LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

SEPTEMBER 2012
VOLUME 20, ISSUE 9

Your Workplace Is Our Work®

Inside this issue:

Expanding Anti-Retaliation Provisions to Employee Benefits Issues

We know all too well that "retaliation" is the most rapidly expanding employment claim and has been for the past three years. The case of *George v. Junior Achievement of Central Indiana, Inc.* (7th Cir. September 4, 2012) further expands the field of retaliation claims by including retaliation as an outcome of an employee inquiry about benefits.

The Employee Retirement Income Security Act ("ERISA") in Section 510 prohibits retaliation "against any person because he is given information or has testified or is about to testify in any inquiry or proceeding" involving benefits covered under ERISA. One would think that "testify" and "inquiry or proceeding" would exclude questions arising at the workplace, but that was not the opinion of the court in the *George* case.

George was Vice President of Junior Achievement of Central Indiana until his termination in January 2010. During the summer of 2009, George raised a question about deductions that were made from his pay which were supposed to be deposited into his retirement account and health savings account, but were deposited in neither. Approximately three months later, Junior Achievement issued George checks for what had been deducted and not deposited. Between October 2009 and January 2010, George discussed with Junior Achievement's board of directors various approaches to consider for his retirement. They did not reach an agreement, and George was notified on January 4, 2010 that he was terminated. George sued under ERISA, and the district court, agreeing with Junior Achievement, granted summary judgment stating that George's question about his retirement account was neither an "inquiry" nor a "proceeding" as defined under ERISA.

In vacating the summary judgment decision, the court noted other circuit courts that ruled that "inquiry" and "proceeding" "applies to unsolicited informal complaints. When dealing with this ambiguous anti-retaliation provision, we are supposed to resolve the ambiguity in favor of protecting employees." The court stated that, "Inquiry could mean something official, such as the investigation that the Department of Labor conducts before deciding whether to file suit under ERISA, but sometimes an inquiry means nothing more than a question."

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

2012 Client Summit

Birmingham..... November 9, 2012
Rosewood Hall – SoHo Square
2850 19th Street South
Homewood, AL 35209

Perhaps the most critical factor in evaluating the risk of a retaliation claim is the timing of an adverse decision in relation to when an employee raised a protected issue. Thus, employers should just process benefits inquiries as one more factor to consider regarding the timing for a potential retaliation claim. Employees who raise questions about benefits, pay, discrimination, harassment, safety or any other matter protected under state or federal law are not immune from the consequences of accountability for their attitude, attendance, performance or behavior. However, employers need to be sure that the closer in time the adverse decision is made in relation to when the employee engaged in protected activities, the greater the clarity must be that the decision would have been made regardless of that protected activity.

The Globalization of the Labor Movement Continues – A Fifty Million Employee Union

Unions follow the direction that business pursues, so it is not surprising that the globalization of manufacturing, energy, and technology has in turn resulted in the globalization of the labor movement. The most recent example is formation of the IndustriALL Global Union. This union claims to represent approximately 50 million workers in 140 countries. Its focus is manufacturing, mining, and energy. The International Association of Machinists was one of the leaders in developing this global union and touts as its recent success overcoming the lockout of employees at Caterpillar operations in Australia. According to Jyrki Raina, who is General Secretary of IndustriALL, "We mobilized our Caterpillar unions [worldwide] and the company was clearly impressed by the solidarity, the pressure by the messages they received at Caterpillar unions throughout the world." Raina added that, "We have to realize that only by joining forces of workers on all five continents can we fight with success for the right to organize with decent pay and working hours for a better life for working people and their families. And organized labor is fighting back."

IndustriALL is comprised of the Machinists, the International Metal Workers' Federation, the International Federation of Chemical, Energy, Mine and General Workers' Unions and the International Textile, Garment and Leatherworkers Federation.

Post-Substance Abuse Drug Test Violates ADA

A widespread practice for employees who voluntarily or are required to participate in substance abuse treatment programs is periodic testing that occurs afterwards. The case of *Fowler v. Westminister College* (D. Utah, September 17, 2012) is a good example of how not to conduct such post-testing procedures.

Fowler was terminated after a post-substance abuse treatment drug test showed what the employer claimed was an excessive amount of prescription drugs in his system. The issue before the court was not whether the employer had the right to require the test (which it did), but whether the test and the employer's interpretation of its results was a pretext to terminate Fowler because of his disability (substance abuse).

Fowler worked for Westminister in the mailroom beginning in 1984. He had several back surgeries from 2001 through 2004, the consequence of which caused him great pain. He became addicted to pain medication after the last surgery. He discussed his concerns about addiction with an executive of the college, who then placed him on disability leave. At the recommendation of the college, Fowler enrolled in a rehabilitation program, which he successfully completed.

After returning from the leave, Fowler's supervisor increased his supervision of Fowler, gave Fowler for the first time ever a performance appraisal stating that he was "below expectations" and moved his office to a less desirable, isolated location. The supervisor and human resources director told Fowler that other employees were concerned about what they viewed as his aberrant behavior and requested Fowler to submit to a urine test, to which he agreed. The urine test showed an excessive amount of prescription drugs and Westminster terminated him.

Fowler was taking Soma, hydrocodone and Valium. He provided evidence of prescriptions for these drugs and that his use of these drugs was within the prescribed

limits. In upholding a jury verdict of over $300,000 for disability discrimination, the court stated that the employer's investigation in response to Fowler's presentation of prescriptions for the drugs was inadequate, the drug test was questionable and the reports about the alleged abuse were conflicting. The court recognized that although an individual is not "a qualified individual with a disability" for the current use of illegal drugs, there was no evidence to substantiate the employer's claim that Fowler in any manner acted illegally in his use of the prescription drugs.

This case was an example of an employer's "ready, fire, aim" approach to addressing concerns about employee behavior after an employee concluded a substance abuse treatment program. Testing protocols must be followed and employers should not "rush to judgment" at the expense of providing the employee with an opportunity to respond fully to the test results. In this situation, had the college reviewed Fowler's prescription documentation and carefully analyzed the test results with medical professionals, perhaps it could have saved hundreds of thousands of dollars in liability, fees, and costs.

Retiree Claim of "Lifetime" Health Benefits Rejected by Court – What Do Your Policies Provide?

Claims under ERISA continue to increase, as those close to retirement age and retirees often find themselves with unanticipated changes to and higher costs to continue their medical benefits. The case of *Witmer v. Acument Global Techs, Inc.* (6th Cir. September 17, 2012) involved a collective bargaining agreement that referenced retiree eligibility for "continuous health insurance." In January 2008, the company reduced health and life insurance benefits for retirees and their spouses. Shortly thereafter, the company announced that it was terminating retiree health and life insurance benefits. Witmer sued, claiming that the bargaining agreement's representation of "continuous health coverage" prohibited the employer's termination of these benefits.

Although this case arose in a bargaining agreement context, its principles are instructive for employers with non-represented employees. In the provisions of the contract that referenced continuous health insurance benefits, there was also language that reserved the right to the company "to amend, modify, suspend, or terminate the Plan." The court stated that language regarding "continuous health insurance" benefits did not supersede the language that gave the employer the right to change or terminate health insurance plans. The court stated that the right to change or terminate the plans "was incompatible with the promise to create vested, unchangeable benefits."

One judge out of the three-judge panel dissented, stating that the language of reserving the right to change or terminate the plan was inconsistent with the language stating that health insurance benefits would be continuous, and the case should be sent to the lower court for considering evidence of the parties' intentions when reaching the agreement. The message for employers, union and non-union, is twofold. First, be sure to include any documents communicated to employees about insurance benefits that the employer has the right to modify, revise or terminate those benefits. Second, review the language from the perspective of whether it may create confusion or an inconsistent expression of intent by referencing "continuous" or "lifetime" benefits, or other terminology implying that the employee or retiree can rely on the existence and levels of those benefits.

Key Aspects of the Employer Shared Responsibility Provisions of the PPACA

Effective January 1, 2014, the Patient Protection and Affordable Care Act's "Employer Shared Responsibility" provisions will take effect. Also known as the "employer mandate," it requires certain employers to offer full-time employees and their dependents certain specified minimum levels of health coverage or be subject to an excise tax penalty. This article addresses key aspects of the employer mandate and explains recently issued guidance from the agencies responsible for administering the PPACA.

1. Which employers are covered?

The employer shared responsibility provisions apply only to "applicable large employers," which the statute defines as an employer that employs an average of at least 50 full-time employees, taking into account "full-time equivalents," during the preceding calendar year. For the sake of explanation, this article will refer to the number of actual "full-time employees" plus "full-time equivalents" as "calculated full-time employees."

Under the statute, "full-time employees" are employees that perform an average of at least 30 hours of service per week in any given month. "Full-time equivalents" means the number obtained by dividing the employer's non-full-time employees' total number of hours of service during a month by 120. The number of full-time equivalents plus the number of actual full-time employees determines the employer's "calculated full-time employees," which determines whether the employer is an applicable large employer subject to the employer mandate. It is important to note that the number of full-time equivalents and the resulting number of "calculated full-time employees" only matters for this purpose; it does not affect the amount of the penalty an employer may be required to pay.

The steps in calculating the number of "calculated full-time employees," during the preceding calendar year are as follows:

(1) Calculate the number of actual full-time employees for each calendar month in the preceding calendar year—number of actual individual employees that worked an average of 30+ hours per week.

(2) Calculate the number of full-time equivalents for each calendar month in the preceding calendar year—divide the total number of hours of service of your non-full-time employees for the month by 120.

(3) Add the number of full-time employees and the number of full-time equivalents for each of the 12 months in the preceding calendar year.

(4) Add up the 12 monthly numbers in step (3) and divide the sum by 12. This is the average number of "calculated full-time employees" for the preceding calendar year.

(5) If the number of "calculated full-time employees" in step (4) is less than 50, the employer is not an applicable large employer for the current calendar year.

(6) If the number of "calculated full-time employees" in step (4) is 50 or more, the employer is an applicable large employer for the current calendar year and will be subject to the employer mandate.

2. What is required?

The employer mandate requires that employers offer their full-time employees and their dependents "minimum essential coverage." In the employer-sponsored plan context, minimum essential coverage is coverage that is "affordable," offers the required "essential health benefits" (as defined in the statute), and provides at least the minimum required value.

Coverage is "affordable" if the employee's contribution to plan premiums is less than 9.5% of that employee's household income. Because employers will not often know an employee's household income, agency guidance has created a safe-harbor that allows employers to use the employee's W-2 wages to determine affordability.

An eligible employer-sponsored plan generally provides "minimum value" if the plan's share of the total allowed costs of benefits provided under the plan is at least 60% of those costs.

Importantly, nothing in the PPACA penalizes small employers for choosing not to offer coverage to any employee, or large employers for choosing to limit their offer of coverage to only full-time employees.

3. What is the penalty for noncompliance?

The PPACA imposes an excise tax penalty on applicable large employers that fail to meet their responsibilities under the statute. The formula for the penalty differs depending on whether the employer fails to offer any coverage to their full-time employees or offers coverage that does not meet the required standards discussed above for one or more employees. The penalty only applies if one or more employees receive tax-subsidized coverage through an individual exchange. The formulas for the different penalties are as follows:

- Employer fails to offer coverage: Employer must pay a $2,000 per year ($166.67 per month) penalty for each actual full-time employee. (The first 30 full-time employees are not counted in figuring the penalty.)

- Employer does offer coverage: If the employer offers coverage, but the coverage does not satisfy specified minimum levels for one or more employees and those employees obtain tax-subsidized coverage through the individual exchange, the employer must pay the lesser of a $3,000 per year ($250 per month) penalty for each such employee or the penalty that would be applicable if the employer did not provide coverage at all.

4. How to determine which employees are full-time employees.

To determine whether an employee is a full-time employee in any given month and, therefore, whether the employer must offer him or her coverage to avoid the excise tax penalty, the IRS and other federal agencies responsible for administering the PPACA have issued guidance creating a “look-back” safe harbor for employers.

The “look-back” safe harbor allows employers to look back at a period of time, called the “standard measurement period,” to determine whether an employee worked an average of at least 30 hours per week. Employers may choose a standard measurement period of no less than three but not more than 12 consecutive calendar months. The result determines if and for what period of time the employer must treat the employee as a full-time employee (the "stability period”).

For ongoing employees, if the employer determines an employee to be a full-time employee during the standard measurement period, the stability period would be a period of at least six consecutive calendar months that is no shorter in duration than the standard measurement period and that begins after the standard measurement period. During this stability period the employer must treat the employee as a full-time employee regardless of the employee's number of hours of service during the stability period, so long as he or she remains an employee. If the employer determines that the employee did not work full-time during the standard measurement period, the employer would be permitted to treat the employee as not a full-time employee during the stability period that follows the standard measurement period, but the stability period can be no longer than the standard measurement period.

The most recent guidance explains how the look-back safe harbor applies to new variable-hour employees. A new employee is a "variable-hour employee" if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week.

Because for these new employees, there is no period of employment to which the employer can “look back,” the guidance creates an "initial measurement period.” The initial measurement period must be between three and 12 months (the same as allowed for ongoing employees) and is selected by the employer.

If the employer determines the employee to be a full-time employee during the initial measurement period, the safe harbor applies the same as that for ongoing employees (the stability period would be a period of at least six consecutive calendar months that is no shorter in duration than the standard measurement period and that begins after the standard measurement period).

On the other hand, if a new variable-hour or seasonal employee is determined not to be a full-time employee during the initial measurement period, the stability period for which the employer would be permitted to treat the employee as not a full-time employee differs from that of an ongoing employee. Under these circumstances, the stability period must not:

- be more than one month longer than the initial measurement period; or

- exceed the remainder of the standard measurement period in which the initial measurement period ends.

The guidance also provides the process for transitioning a new employee to an ongoing employee. Once a new employee has been employed for an initial measurement

period, he or she must then be tested for full-time status under the rules governing standard measurement periods at the same time and under the same conditions as other ongoing employees. An employee determined to be a full-time employee during an initial measurement period or standard measurement period must be treated as a full-time employee for the entire associated stability period (which corresponds with either the initial measurement period or standard measurement period, depending on the circumstances). The scenarios addressed in the Guidance are as follows:

- New employee is a full-time employee during the initial measurement period but not during the overlapping or immediately following standard measurement period.

In that case, the employer may treat the employee as not a full-time employee only after the end of the stability period associated with the initial measurement period. Thereafter, the employee's full-time status would be determined in the same manner as that of the employer's other ongoing employees.

- New employee is not a full-time employee during the initial measurement period, but is a full-time employee during the overlapping or immediately following standard measurement period.

Under those circumstances, the employee must be treated as a full-time employee for the entire stability period that corresponds to that standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period). Thereafter, the employee's full-time status would be determined in the same manner as that of the employer's other ongoing employees.

Notice that in both cases, after the transition period (the overlapping, associated stability period for which the employee must be treated as a full-time employee), the employee's full-time status will be determined in the same manner as that of the employer's other ongoing employees.

It is important that employers begin preparing now to meet their shared responsibility obligations that will take effect on January 1, 2014. Our attorneys will continue to provide updates as additional guidance becomes available.

NLRB Tips: Specialty Healthcare Update – NLRB Institution of Micro Units

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

In *Specialty Healthcare*, 357 NLRB No. 83 (2011), the Board overruled *Park Manor*, 305 NLRB 872 (1991, which established clear categories of appropriate bargaining units for non-acute care facilities. The NLRB's new approach, announced in *Specialty*, offers unions a major boost toward winning an election among small, cherry picked groups of employees where support for the union is the strongest. True to predictions, the principles set forth in *Specialty Healthcare* have now been applied to areas other than non-acute healthcare facilities. As Board Member Brian Hayes observed: "[This decision] fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." (Emphasis supplied). Indeed, this modification in how bargaining units are determined constitutes perhaps the most far reaching change in NLRB precedent in decades.

***Specialty Healthcare* – The Analytical Framework**

When considering the appropriateness of a petitioned-for bargaining unit, the Board first assesses whether the unit as set forth is appropriate applying traditional community of interest standards.

If the petitioned-for unit satisfies that standard, then **the burden shifts** to the employer to demonstrate that the additional employees it seeks to include in the bargaining unit share an "overwhelming community of interest" with the employees in the petitioned-for unit, such that there "is no legitimate basis upon which to exclude [such] employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely."

In *Specialty Healthcare,* the union sought a bargaining unit of all CNAs, while the employer contended that the smallest appropriate unit must also include in it other non-supervisory service and maintenance employees. The Board applied the new standard and concluded that the employer had failed to meet its burden to demonstrate that the employees it wished to add to the bargaining unit shared such an overwhelming community of interest with the CNAs that they must be included in the petitioned-for unit.

Selected Cases Applying *Specialty Healthcare* Principles

First Aviation Services, Inc. (non-reported RC case – 22 RC-61300)

On October 19, 2011, the Board invoked for the first time its new *Specialty Healthcare* rule. In denying a request for review, the Board allowed a Regional office decision to stand, finding that a unit of thirty-four (34) line service employees constituted an appropriate bargaining unit, despite a showing of a substantial community of interest with all but two of the other 110 employees in the same facility.

DTG Operations, Inc., 357 NLRB No. 175 (2012)

The Board reversed the Regional Director in this case (who had dismissed the petition as inappropriate) and found that a petition to represent only the employer's rental service agents and lead agents constituted an appropriate unit without including other employees who shared a significant community of interest with other employees who worked with the rental agents at the same location.

The Employer contended that, because of the community of interest shared with other employees at the facility, only a wall-to-wall unit consisting of bus drivers, mechanics, vehicle shuttle drivers, staff assistants, and a maintenance employee would be appropriate.

In dissent, Member Hayes said the Board's decision in *DTG* provides further confirmation of the predictable effects of [the Board's] outcome-driven *Specialty Healthcare* test for determining whether a unit is appropriate for bargaining." Hayes further stated:

> Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that more unions will choose to organize incrementally.
>
> [This new standard] may well disrupt labor relations stability by requiring a constant process of bargaining for each micro-unit as well as pitting the narrow interests of employees in one such unit against those in other units.

Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2012)

The Board majority rejected the employer's contention that a narrowly drawn unit consisting of certain technician classifications should include additional technical employees. Again, the Board found that the employer failed to show that the additional technical employees shared the required "overwhelming" community of interest with the smaller, petitioned-for unit.

In a move that will undoubtedly bolster the decision's chance of surviving judicial scrutiny, the Board added that even under the traditional community of interest test, a departmental unit of radiological technical employees (those urged by the employer to join the technical unit) constituted "a functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining."

Court/Legislative Challenges to *Specialty Healthcare*

Needless to say, there have been vociferous objections to the Board's new paradigm under *Specialty Healthcare*. There have been several *amici* briefs filed both before the U.S. Circuit courts (6th and 4th Circuits) and the NLRB. These cases are currently pending.

- In June of 2012, the NLRB urged the U.S. Sixth Circuit to uphold the standards enunciated in *Specialty Healthcare*. The Board argued it merely codified the old standard – not created a new one. The Board further asserted that it is required only to approve an appropriate unit – not the best unit or one that is most convenient for the employer.

- Employers have argued that the new standard represents a "sea change" that impacts all employers falling under the Board's jurisdiction and potentially makes every job classification (i.e., job title) a viable bargaining unit, essentially delegating unit determination to the petitioning unions.

In addition to Court challenges, there has been nascent legislative action by the U.S. House of Representatives, attempting to amend the Labor, Health and Human Services appropriations bill that would have denied funding for enforcement of the new standard. This action, had it passed, would have effectively overturned the Board decision. That bill was defeated in Committee by a vote of 15-15, largely along party lines.

The Bottom Line

The new approach by the NLRB has set a standard that employers will find difficult, if not impossible, to meet. When micro-organizing can be accomplished by special Board deference to the bargaining unit sought by the union, the ease with which unions can establish a foothold at an employers' facility becomes problematic. Under the new Board methodology, the risk is increased substantially that an employer may face multiple bargaining units (e.g., by department, job classification or even shift). However, there are some steps that an employer can take now to minimize the establishment of a micro-bargaining unit.

1. Establish clear job classifications within delineated departments and group the classifications/ departments (to the extent possible) along traditional community of interest lines.

2. Move and cross-train employees between departments and job classifications as much as possible (interchange) and make sure there is cross departmental contact on a frequent basis. It will be important to have as much common supervision among your employees as possible, along with a common pay scale and benefits. The objective must be to demonstrate that your operation is totally integrated and that employees share so many traditional community of interest factors that you can make a compelling argument that a broader unit is the only appropriate unit, given the employees "overwhelming" community of interest among themselves.

It is, I know, easier said than done. Hopefully, the Courts will take a less than sanguine view of the Board's decision to change years of precedent and order a return to the traditional approach – of examining the industry involved in the organizing effort and testing the functional integration of the operation to determine the appropriate bargaining unit. Otherwise, it could be "open season" on employers with small pockets of disgruntled employees.

EEO Tips: Solving the Problem of "Unlawful" Medical Examinations

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.

Contrary to the often mistaken belief that an employer cannot make any inquiry of an employee which might reveal a disability, the only question, in actuality, is when such inquiry can be made, not whether it can be made. Under the ADA, the timing and basis for such an inquiry is the problem, not necessarily the legality of making one.

To most employers, it is clear that at the "pre-employment" stage a *"covered entity" (employer) shall not conduct a medical examination or make inquiries… as to whether such applicant is an individual with a disability…"* (Section 12112(d)(1)(A) of the ADA).

Likewise it seems clear that during the "post-offer" stage, an employer can require a medical examination of an applicant if such examination is required of all applicants for the position in question.

However, it is less clear as to when and if an employer can make "medical inquiries" either directly or indirectly of a "normal" employee to determine if such employee has a disability which could affect that employee's ability to perform all of the duties and responsibilities of his/her

current job position. That is the point at which employers must be extremely cautious to avoid violating the broad reach of Section 12112(d)(4)(A) of the ADA. In pertinent part, this section reads as follows:

> (A) *Prohibited examinations and inquiries – A covered entity may not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.*

Whether the employer crossed this prohibited line of inquiry was the issue in the recent case of *Kroll v. White Lake Ambulance* (6th Circuit, 8/22/12). Emily Kroll, the plaintiff in this case, was employed by the ambulance company as an Emergency Medical Technician. Following an emotional screaming outburst at a male acquaintance over the phone while driving an ambulance that contained a patient and in emergency status, the employer requested that Kroll receive "psychological counseling." Because of this incident, as well as evidence that there had been earlier reports to her supervisor of conduct that raised questions as to her mental well-being, the employer made the counseling mandatory for continued employment. The employee refused the counseling and ultimately was discharged. Thereafter, Kroll filed suit alleging, among other things, that she had been terminated in retaliation for refusing to subject herself to psychological counseling.

The trial court granted summary judgment to the employer on all issues. However, the Sixth Circuit, acknowledging that this issue was one of first impression, vacated and remanded the case back to the trial court with instructions to determine whether the evidence would show that the requested "psychological counseling" was in fact a prohibited medical examination and whether it was job-related and justified by business necessity as required by Section 12112(d)(4)(A) of the ADA as cited above.

In remanding the case, the Sixth Circuit specifically mentions the *EEOC's Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)* as a good source of information on the factors to be considered in determining what constitutes a "medical examination." Those factors can be summarized as follows:

1. Whether the test is administered by a health care professional;

2. Whether the test is interpreted by a health care professional;

3. Whether the test is designed to reveal an impairment or physical or mental health;

4. Whether the test is invasive;

5. Whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;

6. Whether the test normally is given in a medical setting; and

7. Whether medical equipment is used.

EEO Tip: In some cases, a combination of factors will be relevant in determining whether a test or procedure is a medical examination. However, quite often, one factor may be sufficient to determine that a test or procedure is medical in nature.

According to the EEOC's Guidance, the following types of tests have been considered to be medical examinations:

- Vision tests conducted by an ophthalmologist or optometrist.

- Blood, urine, hair and saliva tests. Blood pressure screenings.

- Nerve conduction, range of motion and pulmonary function tests. Psychological tests designed to identify a mental disorder or impairment.

- Diagnostic procedures such as X-rays, CAT scans and MRI scans.

However, some of the above tests (such as blood, urine and saliva tests) when used by an employer to determine the current illegal use of drugs, may be allowed. Also,

physical agility tests and psychological tests that measure personality traits such as honesty, preferences or habits are not generally considered to be "medical examinations."

As the *White Lake Ambulance* case suggests, there may be a thin line between an employer's legitimate, reasonable actions to monitor and control the behavior of employees for purposes of maintaining a safe, productive work environment, and making inquiries or requiring measures which in fact turn out to be a medical examination. However, in my judgment, this should not deter employers from taking whatever steps may be necessary. The critical question, as stated at the outset of this article, is not whether the inquiries or measures can be done, but only whether the inquiry or measure in question is job-related and can be justified by business necessity. Closely adhering to this standard should eliminate the problems associated with petty personality clashes and other minor differences between an employee and his/her supervisor.

Please call this office at 205.323.9267 if you have any questions on the matter of medical examinations under the ADA.

OSHA Tips: OSHA and Substance Abuse

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.

October has for a number of years been recognized as a time to focus on drug and alcohol-free workplaces. This year, October 15-20 has been designated as "Drug Free Work Week."

A study published by the Rand Corporation in 2009 places the annual direct and indirect costs of occupational injuries and illnesses in the United States at over 100 billion dollars. The 2010 National Survey on Drug Use and Health, prepared by the Mental Health Services Administration (SAMHSA) found that 74.7% of binge and heavy alcohol users were employed either full or part time. It has been estimated that as many as 65% of workplace accidents are caused by substance abuse and noted that employees who abuse drugs file several times more workmen's compensation claims. The huge dollar cost and significant workplace presence of drug and alcohol users argues strongly for worksite alcohol and substance abuse prevention programs.

While OSHA has adopted no specific standard relevant to alcohol/substance abuse, an agency interpretation letter provides the following information and position on the associated issues:

1. Does OSHA believe that an employer has a duty to provide a workplace free of employees performing assigned duties with mechanical machinery under the intoxicating influence of alcohol or under the influence of illicit drugs? The agency responded, "OSHA strongly supports measures that contribute to a drug-free environment and reasonable programs of drug testing within a comprehensive workplace program for certain workplace environments such as those involving safety-sensitive duties like operating machinery. Such programs, however, need to also take into consideration employee rights to privacy."

2. In a follow-up question it was asked whether OSHA had been in a position to enforce such a viewpoint as posed in the above. OSHA replied to the latter as follows: "Although OSHA supports workplace drug and alcohol programs, at this time OSHA does not have a standard. In some situations, however, OSHA's General Duty Clause, Section 5(a)(1) of the OSH Act, may be applicable where a particular hazard is not addressed by any OSHA standard."

3. In response to the question as to what steps would be reasonable in attempting to provide an alcohol/drug free workplace, the agency responded by referring the requestor to the following number: "800-WORKPLACE" and stated as follows: "An employer's trade association or workers compensation insurance company may also be able to give helpful advice. Any educational/training activity that helps employers and employees become aware of the dangers of working under the influence of alcohol, illicit drugs, and even some over-the-counter and prescription medications would be a good first step."

The “Drug Free Workplace” initiative was initiated by the U. S. Department of Labor as a cooperative agreement focused on improving safety and health in the construction industry through drug free workplace programs. The first Drug Free Work Week was observed in 2006 and in subsequent years more organizations, representing a range of industries, have rallied behind the effort to reinforce to employers and employees alike that “Drugs Don’t Work.”

Wage and Hour Tips: Overtime Pay Requirements of the Fair Labor Standards Act

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.

Almost 75 years ago, Congress passed the Fair Labor Standards Act of 1938, which established a minimum wage of $.25 per hour for most employees. In an effort to create more employment, the Act also provided certain additional requirements that established a penalty on the employer when an employee works more than a specified number of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

An employer who requires or allows an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. Overtime pay is not required for work on Saturdays, Sundays, holidays, or regular days of rest, unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. For example, you may begin your workweek at 11 p.m. on Tuesday if you believe that would enable you to better control the amount of overtime hours that are worked. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted.

Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are not able to determine the amount of overtime due prior to the payday for the pay period you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses and “on-call” pay must be included when determining the employee’s regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals,

lodging, etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance, the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, resulting in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. Likewise, an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he/she must be paid overtime when he/she works more than 40 hours during a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount of liquidated damages to the employee. Further, if the employee brings a private suit, the employer can be required to pay the employee's attorney fees. When the Department of Labor makes an investigation and finds employees have not been paid in accordance with the Act, they may assess Civil Money Penalties of up to $1100 per employee.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA. If I can be of assistance, do not hesitate to give me a call.

2012 Upcoming Events

2012 Client Summit

When: November 13, 2012, 7:30 a.m. to 4:30 p.m.
Where: Rosewood Hall, SoHo Square
2850 19th Street South,
Homewood, Alabama 35209
Registration Fee: Complimentary

Hotel accommodations are available at Aloft Birmingham – SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209, 205.874.8055 or 877-go-aloft. Ask for the discounted "Lehr Middlebrooks" room rate.

To register, contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com, or Click Here to register online. For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com.

Did You Know…

…that according to a survey by the Kaiser Family Foundation/Health Research & Educational Trust, released on September 11, 2012, health insurance costs for 2012 averaged an increase of 4%? Of the average premium for family coverage of $15,745, employees paid $4,316, an increase from $4,129 in 2011. According to the survey, "There is just a hint that premiums could be somewhat higher next year [2013]. Certainly, as the economy improves you would expect utilization to pick back up again, but how much higher, we don't know." The survey reported that for employee only coverage, premiums increased by an average of 3%. Furthermore, 61% offered health insurance, compared to 60% in 2011; 31% offered insurance for same sex domestic partners, an increase from 21%; and 37% offered coverage to opposite sex partners, an increase from 31%.

…that Boston Area Teamsters officials were indicted on 30 counts of extortion and racketeering? *United States v. Perry* (September 19, 2012). Four officials of Teamsters Local 82 are accused of extortion and threatening businesses with "intimidation and fear of physical and economic harm" if they did not do business with the Teamsters. This particular local was heavily involved in the Boston Area convention business. The allegations are that these individuals threatened to disrupt the businesses, shut down the conventions, and take other actions harmful to the businesses and the individuals if they did not agree to the Teamster representatives' "wrongful demand for imposed, unwanted, unnecessary and superfluous jobs for themselves, their friends and family members, some of whom were not union members."

…that injured employees have significantly higher degrees of depression than non-injured employees? According to a report in the September issue of the *Journal of Occupational and Environmental Medicine*, injured employees were 45% more likely to need treatment for depression than those employees who were not injured. The amount spent for those employees to deal with depression was 63% higher than those employees who were not injured and treated for depression. The research involved an analysis of 367,900 employees. According to the report, the industries where injured employees have the greatest degree of depression are financial services and transportation. Also, men who are injured are more likely to be depressed than women who are injured.

…that the "fixed salary for fluctuating workweek" pay system is prohibited in Pennsylvania? *Foster v. Kraft Foods Global, Inc.* (W.D. PA, August 27, 2012). Those of you with operations in states other than Pennsylvania might ask why you should even be concerned about this news. Most states have their own wage and hour laws and regulations, which may be more restrictive on employers than the Fair Labor Standards Act. In this particular case, Kraft's employees were paid according to the fixed salary for fluctuating workweek method, where the employee receives the same salary regardless of the number of hours worked in the week, but overtime is paid at "half-time" rather than time and a half. The court ruled that this pay system violated the Pennsylvania Minimum Wage Act. The court stated that Pennsylvania wage and hour law specifically states that overtime must be paid at time and one-half the employee's regular hourly rate. Therefore, although the fixed salary for fluctuating workweek method was permissible under federal law, the more restrictive Pennsylvania law applied and the employer owed back pay to those who were paid on this method. If your organization uses the fixed salary for fluctuating workweek pay system, be sure that you have the right to do so under state law.

…that an employee's reasonable accommodation request to work from home was an unreasonable accommodation request under the ADA and not required? *EEOC v. Ford Motor Co.* (E.D. Mich., September 10, 2012). Whether a request to work from home is an appropriate accommodation depends on a case-by-case basis. In this instance, a re-sale buyer with irritable bowel syndrome asked to work from home four days a week. In concluding that such a request was unreasonable and the employer could hold the employee accountable for absenteeism, the court stated that the employee's position was highly interactive with customers and employees and required the employee to be present at work. The court quoted from a manager's deposition, where the manager stated that, "The re-sale buyer is the intermediary between two suppliers and must ensure that the requirements are understood and translated correctly. The interaction between the buyer and the suppliers is most effectively performed face-to-face and often includes supplier site

visits." The court noted that the employee "was absent more often than she was at work" and "the essential functions of [the employee's] job could not be performed at home up to four days per week. Her frequent, unpredictable absences negatively affected her performance and increased the workload of her colleagues." Accordingly, the employer could proceed with termination for attendance and was not required to accommodate the employee by permitting her to work from home.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205.226.7120
Whitney R. Brown	205.323.9274
Matthew J. Cannova	205.323.9279
Lyndel L. Erwin	205.323.9272
(Wage and Hour and Government Contracts Consultant)	
Michael G. Green II	205.226.7129
John E. Hall	205.226.7129
(OSHA Consultant)	
Jennifer L. Howard	205.323.8219
Richard I. Lehr	205.323.9260
David J. Middlebrooks	205.323.9262
Jerome C. Rose	205.323.9267
(EEO Consultant)	
Frank F. Rox, Jr.	205.323.8217
(NLRB Consultant)	
Matthew W. Stiles	205.323.9275
Michael L. Thompson	205.323.9278
Albert L. Vreeland, II	205.323.9266