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LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

Employers will benefit from legislation signed by President Bush on February 18, 2005 that limits the forum and scope of class action litigation. Known as the Class Action Fairness Act, the primary purpose of the law is to shift products liability and tort class action claims from state court to federal court. The Act's supporters contend that state court class action litigation results in disproportionate fees for attorneys compared to class member recovery and "forum shopping" to find an elected judge who they believe will be sympathetic to their claims. Under the Act, most class actions will be moved to federal court unless all of the parties are residents of the state in which the case was filed or the damages alleged are less than $5,000,000.

The most immediate impact on employers relates to wage and hour "collective actions." When these claims are filed in federal court, class members have to decide whether to join the class (i.e., "opt-in"). When plaintiffs' attorneys file a wage and hour class action in state court, they have access to a potentially much larger class because class members have an "opt out" choice; they are part of the class unless they elect not to be. Another advantage to employers under this new law is the pool from which potential juries are selected. A federal jury pool is much broader geographically and thus more diverse than a jury for state court, which is typically limited to residents of the county in which the claim is pending.

THE DOL ADDRESSES INCLUDING BONUS PAYMENTS IN OVERTIME CALCULATIONS

In an opinion letter released February 3, 2005, the United States Department of Labor, Wage and Hour Division issued guidance regarding when an incentive or bonus program must be included in overtime calculations for a non-exempt employee. The general rule is that for bonus payments to be excluded, there must not be a prior promise or commitment to pay a bonus based upon actions the employee engages in or refrains from. Furthermore, the bonus must not be based on a predetermined amount but rather must be set solely at the employer's discretion at the end of the pay period.

Because most bonus programs are intended to induce the employee to behave in a certain manner and thus known to the employee prior to the payroll period, it is difficult for employers to argue that a typical bonus plan should not be included as part of the employee's overtime. One reason employers stumble over including the bonus is the calculation of how to do so. For example, in one opinion letter, the Wage and Hour Division stated that an employee was paid $9.00 an hour in base plus $3.00 per hour on top of that if the employee's group met production goals. If they fell short of their goals, the $3.00 bonus payment was reduced proportionately. The employer based overtime on the $9.00 an hour rate, without including the bonus as part of the employee's regular hourly rate. Therefore, the employer owed back pay to each employee who participated in this bonus program. The same principle applies to bonus programs that are paid on a quarterly or even less frequent basis, where the employee knows at the beginning the nature of the bonus program and the purpose of the program is to provide incentive for the employee to behave in a certain manner.

The simplest method to include a bonus for overtime payment is to structure the bonus amount based upon a percentage of the employee's total straight time and overtime earnings over the relevant time period. For example, if an employee receives $10 an hour and works 50 hours, the employee is owed $550 based on straight time and overtime calculations. If the employer's incentive program pays the employee 10% weekly based upon meeting certain goals, then the employee will be paid an additional $55; if the employee works 45 hours, the employee's bonus would be $47.50. Employers with questions about whether their incentive programs comply with wage and hour should contact us to review the actions necessary for compliance.

INCOMPLETE FMLA PAPERWORK DOOMS EMPLOYEE'S FMLA PROTECTION

Some employees (and unfortunately employers) believe that under FMLA, all the employee needs to do is simply notify the employer of the reason for the absence and there is nothing the employer can do if the employee fails to complete the necessary paperwork. The case of *Hoffman v. Professional Medical Team*, (6th Cir., January 7, 2005) illustrates an employer's rights in this regard.

Hoffman had worked for the employer for over five years when she developed severe migraines. This necessitated intermittent FMLA absences, for which she provided medical certification from her physician. The problem, however, was that there was an inconsistent statement from the physician in the certification. The certification stated that Hoffman's condition "will require intermittent short term disability." However, in asking whether it was necessary for Hoffman to work less than a full-time schedule, the physician said "no."

The employer requested that Hoffman and her physician redo the form to clarify this issue but both refused. Hoffman started to miss work due to her migraines, but the employer did not consider the absences as FMLA protected. She was counseled about her failure to comply with the company's attendance policy and also notified that her absences were considered without pay. Hoffman replied in an angry, vulgar and threatening manner, which precipitated her termination for violating the company's policies regarding workplace harassment and violence. The court upheld the district court's granting summary judgment to the employer, stating that the employer was within its rights to require another certification and also to terminate Hoffman for her outburst in reacting to the employer's request.

DON'T FORGET ABOUT HIPAA'S SECURITY REGULATIONS!

Remember the flurry of activity that led up to the compliance deadline for HIPAA's Privacy Regulations? Plan Sponsors were busy appointing privacy officers, drafting Privacy policies and procedures, executing Business Associate Agreements. **Somehow, HIPAA's Security Regulations have not captured the attention of Plan Sponsors to the same extent the Privacy Regulations did.** Maybe that's

because the Security Regulations seem very technical – like they can be passed off to your IT department. Maybe it's because some of the Security Regulations' basic principles are reminiscent of portions of the Privacy Regulations – and so it seems like you've already done the majority of the work. In reality, though, even with a good IT department and strong Privacy policies, there is still a great deal of work to be done to comply with the Security Regulations. Now is the time to analyze the Security Regulations to see what you need to do to comply before the compliance deadline of April 20, 2005 (or April 21, 2006 for small group health plans).

What Are the Security Regulations Designed to Do?

The purpose of the Security Regulations is to safeguard Protected Health Information (PHI) that is maintained or transmitted in electronic format – also known as Electronic Protected Health Information or "EPHI." The Security Regulations do not apply to paper records.

Our culture's growing reliance on computers is, of course, a dual-edged sword: with the convenience and efficiency of maintaining records in computer databases come increased risks of that highly-personal information being accessed by hackers or being made unavailable in the event of a computer problem. The Security Regulations are designed to address those increased risks and also to maximize (hopefully) the benefits of our automated health system.

What Do the Security Regulations Require of Covered Entities?

Under the security regulations, covered entities must meet four security requirements. They must:

(1) Ensure the confidentiality, integrity, and availability of all EPHI;

(2) Protect against any reasonably anticipated threats or hazards to the security or integrity of such information;

(3) Protect against any reasonably anticipated uses or disclosures of such information that are not permitted or required under the provisions of the Security Regulations; and

(4) Ensure compliance by their work force with the Security Regulations.

The Security Regulations are designed to be "scalable," and the nature of compliance with the regulations will depend on the covered entities' size, sophistication, and financial capability. Ultimately, implementation of the Security Regulations will depend on several factors, including the nature of the covered entity and the risk to and vulnerability of the information that entity must protect. When all is said and done, covered entities will have to implement what is "reasonable and appropriate" under the circumstances.

What Kinds of Actions Are Needed to Protect EPHI?

The Security Regulations include three main categories of safeguards:

- **Administrative Safeguards** require the development of policies and procedures that will address issues such as: assigning security responsibility to an individual or team; managing which personnel have access to computers and when EPHI can be accessed; implementing security awareness and training; developing security incident procedures; developing contingency plans for situations such as computer system shutdowns and natural disasters that might affect computer systems; and evaluating compliance measures to make sure they are effective in safeguarding EPHI.
- **Physical Safeguards** require the development of policies and procedures addressing, for example: physical access to your facility (also known as: doors and door locks) and workstation use and security (for instance, using passwords to sign on to computer systems and keeping an inventory of portable devices that would fall under this category).
- **Technical Safeguards** require the development of policies and procedures that address access controls, audit controls, system integrity, and transmission

security. This is the category that is custom-made for you to get on the phone with your technology vendors and ask them what they can do to help you out. At the same time, don't let vendors sell you the Brooklyn Bridge; some vendors may push safeguards that are not required by the regulations given the nature of your operations.

So What Does My Organization Have to Do?

Structurally, the Security Regulations have "standards" and "implementation specifications." Essentially, "standards" tell you what you have to do, and "implementation specifications" tell you how to go about doing it. The plot thickens, however, because, within the category of "implementation specifications," the regulations contain "required" and "addressable" specifications. If the implementation specification is one of many options, it is "addressable." If it's downright mandatory, it's labeled "required."

There are 20 required implementation specifications in the Security Regulations. That means that, at a minimum, covered entities have to institute policies and procedures addressing those 20 specifications. However, "addressable" specifications are not the same as "optional" specifications. If the specification is addressable, covered entities have some flexibility in deciding whether the specification is reasonable and appropriate. They must conduct a risk analysis to evaluate whether the specification needs to be implemented or whether existing or alternative security measures are sufficient for their organizations. Cost can be a factor in this decision. The covered entity must document in writing its final decision, the rationale behind its decision and how the addressable standard is being met. There are 22 addressable specifications in the regulations. If a covered entity determines that the addressable implementation specifications are "reasonable and appropriate" given the specifics of its organization, then the covered entity should adopt policies and procedures for those 22 specifications.

Where Do I Start?

The flexible nature of the Security Regulations falls into the good news/bad news category: it won't hold smaller covered entities to the same standards as larger, more sophisticated operations. However, it also means there are no step-by-step instructions for how to go about achieving compliance; the Security Regulations offer no safe harbor provisions to covered entities that would say "if you do X, Y, and Z, you will be safe." Instead, those entities (and the people who manage them) have to determine whether security countermeasures are going to be sufficient to ensure the confidentiality, integrity, and availability of EPHI and protect that EPHI from any hazard that is reasonably anticipatable.

Here are some steps you can take to help jumpstart your compliance efforts:

- Analyze how you use EPHI currently. How is it transmitted? Do you expect that to change in the next 2-3 years? If so, how?
- Take a look at your current technology regarding your role as a covered entity and analyze how it is used in benefits operations.
- Compare those current uses with how you anticipate your technology being used in the years to come.
- Evaluate any current security policies and procedures (even informal ones…do you let the general public access your computers? if not, that's a security policy).
- Determine what personnel will need access to EPHI, and make plans to train those personnel on the Security Regulations.
- Determine who will have responsibility for making security evaluations and determinations, and for implementing security procedures and systems.
- Draft the necessary policies. Remember, simple policies often work best.
- Develop necessary procedures.

Of course, this list is not exhaustive. It's just meant to give you some tools that will help get things moving towards compliance.

Remember to document any decisions you make, especially when it comes to any decision not to implement one of the addressable specifications. That documentation will be your best evidence that you did engage in the required risk assessment. Please contact Donna Brooks at 205/226-7120 if you have HIPAA questions.

WAGE AND HOUR TIP: WHAT TO EXPECT WHEN WAGE HOUR CALLS

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Some time ago I wrote an article regarding what an employer should expect if his firm is investigated by the Department of Labor to determine whether the firm is in compliance with the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA) or other related statutes. Because many employers will face this issue this year, it seemed timely to revisit the issue.

First, the chances are very small that you will be selected because DOL only has sufficient staff to investigate 1-2% of firms in a given year. If your firm is selected, you should understand that DOL has the authority to investigate any employer they choose and do not have to disclose the reason for the investigation. However, the majority of investigations are conducted because (1) DOL has received information that the employer may not be paying his employees correctly, (2) DOL has received information that the employer is employing minors contrary to the child labor requirements or (3) the employer is in a "targeted" industry. The "targeted" industries vary from year to year. For instance one industry that is targeted this year is the fast food industry, looking specifically at the employment of minors. Investigations vary in length due to several factors such as the size of the business, complexities of the firm's pay plan and schedules of both the employer and the investigator. Some investigations may be completed in one day while others may continue for several months.

DOL also has an informal procedure where they will phone (or write) an employer stating that an employee has alleged that he/she was not paid properly. They ask the employer to investigate the allegation and report back to them. If the parties can resolve the issue through this "conciliation" process DOL will not come to the establishment to conduct a full investigation. If the problem is related to a group of employees or a department, in many instances DOL may ask the employer to rectify the problem with that group of employees rather than instituting a full investigation. Quite often this procedure is used when an employee alleges that he has not received his final paycheck or he was not restored to his position when returning from FMLA leave

Complaints and the persons making complaints. DOL receives complaints from many different sources including current employees, former employees, competitors, employee representatives and other interested parties. DOL has a policy of not disclosing the name(s) of the complainant unless the complaining party has given written permission for them to do so. Therefore, unless DOL is only investigating the pay practice related to a single employee, the DOL investigator will not tell you if there is a complaint and will not identify the complaining party.

Child labor investigations are normally scheduled for one of two reasons. Each year DOL targets an industry, agricultural or construction related occupations for example, that has a history of employing minors contrary to the requirements of the Act. A child labor investigation will also sometimes result when DOL receives information that a minor was injured while working for the firm. A copy of each Workers Compensation Accident Report relating to the injury of a minor is forwarded to DOL. If DOL has reason to believe the minor was employed in a prohibited activity, an investigation will be scheduled.

In addition to the above reasons for investigations each year DOL selects a few industries to target for enforcement. Industries with a history of non-compliance with the Fair Labor Standards Act are selected and DOL will investigate a large number of employers in the industry. A few years ago, the

poultry processing industry was targeted and approximately 1/3 of all processing plants in the country were investigated. In recent years DOL has investigated at the health care industry, fast food establishments and construction industry. Although some targeted activities are nationwide, in most cases they vary from state to state.

Although on rare occasions DOL will make an unannounced visit, the employer will normally be contacted by phone or letter to schedule an appointment to begin the investigation. Once the appointment is confirmed, a DOL investigator will come to the employer's place of business to begin the investigation. The investigator will begin by conducting a conference with the person in charge to gather information regarding the firm's ownership, type of activities, and pay practices. The employer may have whomever he would like at this conference including legal counsel. It is always advisable to be cooperative and courteous.

After the conference the investigator may ask to tour the establishment so that he/she may better understand how the business operates. At one time this was DOL's standard operating procedure but now I understand that many times it is not done. The investigator will then review a sample of the payroll and time records for the past two years. DOL realizes that many employers have their payrolls maintained by a third party or prepared at another location. If this is the case the employer can authorize the investigator to review the records at another location or he can arrange to have them brought to the establishment. If the records are maintained at the firm's central office in another state, DOL may request that the employer transfer the records to the location that is being investigated. Whether the employer agrees to do so is its choice as the employer is also permitted to make the records available at the home office.

The investigator may ask the employer to make photocopies of certain records. Although the employer is not required to do so, the investigator has the authority to gather this information and the copies will expedite the investigation process. Thus, most employers find that it is beneficial to furnish the photocopies. It is suggested that the employer also retain a copy of all records provided to DOL in case the matter is not resolved and results in litigation.

Once the investigator has completed a review of the records he will conduct confidential interviews with a sample of the current employees at the establishment during normal working hours. For FLSA and FMLA investigations the employer is not required to allow the investigator to do this at the establishment; however, the investigator will most likely contact the employees away from the business. If the employer is subject to certain other statutes such as the Davis Bacon and Service Contracts Acts the employer must allow DOL to conduct the confidential interviews on the job site. Most employers find that allowing the investigations to be conducted at the establishment is better than forcing the investigator to contact the employees at home or other locations. Again, the easier it is for the investigator to complete his assignment the quicker he will be finished and gone.

After the fact-finding phase of the investigation is completed, the investigator will schedule another conference with the employer to discuss the findings. As with the initial conference the employer may have a legal representative at the conference. If the investigator determines that the employer has not complied with the FLSA he will discuss the issues and ask for an explanation of the matter. The employer will then be asked to agree to make changes in his pay system to comply with the Act and once an agreement is reached for the future the employer will be asked to pay back wages to the employees that have not been paid correctly. In many instances, as provided by the regulations, the employer will be requested to compute the amounts due each employee and submit them to the investigator for review. If the investigator agrees with computations that were submitted, he will negotiate a payment schedule with the employer to distribute the back wages to the employees.

Note: Under the Fair Labor Standards, Act DOL does not have the authority to force an employer to pay back wages except through litigation. If the employer (or his representative) and the investigator cannot reach an agreement for resolving the matter, the employer may request a meeting with the investigator's supervisor. If no agreement is reached at that level, the options for DOL include:

1. DOL may bring an action in Federal District Court to compel the employer to comply with the FLSA and to pay the back wages that are due the employees. DOL will typically sue for a three-year period (vs. a two year period), as they will allege willful violation of the Act.

In addition they will ask for liquidated damages in amount equal to the amount of back wages that are due.

2. DOL may assess penalties for repeated and/or willful violations of the minimum wage and overtime provisions of the Act of up to $1100 per employee. If minors were found to be illegally employed they may assess penalties of up to $11,000 per minor.
3. In situations where DOL elects not to pursue litigation, they may notify the employees that they are due back wages and that the employee has the right to bring a private suit to recover back wages. Additionally, the employee will be informed of his right to recover liquidated damages, attorney fees and court costs.
4. Employers should also be aware that employees may bring a suit under the FLSA without contacting DOL. There has been more private FLSA litigation in recent years than under any of the other employment statutes.

In summary, if you are one of the "chosen" ones I suggest that you be cooperative and courteous to the investigator so that the investigation can be completed as quickly as possible. However, you should only provide the information requested and only respond to the questions that are asked. Further, if you are asked a question that you do not feel comfortable answering, delay the investigator while you seek guidance from your legal representative. If I can be of assistance while you are undergoing an investigation, do not hesitate to contact me.

EEO TIP: CONDUCT AND SAFETY ISSUES PERTAINING TO INTELLECTUAL DISABILITIES

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This is the last in a series of articles concerning "Intellectual Disabilities" (Mental Retardation or Mental Impairment) under the Americans With Disabilities Act (ADA). While it has been generally conceded that persons with certain intellectual disabilities are frequently found to be stable, solid, dependable employees, the ADA does not necessarily protect all individuals with physical or mental disabilities but only those with impairments that substantially limit a "major life activity." Unfortunately, at this point the legal standard for determining whether a given mental impairment qualifies as one that "substantially limits a major life activity" has not been clearly defined by the courts. For example, is an employee with a bipolar disorder who sometimes screams or rages against co-workers, or who has persistent problems or conflicts with his/her supervisor "substantially limited" in his or her ability to interact and communicate with others. And is the "ability to interact and communicate with others" a major life activity cognizable under the ADA.

Ironically, since the enactment of the ADA, the Supreme Court has addressed various issues pertaining to "major life activities" in six different cases but none of the cases involved a person with a mental disability. Additionally, a number of Federal Circuit Courts of Appeal have faced this issue but with conflicting results. The First Circuit in the case of *Soileau v. Guilford of Maine Inc.* held that "the ability to get along with others is never a major life activity under the ADA." On the other hand, the Ninth Circuit in the case of *McAndlin v. County of San Diego* held that "interacting with others" is an essential and regular function like walking and breathing and therefore within the definition of a major life activity. Several other Circuits such as the Fourth, Sixth, Seventh, Eighth, and Tenth have been faced with the issue but for various reasons declined to specifically spell out a legal standard. Recently, however, the Second Circuit in the case of *Jacques v. DiMarzio Inc.* held that the "fundamental ability to communicate with others…at the most basic level" is a "major life activity." Therefore, any intellectual disability which substantially limited an employees "fundamental ability to communicate" would be covered under the ADA (at least in the Second Circuit), assuming of course that the employee, otherwise could perform the essential functions of the job with or without reasonable accommodation. Because of its logic

and comprehensiveness, some legal scholars believe the Second Circuit's standard will eventually become the law on this issue.

TIP: Notwithstanding the Second Circuit's holding, employers should still challenge an employee's claim of coverage under the ADA under circumstances where there is reasonable doubt as to whether the employee's unruly or antisocial conduct stems from his mental impairment or merely a co-existing personality defect, and also whether, the mental impairment in fact precludes him from performing a "wide range of jobs." An expert opinion may be required to make this determination.

Accordingly, employers should be aware of the difference between an employee's "quirks in behavior" and an actual mental impairment when deciding whether to discipline an employee for misconduct or assess the availability of a reasonable accommodation. An employer does not have to excuse violations of working rules that are uniformly applied and based upon business necessity. However, employers should be certain that the same discipline has been consistently imposed on similarly situated employees who do not have intellectual disabilities. For example an employer would normally be justified in imposing strict disciplinary measures on any employee who engages in acts of violence, or the stealing or destruction of company property. On the other hand, where for example, an employee with a mental impairment such as "Tourette's Syndrome" who frequently, involuntarily swears or curses at no one in particular, but who works in a warehouse and has only limited contact with other employees or the general public, an employer might be more lenient in enforcing its general rule against the use of profane language.

Unfortunately, according to the EEOC even under these circumstances an employer is generally prohibited from disclosing to co-workers that the employee in question is being given a limited accommodation because of an intellectual disability. Rather, the EEOC suggests that all employees be given training on ADA standards and requirements with the hope that the other employees will understand the need for the special treatment. In our opinion the EEOC's position on this particular issue is out of touch with the realities of the workplace. Expect it to be challenged sometime in the future**.** The EEOC does allow that an employee's immediate supervisor and certain other management persons may be told of an employee's intellectual disability on a "need to know" basis.

Finally, a word about safety concerns.

Under the ADA, an employer may refuse to hire or promote an applicant or employee because of their disability if he or she "poses a direct threat" to the applicant's or employee's own health or safety, or the health or safety of others in the workplace. A direct threat is defined by the EEOC as a "significant risk to the health or safety of the individual with the disability or to others that cannot be eliminated by reasonable accommodation." To make this determination an employer must evaluate the person's ability to safely perform the essential functions of the job in question giving careful attention to the nature and duration of any risk, and the likelihood and severity of any potential harm that might result from the employment. Also, the employer must determine whether any reasonable accommodation would reduce the risk or potential harm contemplated. The employer's determination of any direct threat should be based on objective facts and credible evidence, untainted by fears, myths and/or stereotypes.

OSHA TIP: POSTING SIGNS FOR OSHA

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.

As with employee training, OSHA standards are laced with requirements for posting various safety warning and informational signs. A quick check of the web will provide you an idea of the variety of such signs offered by the many available vendors. OSHA's general standard addressing safety signs and the like is found in 29 CFR 1910.145. It is entitled, "Specifications for Accident Prevention Signs and Tags". As the title suggests, it focuses on what signs should look like and not necessarily when or where they are required.

OSHA's standard classifies signs in three categories. "Danger signs" are to indicate

immediate danger requiring special precautions. "Caution signs" are to warn against potential hazards and unsafe practices. The remaining category, "safety instruction signs", are to be used where there is a need for general instructions and suggestions relative to safety measures. Two other special signs are described in 1910.145 and those are for slow-moving vehicles and for biohazards. Specifically excluded from OSHA's definition of signs are news releases, displays commonly known as safety posters and bulletins used for employee education.

The standard calls for signs to be easily read, accurate and concise while containing sufficient information to be understood. It advises that they convey a positive rather than negative message. Pictographs may be used but should be displayed along with the written message.

So how do you determine that you have satisfied OSHA's requirements with regard to sign placement? One way to begin is to check the index to the Section 1910 General Industry standards. While falling far short of exhausting all, you will find a number of references to such requirements under listings for "signs and tags" and "markings". A notable example is 1910.37(q) which addresses exit signs. This is probably the most frequently violated of the sign requirements, ranking in the top 25 for all standard violations in the past fiscal year.

As would be expected, signs are also called for in areas where explosive, flammable or hazardous materials are stored or used, to identify electrical equipment hazards and to denote radiation areas. In the absence of another method of informing employees, signs are required to designate *permit required confined spaces*. Pinpointing all of OSHA's requirements for signs is a challenge. There is no comprehensive listing and various standards range from language that is vague to very specific as to mandating a sign and to its wording. Examples of very specific requirements may be found in the substance-specific standards such as asbestos, formaldehyde, ethylene oxide, lead, etc. found in OSHA standards 1910.1001 through 1910.1450.

Once appropriate signs are posted, it is necessary that employees be instructed as to their purpose and the manner in which they should respond to them. Remember to note whether signs are in place and legible when conducting safety inspections of the workplace. Signs that are obsolete are no longer needed in a location should always be replaced or removed.

DID YOU KNOW . . .

. . . that legislation was introduced in Washington on February 10, 2005 to prohibit requiring nurses to work mandatory overtime? Known as the Safe Nursing and Patient Care Act, mandatory overtime would only be permitted in the event a state of emergency had been declared by a governmental entity. Nurses would be permitted to work overtime on a voluntary basis for as long as they conclude they could provide quality, safe patient care. According to the bill's sponsors, "nurses should be able to work overtime if they want, and they should be able to turn it down if they are mentally and physically exhausted in fear they could jeopardize a patient's safety. Forcing nurses to work overtime is a dangerous practice that is simultaneously endangering patients and driving nurses out of their profession."

. . . that according to opinion letters from the Department of Labor released on February 3, 2005, employers may require those on FMLA leave for their own serious health condition to take a "fitness for duty" drug test upon returning to work? Provided the requirement is applied consistently, the FMLA permits employers to do this and to treat employees who refuse to take the test as insubordinate. In another FMLA opinion letter, the Department of Labor stated that an employer may deny an employee paid sick leave benefits if the employee does not cooperate with employer requests for medical confirmation, provided that the denial of sick leave benefits does not deny the employee unpaid FMLA benefits.

. . . that the Senate on February 17, 2005 by a vote of 98 to 0 passed legislation prohibiting employers to use genetic information in employment related decisions? The House thus far has not acted on the legislation. According to the bill's sponsors, "fear of discrimination by health insurers and employers on the basis of predictive genetic information can deter individuals from taking advantage of these life saving genetic tests and therapies." The bill would cover employers with 100 or more

employees and cap damages at $300,000 per individual.

. . . that the EEOC budget request for fiscal year 2006 will increase by only 1% from 2005? The total amount requested is $331,000,000, up from $327,000,000 currently in effect. The EEOC projects that it will receive approximately 81,000 discrimination charges by the end of fiscal year 2005 (September 30), and 84,000 charges for fiscal year 2006. The EEOC projects that it will resolve 78,300 discrimination charges, 7,600 of them through the EEOC's mediation program. The EEOC employs 2,400 full-time workers and has maintained a hiring freeze for the past three years.

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