LEHR MIDDLEBROOKS & VREELAND, P.C.

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Your Workplace Is Our Work®

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Banking, Insurance & Finance Industry Update

Bruno Conference Center
Birmingham, AL
Sept. 18, 2008, 9:00 am -12:30 pm
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TALKING POLITICS AT WORK: WHAT'S PROTECTED

The final ten weeks leading up to the November 4, 2008 national election might be as contentious as any in our nation's recent history. This raises questions about what rights employers have when employees express political views or beliefs or if employers want to do the same.

Two sources of rights and responsibilities in this area are the National Labor Relations Act and the Federal Election Commission. Under Section 7 of the National Labor Relations Act, employees have broad rights to engage in "mutual aid or protection." NLRB general counsel, Ronald Meisburg, on July 22, 2008, issued guidance regarding the scope of employee protection under Section 7 when engaged in political activity. According to Meisburg, political activity is protected under Section 7 if "there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees." For example, "employee appeals to legislators or governmental agencies were protected, so long as the substance of those appeals was directly related to employee working conditions."

General counsel Meisburg also added that "if the activity is protected, it may lose protection if it is in a manner that is disruptive or violates employer rules regarding employee actions during working time and working areas, provided the employer's rules are lawful and neutrally-applied."

Unions have alleged that Wal-Mart violated Federal Election Commission regulations by communicating to employees about the Employee Free Choice Act, which Wal-Mart told its workforce is supported by the Democratic party. Wal-Mart told its associates about the substance of the Employee Free Choice Act, the main provision involving the loss in most union campaigns of the right to a secret ballot election vote. Although unions challenged Wal-Mart, the Federal Election Commission does not prohibit partisan activity directed toward a party. Rather, employers may not tell employees to vote for a clearly identified candidate.

Employers have rights to communicate to employees about politics. Employers need to consider the scope of protection employees have regarding political activities, and be sure that employer policies regarding solicitation and distribution are reviewed so they are lawful and applied consistently.

BIG MOUTH, BIG RISK

In the case of *EEOC v. Starlight, LLC* (E.D. Wa., August 4, 2008) an owner's comments about a Muslim employee's "scarf thing" and desirability of having "hot white girls" work during cocktail hours and dinner were considered direct evidence of discrimination against an African American Muslim.

Starlight owns a bar and restaurant with approximately 40 employees. Harper was hired as a dishwasher and, as part of her religious beliefs, wore a head scarf for modesty. She asked a manager if she could work as a waitress during breakfast and lunch, and was allowed to do so. She then asked if she could work the dinner shifts, which were the most lucrative. However, she was only permitted to do so when it was necessary to cover for other employees during that shift. Throughout that time, eight white females were hired to work the cocktail and dinner shifts.

The direct evidence of discrimination included comments by the owner such as "what's the deal with the thing on your head?" and asking whether Harper could wear a "fancier headdress." The owner also told Harper that the owner did not understand "the whole Muslim thing." The owner also told the dining room manager that the owner did not think "the headdress and her being Muslim is what we want in the bar." In denying the employer's motion for summary judgment, the Court stated that it was reasonable for someone in Harper's position to leave employment, thus the jury will hear the claim of constructive discharge.

FMLA RETALIATION-AFTER THE EMPLOYEE RETURNS FROM LEAVE

The retaliation prohibitions under the Family Medical Leave Act are broad enough to cover a termination or adverse decision that arises subsequent to the employee returning from leave. There is no specific ending point when retaliation may no longer be considered, except that the more remote it is in time from the leave, the less likely it is to be a viable claim. The case of *Bryant v. Dollar General Corporation* (6th Cir. August 15, 2008) involved a jury award of $148,000.00 to an employee who was terminated four days after returning from an FMLA absence.

The employer argued that the specific language in the FMLA prohibits retaliation for "opposing any practice made unlawful." The United States Department of Labor in its FMLA regulation Section 825.220(c) provides that "an employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave." Dollar General argued that this regulation is beyond the scope of the statute. They argued that the language of the statute prohibits the "opposition" form of retaliation. That is, an employee may not be retaliated against only for opposing a practice that violates the FMLA.

In rejecting the employer's argument upon appeal, the court stated that the company's interpretation would mean that "Congress wished to erect no obstacle to prevent employers from terminating employees who exercised their newly granted rights." The court added that it would be an "absurd result" and would "essentially render the FMLA a nullity "to permit employers to terminate employees because they used their FMLA benefit."

In contrast, in the case of *Ridings v. Riverside Medical Center* (7th Cir. August 11, 2008), the court concluded that it was not retaliation to terminate an employee who failed to comply with the employer's request to provide information to substantiate her FMLA request. The employee stated that she needed reduced work hours due to her medical condition. In rejecting the employee's retaliation claim, the court stated that the employer "was permitted by the FMLA to require Ridings to substantiate her continued need for a reduced schedule," and had terminated her in accordance with the FMLA and its employment policies after giving her repeated opportunities to provide the information it had requested. "An employer cannot be deemed to retaliate against an employee by asking her to fulfill her obligations under the FMLA."

TIME FOR A HIPAA CHECKUP?

On July 17, 2008, in the first monetary settlement since HIPAA's privacy rules took effect in 2003,

Providence Health & Services agreed to pay $100,000 to resolve privacy and security allegations. The U.S. Dept. of Health & Human Services Agency ("HHS"), the Office for Civil Rights (OCR) and Centers for Medicare and Medicaid Services (CMS), had received more than 30 privacy and security complaints against Providence based on its widely-publicized losses of laptops and other privacy-protected items in 2005 and 2006. As you'll recall, the Privacy Regulations require reasonable and appropriate safeguards for all PHI, and the Security Regulations impose additional standards for electronic PHI, which includes data stored or physically transported on portable media.

As a result of the Agreement, Providence, an integrated health system, will implement a detailed corrective action plan (CAP) to settle a joint enforcement action by OCR and CMS. Providence did not admit liability in the settlement.

The investigation stemmed from five incidents, including a December 2005 theft from a Providence employee's car of backup tapes and disks containing unencrypted health information related to about 365,000 home health care patients. Providence already had agreed to provide free credit monitoring and step up security measures in a September 2006 settlement with the state of Oregon. OCR and CMS focused their investigations on Providence's alleged failure to implement policies and procedures to safeguard protected health information (PHI).

"Effective compliance means more than just having written policies and procedures," CMS Acting Administrator Kerry Weems explained. "Covered entities need to continuously monitor the details of their execution, and ensure that these efforts include effective privacy and security staffing, employee training and physical and technical features."

How are you doing in keeping your HIPAA compliance efforts up-to-date? Did you scramble to get your Privacy Regulations binder together by the compliance deadline, only to never consider how your policies and procedures are actually working? Did you put less effort into Security Regulation compliance (because you were just HIPAA'd out)? If so, now is a good time to learn from Providence's experiences.

The corrective action plan incorporated in the resolution agreement requires Providence, among other things, to:

- Submit for HHS review, within 90 days, policies and procedures governing risk assessment and management, physically safeguarding off-site portable devices and backup media, encryption and password protection, and reporting violations to HHS;
    - Have you addressed portable technology in your compliance efforts? Are you encrypting files that need it?
- Provide evidence, within 60 days after HHS approval, of having implemented these policies and procedures;
    - What kind of compliance documentation do you have?
- Distribute the policies and procedures to all employees and update them at least annually for three years;
    - Providence was a health care provider, so its training obligations are broader, but have you communicated your HIPAA policies to those employees who need to know them?
- Train all employees on the revised policies and procedures within 90 days;
    - Have you trained new hires who work with PHI or EPHI? Those recently promoted into HR and/or benefits?
- Conduct "monitor reviews," including unannounced site visits and random interviews, to verify workforce familiarity and compliance with the policies and procedures;
    - How would your facility(ies) fare in a mock audit?
- Submit an "implementation report" on compliance within 120 days after HHS approves the policies and procedures, and three annual reports thereafter.

- Wouldn't an annual compliance check-up and internal report be a great way to show your continued compliance?

Until now, HHS has been subject to growing criticism from consumer groups for not having imposed any monetary penalties despite receiving tens of thousands of privacy complaints. Depending on how this year's Presidential election turns out, we could see a much more aggressive enforcement approach. Will you be ready?

The full test of HHS' "resolution agreement" with Providence is available on the agency's Web site at http://www.hhs.gov/ocr/privacy/enforcement/agreement.pdf.

EEO Tips: Sorting Out the Issue of Disability Accommodation

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of Lehr Middlebrooks & 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 U.S. Equal Employment Opportunity Commission (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.

Just when most employers were getting comfortable in understanding and complying with the accommodation provisions under the Americans With Disabilities Act (ADA), two appellate courts muddied the judicial water. **The Second Circuit in the case of *Brady v. Wal-Mart Stores*, (2nd Circuit, July 29, 2008) recently affirmed an award of $900,002 and held that an employer may be obligated to provide an accommodation to an applicant or employee, who is obviously disabled, even if he or she doesn't ask for one.** Around the same time, the Eighth Circuit in the case of *Tjernagel v. Gates Corp.*, (8th Circuit, July 29, 2008) held that the ability to work overtime was an essential function for employees in a production department and therefore an employee whose physical impairments apparently prevented her from working overtime was not a "qualified individual" with a disability under the ADA.

The plaintiff in the *Brady* case was a 19 year-old male who had cerebral palsy but who had acquired valuable experience as a pharmacy assistant prior to his applying for a similar position at a Wal-Mart store in New York. Apparently, based upon his experience, which included receiving and dispensing prescriptions, he was hired and placed in the pharmacy department at Wal-Mart. However, according to his supervisor, Brady's performance was too slow and otherwise not up to par. Thereafter, he was transferred to several other positions outside of the pharmacy department, including that of a parking lot attendant where his duties included collecting shopping carts and keeping the parking lot tidy. Finally he was assigned the task as a food stocker in the grocery department.

According to the record, Brady objected to his various assignments outside of the pharmacy department, all of which he considered to be a demotion. He reportedly became very unhappy, emotionally distressed and quit. He filed suit against Wal-Mart in the U. S. District Court for the Eastern District of New York alleging constructive discharge and a failure to accommodate under the ADA and violations of the New York Human Rights Law. A jury then awarded him $600,000 in compensatory damages, $300,000 in punitive damages and $2 in nominal damages. The jury did not find that Brady had been constructively discharged.

Upon appeal, Wal-Mart asserted that it was not obligated to provide an accommodation because Brady had never requested one. However, notwithstanding the general rule that an employee is normally responsible for requesting an accommodation, the Second Circuit held that "...an employer has a duty to reasonably accommodate an employee's disability if the disability is obvious… which is to say, if the employer knew or reasonably should have known that the employee was disabled." In this case various witnesses at trial testified that Brady's cerebral palsy was obvious because he limped or walked slowly with a shuffle, and that he was slower and quieter in speaking, had weaker vision and a poor sense of direction. The Second Circuit based its opinion on that portion of the ADA which requires "an accommodation of an individual's 'known disabilities,'" not just those for which an accommodation has been requested.

Thus, at least in the Second Circuit this decision places an additional burden upon employers to be aware of "obvious" disabilities of both applicants and employees.

They must be interactive while at the same time respecting an applicant or employee's right to privacy under the ADA.

In the *Gates Corp.* case the Plaintiff, Glena Tjernagel worked on a production line at Gates which manufactured hydraulic and industrial hoses. Among other things, her job description indicated that employees on the line were required to work eight-hour shifts and "overtime" including weekends as needed to meet production requirements.

After being employed for some time Tjernagel was diagnosed as having multiple sclerosis. Her illness progressively caused extreme fatigue, problems standing, walking and breathing as well as some short term memory loss, numbness and tingling in her body. Because of these symptoms her doctor put her on certain work restrictions including no overtime.

The employer, Gates, provided some accommodations in the form of breaks or rest periods as needed for a period of time but found that such accommodations disrupted the production line. Ultimately she was discharged. Tjernagel persuaded her doctor to lift the "no overtime" work restriction and appealed her discharge, but a peer-review panel upheld the termination. It is not clear why her termination was upheld unless the panel felt that her other accommodations would still be too disruptive of the production line notwithstanding her doctor's removal of the no overtime restriction. Thereafter, Tjernagel filed suit in the U. S. District Court for the Southern District of Iowa. Among other things, she alleged violations of the Americans With Disabilities Act and the Iowa Civil Rights Code.

The district court granted summary judgment to the Gates Corp. holding, curiously, that the Plaintiff was not substantially limited in the major life activities of lifting, standing, thinking, waking, breathing and seeing. However, the Eighth Circuit on appeal was more specific in holding that "An individual does not prove he or she has a disability simply by showing an impairment that makes it impossible to do a particular job without accommodation." The Eighth Circuit added that summary judgment was "proper" in this case because Tjernagel could not perform the essential functions of her job in that "her doctor's restrictions were not compatible with the required activities of her position." Thus, she was not a qualified individual with a disability.

Both courts in my judgment seemed to ignore the fact that Tjernagel got her doctor to remove the overtime restrictions. The key factor in this case in my judgment was that Tjernagel, the plaintiff, worked on a production line and that any accommodation to her disability would have been disruptive and thus create an undue hardship on the employer. Seemingly, neither the district court nor the Eighth Circuit placed any great emphasis on this aspect of the case. Since multiple sclerosis would, normally, be a disability, it will be interesting to see if the reasoning of the Eighth Circuit is followed by other Courts.

The ADA Amendments Act of 2008

On June 25, 2008 the U. S. House of Representatives passed H.R. 3195, The ADA Amendments Act of 2008. Some observers believe that the impact of that Act, if it is passed by the Senate and becomes law, may further "muddy the water" as to what would constitute a disability which would be subject to an accommodation by employers. The stated purposes of the act among other things are:

- To carry out the ADA's objectives of providing ..."clear strong, consistent, enforceable standards…by reinstating a broad scope of protection to be available under the ADA."

- To reject a number of the standards enunciated by the Supreme Court in *Sutton v. United Airlines, Inc.* ...and its companion cases pertaining to the use of "mitigating measures."

- To provide a new definition of "substantially limits" which would be a departure from the strict standards in the Supreme Court's holding in *Toyota Motor Mfg. Kentucky, Inc. v. Williams* and other courts.

It is expected that H.R. 3195, or some version thereof, will be passed by the Senate later this year. At this point it would be purely conjectural as to whether its more liberal provisions would have changed the outcome of the *Tjernagel v. Gates Corp.* case outlined above. However, if and when H.R. 3195 is passed, employers

can expect even more confusion, at least for a while, as to the definition of a "qualified individual with a disability."

If you believe that you may need legal counsel concerning accommodations for applicants or employees with a disability, please call this office at (205) 323-9267.

OSHA Tips: OSHA Interpretations

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & 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.

A very useful tool in gaining insight into how OSHA will enforce its many standards may be found on the agency website at www.osha.gov. A click on the "interpretations" topic will access almost 4000 letters that offer technical and policy guidance with respect to OSHA requirements. These date from 1972 through recent postings.

OSHA points out that these guidance documents serve to explain requirements and how they might apply in particular circumstances but they do not create any additional obligations for the employer. Also it should be noted that these interpretations apply in **federal** OSHA states. About one-half of the states operate their own OSHA-approved programs and adopt and enforce their own standards which may differ from the federal requirements.

A sampling of the approximately 100 interpretation letters issued within the past 18 months includes the following:

An entry dated January 17, 2008 responded to the following question: Does OSHA require that the person conducting bloodborne pathogens training be a healthcare professional? **"No"** is the answer given. The applicable standard, 1910.1030, does not specify a particular job classification for qualified trainers. However, it does require that the trainer be knowledgeable in the subject matter covered by the elements of the standard.

Another question pertaining to bloodborne pathogens requirements was answered in a reply dated June 14, 2007. Addressing the question of whether a sharps container on a crash cart needs to be closed during transport from one location to another in the hospital, OSHA's answer is **"Yes."** It is noted that the intent of the standard is to ensure that employees are protected from contaminated sharps that may fall out while the container is being transported.

Another letter poses the question as to whether someone is precluded from operating a crane due to having vision in only one eye. The answer given is that **"there is no federal OSHA standard that sets physical requirements for crane operators."** (10/18/07)

In a reply dated March 3, 2008 OSHA addresses the question of whether a HAZMAT team member can opt out of medical surveillance. The answer given says that **"HAZMAT team members involved in emergency operations covered by 1910.120(q)(9)(i) must receive a baseline physical exam."** This is true whether they are assigned to the team or volunteer for this duty. After receiving the baseline examination a team member may opt out of additional examinations.

In a departure from the typical question-answer format, the guidance document dated April 17, 2007 is a policy statement concerning OSHA training standards. Its stated purpose is to reiterate the agency's policy that required employee training be presented in a manner that employees can understand. "This means that an employer must instruct its employees using both a language and a vocabulary that the employees can understand. For example, if an employee does not speak or understand English, instruction must be provided in a language the employee can understand. Similarly, if the employee's vocabulary is limited, the training must account for that limitation."

On April 3, 2007 OSHA responded to the following recordkeeping question. "Would damage to a denture in the presence of no further discernable injury be considered a recordable injury requiring entry on the OSHA 300 log even when medical treatment is not administered?" The agency replied that **"damage only to a denture would not be a recordable injury."** Damage to artificial or mechanical devices, such as

dentures, eye glasses, canes, or prosthetic arms or legs, would not be considered and injury or illness under Part 1904.

Wage and Hour Tips: Current Wage and Hour Highlights

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & 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.

Recently the General Accountability Office (GAO), an agency that performs auditing for Congress, released a harsh report on the operations of the Wage and Hour Division. Among other things, the report criticizes the agency for not following up on several employee complaints and for the failure to develop compliance partnerships with employers as a method of encouraging employers to comply with the Fair Labor Standards Act. The report also pointed out that the Wage and Hour investigative staff had been reduced by some 200 during the past 10 years and the number of compliance actions had decreased from 47,000 in 1997 to 30,000 in 2007. Another interesting statistic in the report notes that 72% of Wage and Hour's compliance actions were based on complaints from workers. The remaining actions were concentrated in four industry groups: agriculture, accommodation and food service, manufacturing and health care.

The GAO report was presented at a July 15 hearing before the Committee on Education and Labor of the U. S. House of Representatives and included 15 specific cases where they believed that Wage and Hour failed to properly handle complaints that were received. Copies of both the reports and the GAO testimony are available on the GAO web site, GAO.GOV. (reports GAO-08-962T and GAO-08-973T).

I recently read that Wage and Hour has recovered more than $1.25 billion in back wages for employees since 2001. The amount for the most recent fiscal year (FY-07) exceeded $220 million which is a 70% increase since 2001. Thus, even though their resources have been reduced they are still in the business of making investigations and collecting back wages. In addition, private suits under the wage and hour law continue to increase in number each year, with almost 7,000 filed in 2007. In 2000, there were less than 2,000 suits being filed each year.

On July 28, 2008, Wage and Hour also published a notice of proposed rule making to ensure that its regulations conform to changes created by several amendments to the FLSA over the past 30 years. Most of the proposed modifications appear to be minor.

During its most recent session, the U. S. Supreme Court refused to hear three separate cases regarding the "donning and doffing" of protective gear by employees. In one of the cases involving Tyson Foods, Inc., the U. S. Third Circuit Court of Appeals had ruled that employees were entitled to be paid for time spent donning, doffing and washing protective gear prior to the beginning of the shift, at meal breaks and at the conclusion of the shift.

In another case against Cagle Foods and involving employees working at a poultry plant, the U.S. Eleventh Circuit Court of Appeals ruled that the employees were not entitled to pay for the donning, doffing and cleaning of protective gear because the employer had a custom or practice of not paying for such time pursuant to a collective bargaining agreement.

In the third case, employees of a Consolidated Edison nuclear power plant in New York were found by the U. S. Second Circuit Court of Appeals not to be entitled to pay for donning and doffing of protective glasses, boots and helmets because the activity was "relatively effortless" and was not "integral" to their principal activities.

The donning and doffing issue has been on the forefront of litigation for the past several years and I understand that a pending case on the issue involving a Tyson's plant in Blountsville, AL is scheduled for trial in Birmingham later this year or early 2009. I believe the case was originally filed in 2000.

Earlier this year, the U. S. Second Circuit Court of Appeals ordered an employer to pay employees for overtime work even though the overtime was not authorized and was in violation of company policy. The employer, a staffing agency that provided nurses to hospitals, printed the following statement on its timesheets: "You must notify…in advance and receive authorization from…for any shift or partial shift that will bring your total hours to more than 40 hours in any given week. If you fail to do so you will not be paid overtime rates for these hours." The court held that because the employer knew the work was being performed and allowed it, the employees must be paid time and one-half their regular rate for the hours over 40 in a workweek. Thus, the Court agreed with Wage and Hour's position that if an employer allows the work to be performed, the employer must pay for the time even if the performance is contrary to company policy.

Employers of minors ages 14 & 15 need to remember the limitation on the hours that may be worked by these employees. With school starting back, the employees may not work past 7pm nor may they work more than 3 hours on a school day, 18 hours in a school week or more than 8 hours on a non-school day. Further, the Alabama State Child Labor statute prohibits a minor under 19 from working past 10pm on the night before a school day. In addition there are strict limitations on the duties that these employees may perform. Earlier this year a McDonald's franchisee in south Alabama was fined over $86,000 by Wage and Hour because he allowed these minors to operate a deep fryer or trash compactor. With the change in the amount of civil money penalties that may be assessed, an employer may be liable for up to $100,000 if a minor is seriously injured while illegally employed.

As you can see, the Fair Labor Standards Act continues to be a subject of much activity and employers are often found not to have complied with the act. In many cases employers are hit with back wages, liquidated damages and attorney's fees. Thus, it behooves employers to make a diligent effort to become aware of the requirements of these statutes and to follow their regulations. If I can be of assistance, please give me a call.

2008 Upcoming Events

AFFIRMATIVE ACTION UPDATES

Birmingham – December 9, 2008
Bruno Conference Center

Huntsville – December 11, 2008
Holiday Inn Express

EFFECTIVE SUPERVISOR®

Huntsville-October 2, 2008
Holiday Inn Express

Birmingham-October 8, 2008
Cahaba Grand Conference Center

Muscle Shoals-October 16, 2008
Marriott Shoals

Mobile-October 22, 2008
Ashbury Hotel

Auburn/Opelika-October 30, 2008
Hilton Garden Inn

RETAIL/SERVICE/HOSPITALITY EMPLOYERS BRIEFING

Birmingham – September 16, 2008
Vulcan Park

WAGE AND HOUR REVIEW

Birmingham – December 10, 2008
Vulcan Park

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com.

Did You Know…

…that national unemployment is at 5.7%, the highest since March 2004? Approximately 651,000 jobs have been lost in the private sector during the past seven months, but 188,000 have been gained in the public sector. During the past 12 months, overall public sector employment grew by 351,000 jobs and private sector declined by 418,000 jobs. Additionally, the number of those who were defined as "involuntarily part time employees" increased by 300,000 last month to 5.7 million, the highest since 1994 and 1.4 million more than July 2007.

…that according to the August 2008 issue of Group and Organization Management, there is "widespread bias" against employees and job applicants due to their obesity? Their report is based upon a survey of personality traits filled out by participants who are obese. The researchers concluded that conscientiousness at work is unrelated to whether an individual is obese. However the researchers also state that "we do not intend to suggest that the results of the present studies conclusively refute stereotypes of overweight workers. Clearly, there is a need for research in this area that does not rely on pencil-and-paper, self-assessments of personality."

…that New York enacted legislation that prohibits health care facilities from imposing mandatory overtime on nurses? Nurses may voluntarily work overtime, but it may not be mandatory, except during natural disasters. On August 5, 2008, New York signed its own version of the Worker Adjustment and Retraining Notification Act. The New York version covers private sector employers with 50 or more employees and it requires 90 days notice in the event of a mass layoff or closing.

…that former Home Depot employees may pursue their claim of breach of fiduciary duty by the company? *Lanfear v. Home Depot, Inc.* (11th Cir. July 31, 2008). The employees claim that the company was investing assets in the employee defined contribution plan and company stock at the same time company leadership was backdating their stock options. The suit claims that the backdating of the options artificially inflated the stock's value. They concluded that the employees were considered "participants" under ERISA and their claim was for benefits and not damages. The court also concluded that the employees failed to exhaust their administrative procedures under the plan, and remanded the case to the District Court for them to first exhaust their administrative remedies.

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