more flexible approach to coverage and will almost certainly prompt more research into weight loss and the effectiveness of various treatments.

Private insurers will not likely be able to get away with providing less coverage than Medicare. So they should find themselves walking down any trails blazed by HHS.

There will be difficult questions to be answered: exercise is most likely one of the most scientifically-effective treatments for obesity; does that mean that gym memberships should be covered? Weight-loss surgery has received a lot of press recently as being effective, but risky; will it soon be covered as a matter of course? And what about diet pills? Non-physician supervised weight loss programs?

However, obesity has reached such epidemic proportions in our nation that it will be necessary to address these difficult questions. Check out the following facts cited by the Surgeon General:

- Nearly 2 out of 3 Americans are overweight and obese – which is a 50% increase from just 10 years ago;
- More than 300,000 Americans were projected to die last year alone from heart disease, diabetes, and other illnesses related to obesity and/or being overweight;
- Obesity-related illness is the fastest-growing killer of Americans;
- In the year 2000, the total annual cost of obesity in the United States was $117 billion;
- Research by the American Cancer Society estimates that obesity and/or being overweight could account for 14% of deaths from cancer in men and 20% of cancer deaths in women;
- New research shows that some cancers, like other life-threatening illnesses such as cardiovascular disease and diabetes, are more common in overweight and obese patients; and
- An overweight or obese American spends an average of $700 more per year on medical bills than an American who is not overweight. That amounts to a total of about $93 billion in extra medical expenses a year.

With these kinds of red flags about the weight epidemic everywhere in our country and the additional costs, both financial and in terms of human life and quality of life, resulting from obesity, it's no wonder that people are making every effort to try and have insurance cover treatments that will perhaps help prevent some of these harmful results.

The change in policy announced by Medicare is a response to growing concern over these issues, and also perhaps out of concern that the exclusion as written could have been used to deny coverage for treatment for conditions that were secondary to obesity. For instance, a doctor might note that he was prescribing a treatment for high blood pressure brought on by obesity. There was concern that the exclusion might lead to denial of the blood pressure treatment.

If you are faced with requests from employees for coverage for weight-loss surgery, or some other form of obesity treatment, the decision concerning whether it is a covered procedure must be based on the language in your health plan. If your plan is self-insured, do not feel like you can administer the plan with such flexibility that you can provide coverage for the surgery for a long-time employee that you want to help out, while not generally covering the surgery for others. That could be a breach of your fiduciary duties to the plan. Instead, make the decision whether such procedures will be covered, and amend the applicable plan documents so that they reflect this coverage decision, and at all times act in a manner that is consistent with your plan documents.

EMPLOYEE MAY SUE EMPLOYER FOR LABORATORY'S UNAUTHORIZED RELEASE OF MEDICAL INFORMATION

The Florida case of *Abril v. Department of Corrections* (July 30, 2004) addressed an issue of concern to any private sector employer, which is the release of medical information about an employee by a third party provider, such as a laboratory. In the Florida case, the court held

that the employee could maintain a cause of action against her employer, the Department of Corrections, alleging that the department was responsible for a laboratory's failure to maintain the confidentiality for medical condition.

Plaintiff Lisa Abril worked as a nurse at a prison in Florida. After giving mouth to mouth resuscitation to an inmate, Abril discovered that the inmate had Hepatitis C. Abril was tested by the laboratory that contracted with the Department of Corrections to test inmates for HIV. The laboratory faxed the positive HIV test results to unsecured fax machines at the Department of Corrections. Subsequently, the laboratory concluded that the test result was a false positive for HIV.

Abril sued her employer, alleging that the disclosure by the laboratory caused her great emotional distress and humiliation. Under Florida law, the unauthorized disclosure of an HIV result is a misdemeanor. The lower court dismissed the case, but the court of appeals said that a statute characterizing the unauthorized disclosure of HIV test results as a misdemeanor does not preclude an individual from filing a suit based upon negligence.

Although this case arose under a specific Florida statute, the case raises practical issues for employers to evaluate. For example, are employers taking sufficient steps to ensure that third party providers used by the employer's employees are maintaining confidentiality. In contractual agreements with such providers, employers should consider addressing confidentiality requirements and indemnification (and cost of defense) protection for employers in the event the third party provider breaches its confidentiality obligations. These issues should be addressed when negotiating the agreement with the third party provider – i.e., the time when employers possess the greatest amount of leverage.

THE JURY'S VERDICT: AGE DISCRIMINATION DAMAGES LEAD THE WAY

According to recent statistics issued by Jury Verdict Research, overall compensatory damages for discrimination cases in 2003 declined from 2002, while age and disability discrimination plaintiffs received the highest median average of compensatory damages from juries from 1997 through 2003. According to the report, the median damages in discrimination cases for 2003 was $232,322, down from $236,500 in 2002. The lowest median average during the past seven years was $145,412 in 1999.

By type of discrimination, the average median compensatory award over the past seven years was as follows:

Age	-	$255,143
Disability	-	$210,000
Sex	-	$151,625
Race	-	$150,000
Other*	-	$125,000

(*Such as National Origin and Religion).

The median for compensatory damages awards in all employment cases, which include discrimination, retaliation and wrongful termination claims, rose 18% in 2003 to $250,000.

The long term trend forecast is an increase in the number of age discrimination cases and size of damages awarded, as babyboomers move through their 50's and 60's. Termination issues of age discrimination plaintiffs often do not involve the type of behavior or rules violations associated with the less mature employee. Jurors identify more easily with an age discrimination plaintiff than any other protected class – one thing all jurors have in common is growing older. When a long term age protected employee is laid off or terminated without regard to the impact on the individual's dignity, some may view litigation as redemption for what the company "did to me."

If you are interested in obtaining a copy of the 61 page jury statistics and trends report, you may log on at www/juryverdictresearch.com, e-mail at custserv@lrp.com or call 1-800-341-7874.

WAGE AND HOUR TIP: CURRENT WAGE AND HOUR HIGHLIGHTS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks Price & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

The number one current wage and hour issue is that the new regulations governing the application of the "white collar" exemptions took effect on August 23, 2004. Although Congress has gotten involved in an attempt to delay their implementation, no action has been taken at this time that will postpone the effective date of the new requirements. There are indications that another move will be made when Congress reconvenes in September to put the regulations on hold. The following is a list of the current prominent wage and hour issues.

1. There has been much discussion about the effect the new regulations will have on employers and employees. A large part of the discussion relates to the number of employees that will be exempt under the new regulations. The Department of Labor estimates that something over 100,000 employees who have been non-exempt under the old regulations will now be exempt under the new regulations while some organizations contend that as many as six million additional employees will become exempt under the new rules. DOL also believes that more than one million employees who were exempt under the old regulations will no longer be exempt. This is primarily due to the increase in the minimum salary requirements to $455 per week. Recently I read in an article in a national publication, which stated that even though the new regulations are supposed to reduce the amount of litigation under the Wage Hour law it is doubtful that this will be the case. As with any major change in a regulation or statute I anticipate continued litigation regarding the meaning of the changes. DOL has indicated that they will vigorously enforce the new regulations to ensure that employers are complying with them.

2. **Congress is still considering at least two** proposals **that would increase the minimum wage. One would raise the rate to $6.25 in two increments while the other would increase it to $7.00 in three increments**. Indications continue that a strong push will be made to pass some type of minimum wage increase during this year. Also, in the November election Florida voters will consider a ballot initiative to establish a state minimum of $6.15 per hour. The California Legislature is considering a bill that would raise their minimum wage to $7.75 per hour. The New York Legislature has passed a bill that would increase that state's minimum wage to $7.15 per hour by January 2007. Voters in Nevada will vote in November on a bill that would require employers who fail to provide their employees with health insurance to pay a minimum wage of $6.15 per hour.

3. In a related issue regarding overtime, President Bush in a Columbus, Ohio speech on August 5 called for Congress to pass legislation making it easier for employers to offer private sector employees time off instead of overtime pay. There have been several bills introduced in recent years that would allow private firms to grant employees compensatory time instead of overtime under certain conditions. At this time it is not known if such a bill will have a chance of becoming law before the end of the current session of Congress.

4. The U. S. Second Circuit Court of Appeals invalidated a DOL regulation that

has been in effect since 1974. The case deals with persons who are employed by agencies as "home healthcare attendants." These employees provide companionship and care for the persons who are unable to care for themselves. There is a section of the Act, which states that persons employed in domestic service to provide companionship services are exempt from both the minimum wage and overtime requirements of the Act. When DOL proposed the initial regulation it stated that employees who worked for third parties could not be exempt, however, when it issued the final regulations they stated these employees could be exempt. In 2001 the Department proposed a change that would have made the employees non-exempt but those regulations were never put into effect. Due to varying positions taken by DOL the court stated that they would not give deference to the DOL position and found the regulations to be unenforceable. The court's decision – which is not binding on courts in Alabama — requires that companion employees be paid both minimum wage and overtime.

5. In an Alabama case, the Eleventh Circuit Court of Appeals ruled that a teacher who had requested FMLA leave for the birth of a child was not eligible for leave, as she had not worked for the employer for a year when she requested FMLA leave. She began work for the school system on August 9, 1999 and in December of that year she informed her principal that she was pregnant. In April 2000 she informed the principal that her baby was due August 2 and asked what she needed to do to obtain maternity leave. The principal told her that she should make her request in a letter to the School Board but recommended that she wait until after the board decided whether to renew her contract for the following year. The board made a decision of May 15 not to renew the employee's contract for another year and this was conveyed to the employee on May 16 by letter. In January 2001 the employee sued the school for retaliation because she had requested leave under the FMLA. The Court found that since she had not worked for the school at least twelve months she was not entitled to FMLA leave and the FMLA statute did not protect her.

6. The Sixth Circuit Court of Appeals recently ruled in a Family and Medical Leave Act case (Ricco v. Potter) that an employee who was wrongfully discharged was entitled to FMLA protection. The employee had not worked the 1250 hours required in order for her to be entitled to FMLA leave but the court ruled that she would have worked the minimum number of hours had she not been wrongfully discharged. Therefore, the Court found she was entitled to the protections of the FMLA.

Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be very active. Thus, employers need to ensure that they are complying with both statutes to the best of their ability. If I can be of assistance complying with wage and hour or FMLA issues, please give me a call.

OSHA TIP: OSHA AND WHISTLEBLOWERS

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.

Retaliating against an employee who caused your site to be inspected by OSHA could cost you. Consequences could include reinstatement, back pay and the like.

Section 11(c) of the Occupational Safety and Health Act prohibits reprisals against employees for having engaged in "protected activities" granted by the Act. Probably the most obvious example of such protected activity is filing a safety and health complaint with the agency. Others include such things as participating in an OSHA inspection, raising safety and health concerns with the employer, or requesting

OSHA information. In addition to being fired or laid off, acts of discrimination may include actions such as being assigned to undesirable shifts, demoting, denying overtime or benefits, blacklisting and reducing pay or hours.

Absent exceptional circumstances, a complaint must be filed with the Secretary of Labor within thirty days. Once a discrimination complaint under Section 11(c) is filed it must be investigated by the Secretary. OSHA has investigators in its various regions that are trained and specialize in investigating discrimination claims within the federal jurisdiction. If an investigation finds that a violation did occur, the Secretary must bring an action in a United States District Court. Four essential elements in establishing a violation under this section are a showing of protected activity, knowledge, animus and a reprisal. Where a violation is found, the court may order all appropriate relief.

One of the more common discrimination complaints arises when an employee files a formal complaint, causes an inspection, and is subsequently fired or perceives some other mistreatment. When confronted with a complaint alleging unsafe working conditions, an employer may attempt to identify its source. The OSHA compliance officer will not disclose the name unless the complainant has indicated his or her name may be revealed. Not knowing the complainant's identity might help to avoid any appearance of retaliatory actions.

An employee's engagement in a protected activity may not be the only factor leading to termination or other adverse action. Problems with attendance or productivity may have existed prior to the employee's filing a safety complaint. However, if the protected activity was a substantial reason for a subsequent adverse action, then a violation of Section 11(c) may be established.

Another cause of discrimination complaints occurs when employees are terminated or otherwise sanctioned for refusing to do a job they consider unsafe. A union contract or state law might allow an employee to refuse to do a job he or she considers unsafe, but OSHA cannot enforce this. While the OSH Act doesn't allow an employee to refuse to do any job considered unsafe, there are circumstances that would justify such an action and offer protection from discrimination. The following criteria should all be met before a "refusal to work" might be considered protected activity:

(1) The employer must be asked to eliminate the danger and fail to do so.
(2) The employee must genuinely believe there is an imminent danger and the refusal to work is in good faith.
(3) A reasonable person would agree that there is a real danger of death or serious injury.
(4) The urgency of the situation doesn't allow the employee time to have OSHA inspect and get the hazard eliminated.

In addition to section 11(c) of the OSH Act, OSHA has responsibility for enforcing whistleblower protections of 13 other federal statutes. Perhaps surprisingly, not all appear to have a close tie to safety and health. These various statutes relate to airlines, the trucking industry, nuclear power, among others. The last two additions to the list came in 2002 when responsibility was added under the Corporate and Criminal Fraud Accountability Act (Sarbanes-Oxley) and the Pipeline Safety Improvement Act.

EEO TIP: WHAT'S HAPPENING WITH SEX DISCRIMINATION AGAINST MEN?

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of Lehr Middlebrooks Price & Vreeland, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the EEOC. As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

On August 13, 2004 **the U.S. Equal Employment Opportunity Commission (EEOC**) announced that it had settled a sex discrimination lawsuit under Title VII for **$360,000 with Jillian's Entertainment Corporation.** A lawsuit was filed in the U.S.

District Court for the Southern District of Indiana on behalf of **a class of male employees** who alleged that Jillian's maintained sex-segregated job classifications on a nationwide basis and failed or refused to hire and/or transfer male employees to certain lucrative server or waiter positions.

According to its web-site, Jillian's originated in Boston in 1988 and now operates a nationwide chain of "family dining/entertainment facilities" or clubs in twenty five (25) states and currently has over 5000 employees. Among other activities the patrons of Jillian's can eat, drink, play an assortment of video games, go bowling, play billiards, or even dance to the lively music provided in a dance hall. Jillian's developed a guest profile which indicates that over 60 % of its patrons are males, 90% of its guests are between 21 and 44 years of age, and 65% are single. Apparently, such demographics make it easy to see why the Company tended to hire and/or place attractive females in lucrative wait staff positions. Males were hired and placed in other positions.

Unfortunately for Jillian's, sex discrimination against males in *some* positions, notwithstanding the usual prominence of males in *most* positions, is still sex discrimination under Title VII and the Equal Pay Act. This recent incident might be a good reason to review the basic rules pertaining to sex discrimination so as to avoid the pitfall that Jillian's ran into by allowing its job classifications to become sex-segregated, apparently based on customer preferences or "guest profiles."

The basic principles pertaining to sex discrimination under Title VII (excluding Sexual Harassment) are generally found at 29 C.F.R. Part 1604. These principles can be summarized as follows:

1. **Bona Fide Occupational Qualification** It is unlawful to discriminate on the basis of sex except where sex is a **"bona fide occupational qualification.**

2. **Separate Lines of Progression** It is unlawful to discriminate on the basis of sex with respect to **separate lines of progression and/or separate seniority systems.** Obviously, a separate line of progression or seniority system which is based on an employee's job classification would be lawful if the job classification, itself, was not the product of sex discrimination**.**

Employers should be aware of any adverse impact which their hiring or job classification policies and practices may have on the hiring or promotion of one sex over the other.

3. **Fringe Benefits**. Such items as medical insurance, life insurance, accident insurance, profit sharing plans, retirement plans, bonus plans and leave are often tied to an employee's job classification. Again, it would be wise for employers to review their various benefit packages to ensure that such benefits are provided on a non-discriminatory basis. For example, it would be unlawful **to make benefits available for the wives of male employees**, where the same or equal benefits **are not made available to the husbands of female employees.** Maternity benefits often fall into this area of concern.

According to the EEOC's Guidelines on the matter of fringe benefits, it is not a defense under Title VII to a charge of discrimination that the cost of such benefits is greater for males than females, or visa versa.

4. **Conflicts With State Laws** Some states have enacted laws or regulations pertaining to the employment of women and minors which limit or restrict their employment in certain jobs, the hours that can be worked or the maximum lifting or carrying of weights that can be required. In many instances this could result in the making of work schedules or job assignments that discriminate against males or limit or restrict job assignments to females.

The EEOC has taken the position that such laws or regulations conflict with and are superseded by Title VII. Accordingly, from

the EEOC's point of view, adherence to such laws will not be a defense to any of the unlawful employment practices outlined above.

5. **The Equal Pay Act** In general the EPA prohibits discrimination on the basis of sex in the payment of wages **for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions…"** Under this statute, employers must be cognizant that **sex discrimination can be found by comparing the wages paid to a current employee in a given position to the wages paid to an employee who previously occupied the same position**. For example where an employer paid a male occupant of a given position who is no longer employed, more than is being offered to a female occupant of the same position who has only recently been hired, a violation may be found. Allowances can be made of course for periodic raises and merit increases for superior performance.

Both Title VII and the EPA protect males as well as females from discriminatory employment practices based on their sex. As stated above it is always wise to make a periodic review of all policies or practices which in fact make sex a bona fide occupational qualification or which might have an adverse impact on the employment or promotion of one sex over the other.

DID YOU KNOW . . .

. . . that an employer's mandatory arbitration agreement precluded an individual for suing for sexual harassment? *EEOC v. Woodmen of the World Life Insurance Society,* (D. Neb., Aug. 17, 2004). The employee, Louella Rollins, filed a discrimination charge with the EEOC, alleging that for three years she was subjected to sexual harassment at the workplace. The EEOC initiated litigation on her behalf, and she attempted to join the case as a second plaintiff. Although mandatory arbitration did not preclude the EEOC from suing, Rollins was denied that opportunity, as the court stated that "the language of the arbitration effectuated between Rollins and Woodmen clearly shows that Rollins's claims fall under the parameters of the arbitration clause." Because the EEOC was not a party to the arbitration agreement, the agreement did not preclude the EEOC from filing suit.

. . . that according to the government accountability office OSHA is not identifying significant workplace safety risk because it is underutilizing its regional area office audit procedure? A report, issued on August 13, 2004, is entitled Workplace Safety and Health: OSHA's oversight of its civil penalties determinations and violation abatement process. When audits were conducted, GAO found several mistakes, including "inaccurate classification of violation gravity in four or five regions, improper application of penalty reductions, improper follow-up inspections, improper documentation and management review of penalty determinations and improper management review of violation abatements." This report is available from the GAO website at http:\\www.GAO.gov\new.items\d04920.pdf.

. . . that a pregnant employee's case of sex discrimination for denial of light duty can proceed to a jury? *Walker v. Frednesbit Distributing Company*, (S.D. Iowa, Aug. 12, 2004). Although an employer is not required to provide light duty for pregnant employees, Walker's case alleges that light duty was provided to other employee's for non-work related injuries. She claims that as the only female truck driver, denial of light duty to her was based upon her sex and pregnancy. She also alleges that she was terminated in retaliation for raising these concerns and that her pregnancy was a disability. The court rejected the retaliation claim, stating that the three month gap between her protected activity and termination "does not provide any evidence of causation." The court also rejected her ADA claim, stating that for pregnancy to be a disability, it is "almost exclusively concerned

with the magnitude of the symptoms experienced by the mother, outside typical pregnancy complications." However, the court allowed her other claims to go forward.

. . . that EEOC attorneys filed 123 lawsuits during the first nine months of fiscal year 2004, compared to an annual average of 400 lawsuits during the past ten years? Look for the EEOC to file a significant number of lawsuits in September, as they try to conclude year end with litigation statistics as close as possible to previous years.

. . . that Anheuser – Busch, Inc. violated the National Labor Relations Act by installing surveillance cameras without first bargaining about this issue with its union? (*Anheuser – Busch, Inc*., 324 NLRB No. 49, July 28, 2004). The cameras were installed in a break area after the company suspected employee drug use during break time. After the company video-taped sixteen employees engaging in drug use in violation of company policy, the company reviewed the surveillance with the union and disciplined all sixteen employees. The ALJ and Board ruled that "the use of hidden surveillance cameras in the workplace is a mandatory subject of collective bargaining," which means that the employer could not implement it under the terms of the contract unilaterally. The remedy did not include revocation of the discipline.

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