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June 1 an Important, Unwritten, Affordable Care Act Deadline for Small Businesses on the Cusp of ACA's Employer Mandate

Small businesses looking to re-structure their employment classification systems, change employee hours, or reduce staff to avoid the costs associated with the Affordable Care Act's (ACA) employer mandate generally must do so by June 1. You won't find that deadline in the Act, its regulations, or any agency-issued guidance. June 1 is important because the shortest period of time an employer can look back at employee rolls to determine whether it is subject to the employer mandate is six months, and that mandate is scheduled to take effect January 1, 2014.

The ACA's employer mandate or "shared responsibility" provisions require only "applicable large employers" to offer full-time employees (and their dependents) certain specified minimum levels of health care coverage or be subject to an excise tax penalty. Whether an employer is an "applicable large employer" turns on the number of employees and their hours worked in 2013, and recent transitional guidance allows employers to look at a window of time as small as six consecutive calendar months in order to make the determination of whether it will be an "applicable large employer" for 2014.

An "applicable large employer" is one with 50 or more full-time employees in any consecutive six-month period (or calendar year) of 2013. Because the employer mandate only applies to large employers, nothing in the ACA penalizes small employers for choosing not to offer coverage to any employee.

Under the ACA and for purposes of determining applicable large employer status, a full-time employee is an employee that averages at least 30 hours of service per week or 130 hours of service per month.

Employees' hours of service are the measuring unit for determining whether an employer is an "applicable large employer" subject to the employer mandate. An employee's hours of service include the following: (1) each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and (2) each hour for which an employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

The steps in calculating the number of full-time employees (taking into account "full-time equivalents") in the preceding six-month period (or calendar year) for purposes of determining "applicable large employer" status are:

(1) Calculate the number of 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 or 130+ hours per month;

(2) Calculate the number of full-time equivalents for each calendar month in the preceding calendar year—add the total number of hours of service of non-full-time employees for the month (only up to 120 for any one employee) and divide 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 full-time employees (taking into account "full-time equivalents") for the preceding calendar year;

(5) If the result in step (4) is less than 50, the employer is not an applicable large employer for the current calendar year; and

(6) If the result 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.

Under ACA, "applicable large employers" must offer coverage only to their full-time employees (and their non-spousal dependents). Nothing in the ACA penalizes large employers for choosing not to offer coverage to non-full-time employees.

With many additional key deadlines for implementation of ACA scheduled to occur between now and January 1, 2014, we expect federal agencies to continue issuing further regulations and clarifying guidance in the weeks and months ahead. Many benefits professionals are wondering not if, but rather how much of ACA will be delayed. If you are still evaluating your organization's compliance strategies, be sure to contact one of our benefits attorneys. In the meantime, stay tuned for further ACA developments.

Unions Fight for Relevance by Drawing Attention to Social, Economic Issues, and Working Class Organizing

April 24, 2013 was an unprecedented day of union activity from Chicago, Illinois to Bernalillo County, New Mexico, to 150 Wal-Mart stores nationwide. In each case, unions led picketing and demonstration efforts—many of them with non-union participants—to draw awareness to the negative effects of low income wages.

In Chicago, hundreds of fast food and retail employees, led by the Workers' Organizing Committee (a group of workers and community activists, formed for the purpose of demanding a living wage for fast food workers) called a one-day strike to argue for a raise to $15 per hour. In New Mexico, a group of primarily non-union voters, backed by the AFL-CIO, picketed the Bernalillo County government and successfully persuaded county supervisors to raise the minimum wage there. At the same time, across the country, both workers and community activists, with support from the United Food & Commercial Workers Union, demonstrated to regularize employee work schedules.

None of these orchestrated demonstrations was for the purpose of unionizing an employer's employees. None of these efforts would have resulted in collective bargaining agreements. However, unions are increasingly viewing social activism as a means of bringing awareness to issues of importance to unions and their members. In the case of Bernalillo County, that awareness had tangible results, improving the minimum wage for workers in that community.

At a time when union membership is at its lowest levels since before the labor movement even began, unions may be taking a more realistic look at their limited prospects for organizing an employer's workforce. But with their mobilization capabilities, unions may begin to

target issues of broader social concern that could still deliver improved working conditions for their members while reaching out and reconnecting with a workforce that may change its mind about unions tomorrow.

It's no easy task for unions, who are spending their memberships' dues on efforts that do not immediately increase union ranks and may not necessarily have a direct effect on the places they work. But as the number of traditional union organizing campaigns continues to decline, and the costs and burdens of those campaigns continue to increase, unions may begin looking at more generalized, working-class organizing efforts.

Employee Facebook Friends Awarded Backpay and Reinstatement after Employer Termination; States Enact Employer Restrictions

The NLRB continues to insert itself into employer/employee social media situations, and the latest decision by the NLRB is yet another example of employer risks when acting on employee Facebook posts.

In the case of Design Technology Group, LLC, three employees of a retail clothing store in San Francisco made a multitude of complaints about the company's store manager. Although they directed complaints to company management, they also took their discussion to Facebook. On an evening in November 2011, two employees received permission from the store's owner to close one hour early. After closing, one of the employees received an irate phone call from the store manager (apparently not in the loop on the early closing), who was angry that she was not answering the store telephone, and accused her of lying about having permission to close early. Afterward, the employee posted a Facebook status complaining about the store manager and she was joined in this discussion by the second employee (who closed early with her) as well as a third employee.

In their Facebook discussions, one employee wrote, "hey dudes it's totally cool, tomorrow I'm bringing a California Worker's Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's going on that's in violation . . . see you tomorrow!"

One of their co-employees ratted them out to the store manager, and just six days after the Facebook discussion, he fired the two employees because things "weren't working out." After their termination, they posted on Facebook that their firings were "amazing" and "the best thing." The third employee chimed in again and added that the store had "fallen into my crutches," which is apparently an obscure reference to a line from the 1960s sitcom, "The Monkees."

Once the store manager learned about the third employee's post, it terminated her a month later for misconduct. When the employer responded to the third employee's claim for unemployment, it produced copies of her Facebook comments and introduced it as evidence that she had committed "defamation on public media" against the store.

Of course, all three former employees found their way to the NLRB, which issued a complaint against the employer. The matter proceeded to trial, where the administrative law judge found the Facebook comments by all three employees were "in and of themselves" protected concerted activity. The Board agreed, ordering the store to compensate all three employees for back pay, reinstate them to their jobs, and post a nationwide notice that it had unlawfully enforced a policy in its handbook that violated the National Labor Relations Act.

Chances are, most employers have a policy buried somewhere in their employee handbooks that would irk the current NLRB. But as this latest case illustrates, employee discipline for social media comments is fraught with the greatest risk where it results in a termination from employment. Employers still have a right to restrict employee communications through social media. Social media policies can probably be written in a way that complies with even this NLRB's expectations. But whenever enforcement of a policy might lead to a termination or suspension related to the misuse of social media, employers should seek advice from legal counsel, at least until the standards in this area of the law are better defined.

State lawmakers continue to look at ways to restrict employer use of and access to employee social media, with Colorado becoming the most recent state to enact legislation that would bar employers from asking employees or applicants to disclose their account login credentials and prohibits employers from demanding changes to employee privacy settings or requiring them to add a company individual as a friend or contact.

Colorado is the eighth state to enact such legislation. Maryland, Illinois, California and Michigan enacted similar legislation in 2012, and Utah, Arkansas and New Mexico passed similar legislation in 2013 (although the New Mexico Act applies only to applicants).

Lawmakers in the states of New Jersey and Washington are currently considering similar legislation.

DOL Issues Guidance on Employer Health Insurance Exchange Notice Requirements

The Department of Labor ("DOL") has issued Technical Release 2013-02 outlining employers' obligations to provide notice to employees of coverage options under the Affordable Care Act's health insurance exchanges (which the Departments have re-branded as "marketplaces"). The original deadline to provide this notice was March 1, 2013; however, DOL delayed the requirement pending regulations to be issued at a later date. Although DOL still has not released the promised regulations, the guidance sets a new effective date of October 1, 2013, the same day that open enrollment on exchanges is scheduled to begin. DOL said that it issued this guidance in response to employer requests for model notices, as well as to coordinate with recent IRS guidance on minimum value.

Content & Delivery. The guidance reiterates that the notice requirement applies to all employers who are subject to the Fair Labor Standards Act. These employers must provide notice to current employees by October 1, 2013. Regarding new employees, the guidance specifies that, beginning on October 1, 2013, employers must provide notice to new employees at the time of hiring. For 2014, however, DOL will consider notice to be provided at the time of hiring if the notice is provided within 14 days of an employee's start date. The notice must be provided automatically and free of charge. While the notice must be in written form, it may be provided via mail or electronically (if existing requirements for electronic disclosures are met).

The notice must be written in a manner calculated to be understood by the average employee and must inform employees of the following:

- information regarding the existence of the Marketplace (again, formerly referred to as exchanges), including a description of the services provided by the Marketplace, and the manner in which the employee may contact the Marketplace to request assistance;
- that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code, if the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs and the employee purchases a qualified health plan through the Marketplace; and
- if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

To satisfy the content requirements, model language is available on DOL's website at www.dol.gov/ebsa/healthreform. There is one model for employers who do not offer a health plan and another model for employers who offer a health plan for some or all employees. Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above.

The language of the model notices is relatively straightforward; however, the notices leave out certain important information that will undoubtedly create additional challenges and frustration for employers' HR departments. For example, although the content requirements specify that employers must inform employees of the manner in which the employee may

contact the Marketplace to request assistance, the model language only directs an employee to the HealthCare.gov webpage for more information. The model notices also are not state specific--i.e. they do not specify what type of exchange will be run in the particular state.

This guidance will remain in effect until DOL issues regulations or other guidance. DOL specified that future regulations or other guidance on these issues will provide adequate time to comply with any additional or modified requirements. When that additional guidance will come is unclear; however, the model notices' approval by the Office of Management & Budget (required under the Paperwork Reduction Act) expires on November 30, 2013.

Employee Who Took FMLA Leave for “Psychotic Break” Quit After Return and Suffered No FMLA Interference

The Sixth Circuit Court of Appeals held that an employer is permitted to refuse rescinding a resignation for an employee who took FMLA leave for a “psychotic break” and then quit one day after her return to work. In *Miles v. Nashville Electric Serv.* (6th Circuit, May 9, 2013), an electric worker, Bilqis Miles, who suffered “psychotic breaks” that would cause her to run screaming from her work building, have hallucinations, and require hospitalization, took three different FMLA leaves between 2008 and 2011.

The last of these leaves ran from April 11 to May 4, 2011, for which Miles submitted FMLA certification forms, the leave for which her employer approved. The hospital released Miles from its care at the end of the leave and provided her with a return-to-work medical release listing no work restrictions. Although Miles returned to work as planned, on the first day back she asked her supervisor if she could leave work early. Miles’s supervisor approved her early departure. But the next day, Miles called her supervisor and told him she “wasn’t gonna be back.” Her supervisor asked her “what type of leave she needed,” but Miles said she was quitting. Her supervisor asked Miles to submit a resignation letter and then met with her at a nearby farmers market where Miles provided a simple resignation letter.

Three days later, Miles had second thoughts. She testified that her resignation was impulsive and a “spur of the moment decision.” She contacted the employer and asked to rescind her resignation. When her employer refused, Miles filed suit alleging FMLA interference. The trial court granted summary judgment for the employer, holding that it had given Miles FMLA leave and was not on sufficient notice that she would need to take more.

On appeal to the Sixth Circuit Court of Appeals, Miles argued that the employer knew of her need for “psychotic breaks” and should have known not to trust her temporary impulsiveness when resigning her employment. In considering the parties’ arguments, the Sixth Circuit said that an employer’s duty to inquire whether an employee needs FMLA “is triggered only once the employee has provided sufficient notice.” As the Court explained, nothing from Miles’s words or actions reasonably indicated to the employer that she had a reason to take additional FMLA leave. Rather, her deliberate actions to carry out the resignation, combined with her rejection of the supervisor’s question about what type of leave she needed, clearly indicated to the employer her intention to resign. Finally, the Court concluded that once Miles resigned her employment, the employer was under no further duty to offer her leave because she ceased to be an “eligible employee.”

We wonder if this case might have turned out differently had the supervisor not had the presence of mind to ask Miles “what type of leave she needed.” Certainly the employer’s defenses would have been weaker in the absence of that thoughtful question by the supervisor. Questions like these are good stock tools to have on hand whenever issues of FMLA leave or ADA accommodations come into play. If you think an employee has a physical or mental condition that may require a reasonable accommodation or a serious health condition that may entitle her to FMLA leave, keep this stock question handy, in addition to the always trusty, “is there anything we can do/provide that would help you perform the requirements of your job?” Such questions do not draw conclusions and do not pass judgment on an employee’s physical or mental abilities, but rather express the employer’s thoughtful concerns while inviting

the employee to ask for FMLA leave or a reasonable accommodation.

NLRB Tips: D.C. Circuit Court of Appeals Strikes Down NLRB Notice Posting Rule

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On May 7, 2013, the District of Columbia U.S. Court of Appeals reversed a U.S. District Court judge, and found that the NLRB's proposed notice posting rule was improper. The court found that the posting rule was not authorized under Section 8(c) – the "free speech" provisions – of the Act. While the ruling is good news for employers, it is not clear that this decision signals the death knell of the proposed posting rule. However, the court ruling is undoubtedly a setback for the NLRB in implementing its pro-union agenda through the rulemaking process. The D.C. court ruling is discussed below.

The Proposed Notice Rule Requirements

If the rule had been upheld by the D.C. Circuit, it would have required all employers subject to the NLRA to post a specific workplace notice explaining to employees their right to, among other things, organize a union, discuss the terms and conditions of their employment, take action with fellow employees to improve their working conditions, and go on strike. The rule also listed various actions taken by employers that are illegal under the Act – such as questioning employees about their support of unions or threatening employees with reprisals because of their support for unions.

Failure to post the notice would have been considered an unfair labor practice, could have been considered evidence of an employer's anti-union motive, and could have tolled the six-month statute of limitations for filing unfair labor practice charges.

The reaction from employers to the proposed rule was immediate. Most employers considered the language on the notice to be one-sided and clearly pro-union, while the Board considered the notice neutral, only serving to publicize employees' rights under the Act.

The District Court Decision

As noted in the January and March 2012 Employment Law Bulletins, the National Right to Work Legal Defense Fund and Education to Work Foundation Inc. filed a motion with the U.S. District Court of Columbia requesting that the Court hold President Obama's recess appointments to the NLRB "unconstitutional, null and void" and that the illegality of the appointments prevented the NLRB from implementing or enforcing a new rule requiring employers to post workplace notices of employee rights under the Act. (*Nat'l Assn. of Mfrs. v. NLRB*, D.D.C., No. 11-cv-1629, *motion* filed 1/13/12).

On March 2, 2012, U.S. District Court Judge Amy Jackson issued her decision, finding that the Act provides the Board a "broad, express grant of rulemaking authority." In discussing the Board's authority to adopt rules under Section 6 of the Act, Jackson noted:

> . . . the notice posting rule at issue is authorized unless some other provision of the Act limits the Board's authority to impose such a requirement on employers. Plaintiffs complain loudly about the lack of Board authority here, but they fail to point to any limiting provision.
>
> . . . the Court cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act. Neither the text of the statute nor any binding precedent supports plaintiffs'' narrow reading of a broad, express grant of rulemaking authority.

Although finding that the Board had the authority to require employers to post the notice outlining employees' rights, the Court rejected the challenge to the Obama recess appointments. In a separate legal memorandum and order, Judge Jackson characterized the plaintiff's attempt to challenge the validity of the Administration's

recess appointments as a "shoehorn" attempt to inject the appointment issue into the challenge to the notice posting rule, declaring that resolving the appointment issue was "not essential, or even relevant to resolving the merits of [the notice posting requirement]."

While the notice posting requirement was upheld, the District Court further found that the Board exceeded its statutory authority in determining that any failure to post the notice would be considered an unfair labor practice:

> [t]he Court is not making an absolute statement that inaction can never be interference [with Section 7 rights]; rather this memorandum opinion simply holds that the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.

Finally, the Court determined that the Agency cannot "toll' the statute of limitations under Section 10(b) of the Act where an employer has failed to post the notice.

On March 5, 2012, the parties to the District of Columbia lawsuit filed an appeal of the District Court ruling. On April 17, 2012, the D.C. Circuit Court granted an emergency stay of Judge Jackson's ruling, barring implementation of the posting rule.

The D.C. Circuit Court Reverses the District Court

As noted, on May 7th of this year, the D.C. Circuit reversed the district court in relevant part, finding that the proposed notice posting rule was invalid and inconsistent with the free speech provisions of the Act. In reaching its conclusion that the proposed notice rule was invalid and unenforceable, the Court addressed a number of issues.

- Before reaching the merits of the dispute, the Court addressed the *Noel Canning* quorum issue. In finding that the Agency had a validly appointed quorum, the Court noted that the Board had four members when the Federal Register published the proposed notice-posting rule on December 22, 2010. Three members, Wilma B. Liebman, Mark G. Pearce, and Brian Hayes, were confirmed by the Senate:

> Our judgment is that the time of filing with the Office of the Federal Register is the appropriate time for determining whether the Board had a valid quorum. That the Board may have lost a quorum before its rule was published did not render its rule invalid.

- Turning to the merits, the court held that the notice rule conflicted with Section 8(c) of the NLRA – the "free speech" provision of the Act. The D.C. Circuit concluded that creating a new unfair labor practice or finding unlawful motivation in an unfair labor practice case, based on the failure to post the notice, amounted to an impermissible restriction on employer free speech. In its opinion, the court stated the following:

> [T]he Board's rule requires employers to disseminate such information, upon pain of being held to have committed an unfair labor practice. But that . . . hardly ends the matter. The right to disseminate another's speech [the Board's notice] necessarily includes the right to decide not to disseminate it.
>
> . . . .
>
> Like the freedom of speech guaranteed in the First Amendment, [Section] 8(c) necessarily protects – as against the Board . . . – the right of employers (and unions) not to speak.

- The court found that the Notice Rule's tolling penalty for failure to post the notice conflicted with Section 10(b)'s six-month statute of limitations for filing unfair labor practice charges. According to the D.C. Circuit, "the Board made no effort to demonstrate that when [Section] 10(b) became law in 1947, Congress would have had any basis for assuming that the six-month limitations period might be modified by the sort of tolling rule announced [by the Agency] sixty-four years later."

- Based upon the unanimous findings, the opinion declined to address whether the NLRB lacked the authority – under Section 6 of the NLRA – to issue the rule in the first place. In a concurring opinion, two justices articulated why, in their judgment,

Section 6 does not authorize the issuance of the notice posting rule.

Implications of the Circuit Court Decision

In 2011, the Agency suspended enforcement of the notice posting rule because of various the legal challenges. A federal court in South Carolina previously held that the NLRB lacked the authority to promulgate the rule. The appeal in that case is currently pending before the Fourth Circuit Court of Appeals. As of this writing, the NLRB has not decided upon a course of action to the D.C. Court decision.

For the foreseeable future, the notice posting rule will not be enforced by the Agency, pending appeal to the full D.C. Circuit or potentially to the U.S. Supreme Court. Any future "split" among the U.S. circuit courts increases the probability for review of the notice posting rule by the Supreme Court later in 2013 or 2014.

The storm of litigation surrounding the policy changes by the Agency demonstrates that the aggressive pro-labor agenda set by the Agency may prove more difficult to implement than anticipated. One must wonder if a more "incremental" approach by the NLRB would have ultimately accomplished more positive results for labor organizations and its supporters. The Agency must be (or at least should be) having second thoughts, as resistance to the sweeping policy and procedural changes contemplated by the Board have not faded over time.

LATE BREAKING NEWS

As a Senate committee panel was holding confirmation hearings on the nomination of the President's five members to the National Labor Relations Board, the Third Circuit Court of Appeals held that the Administration's recess appointment of Craig Becker to the Board during a March 2010 intrasession Senate break was invalid. Therefore, the NLRB panel including Becker lacked a valid quorum to issue a bargaining order to a New Jersey nursing facility (*NLRB v. New Vista Nursing* & *Rehab.*, 3d Cir., No. 11-3440, 5/16/13).

This is the second federal appeals court to rule that recess appointments of NLRB members were unconstitutional because they did not occur during an intersession recess of the Senate.

In dissent, Judge Joseph Greenaway said although the majority did not rule on the January 4 appointments of Members Block, Flynn and Griffin, it presumably would find those appointments likewise invalid. Greenaway claimed that the majority decision "undoes an appointment process that has successfully operated within our separation of powers regime for over 220 years."

This decision constitutes another setback for the Agency. The back log continues to build while the recess appointment controversy remains unresolved.

- Since the January appointments, the NLRB has issued 368 contested decisions, which can all be called into question under *Noel Canning.* In the D.C. Circuit alone, 46 pending cases are on hold.
- In other circuit courts where Board cases were decided by recess appointees, 38 cases have raised a *Noel Canning* issue. Challenges to the appointment of Craig Becker have been raised in 34 pending cases, with 28 of those cases on hold in the D.C. Circuit.
- Agency records indicate that *Noel Canning* has been cited at some stage in 144 cases. NLRB officials admit that some unfair labor practice hearings have been postponed because of *Noel Canning* issues.

EEO Tips: EEOC Seeks Input on Regulations for Wellness Programs

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Although employers have been using wellness programs for many years, according to EEOC Commissioner Chai

Feldblum, they have been rapidly increasing over the last ten years. Feldblum cited statistics showing that in 1998-1999 only 19% of full-time private sector employees had access to employer-sponsored wellness plans. He stated that more recently a survey conducted by the *Society for Human Resource Management* (SHRM) in December 2012 shows that 55% of its member organizations now offer wellness plans. Finally, on this point, the EEOC in its press release of May 8, 2013 referred to a study by Karen Politz of the Kaiser Foundation which asserts that "94 percent of employers with over 200 workers, and 63 percent of smaller ones, offer some sort of wellness program."

There are a number of reasons for this increase. First of all, there is the general perception that wellness programs are good for bottom line business reasons. Reportedly, they improve the lives of employees while increasing the organizations' productivity and lowering the employer's overall long-term health expense cost. Secondly, under Section 1201 of the Affordable Care Act (ACA), Congress encouraged the growth of wellness programs by exempting those wellness programs from the provisions of the Health Insurance Portability and Accountability Act (HIPAA) which prohibit discrimination against any employee with respect to premiums, if the program conditions a percentage of the employee's premiums on the attainment of certain positive health outcomes, and the program meets certain other conditions or standards. Thirdly, for some time now, the Americans with Disabilities Act (ADA) has allowed employers to ask for medical information on a "voluntary" basis in connection with the conduct of wellness programs in order to facilitate the objectives of the program.

However, the provisions in the ACA and HIPAA do not directly apply to the ADA and the Genetic Information Nondiscrimination Act (GINA), which also place restrictions on the design and use of information obtained or obtainable through wellness programs. And, even though the ADA allows employers to obtain medical information in connection with a wellness program on a voluntary basis, the EEOC has not provided clear, comprehensive regulations or guidance on the issue of voluntariness, or reasonable accommodations, rewards and incentives for disabled employees in meeting the health goals under wellness programs. Thus, on May 8, the EEOC sought input from employers and other public stakeholders as to how to approach these problems.

Specifically, Commissioner Feldblum stated that the Commission was seeking answers to the following questions:

1. What accommodations must an employer provide to employees with disabilities who participate in wellness programs?

2. When is a medical examination or inquiry a "part of an employee health program?"

3. When is a medical examination or inquiry that is part of an employee health program considered a "voluntary" examination or inquiry?

Several participants in the Commission meeting on May 8 made potentially useful recommendations in response to Commission Feldblum's questions.

For example, Jennifer Mathis, Director of Programs at the Bazelon Center for Mental Health Law (on behalf of the Consortium of Citizens with Disabilities) made the following suggestions with respect to wellness programs that reward individuals for meeting health targets (i.e., Health-Contingent Wellness Programs) or penalizes them for failing to meet those targets:

1. Since the EEOC already recognizes that reasonable accommodations are required to afford employees with disabilities equal opportunities to meet the health targets and avoid any penalties, to the extent required by the ADA.

2. An employer, therefore, who offers "…a health-contingent wellness program must ensure that, if an employee cannot meet the standard due to a disability, the employee is afforded the reasonable accommodation of having the opportunity to meet an alternative standard that is feasible for the individual to meet given his or her disability – or waiver of the standard if there is no feasible alternative standard (unless the employer demonstrates that doing so is an undue hardship)."

Mathis in effect would simply clarify the reasonable accommodation requirement in existing law.

Former EEOC Commissioner (Vice Chair) Leslie Silverman, now a partner in the law firm of Proskauer Rose, LLP, proposed to simplify the entire process of defining terms and setting limitations on wellness programs. In substance, she suggested that the Commission "…articulate plainly a policy that compliance with the complex scheme contained within HIPAA and the ACA will be compliance for purposes of federal EEO law." According to Ms. Silverman, the adoption of this policy would greatly assist employers in implementing wellness programs by having a uniform set of rules which apply to all of the statutes, instead of having to craft their programs based upon a number of individual statutes which cover basically the same principles of law.

Judith Lichtman, Senior Advisor, National Partnership for Women and Families, expressed deep concern about the punitive provisions of some wellness programs because of their potential violation of other anti-discrimination statutes beyond the ADA. For example, she cautioned that:

1. Wellness programs that impose disproportionate penalties or disproportionately deny rewards, or result in unequal provision of health insurance coverage on the basis of sex, race or national origin may violate Title VII. For example, she cites the case of *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) in which the Supreme Court held that health insurance and other fringe benefits are compensation, terms, conditions, or privileges of employment under Title VII. "Charging increased fees or denying rewards for failure to meet certain biometrics are practices that could be subject to a disparate impact challenge under the Title VII framework."

2. Wellness programs that disproportionately impose penalties or deny rewards to older workers may violate the Age Discrimination in Employment Act. For example, she states that if the punitive aspect of a wellness program has a disparate impact on older employees who typically are more likely to suffer from a range of chronic conditions (some, if not all, of which also would qualify as disabilities under the ADA or the Rehabilitation Act of 1973), it may violate the ADEA as well as the ADA.

In substance, Ms. Lichtman suggested that in drafting the regulations and guidance pertaining to wellness programs, the EEOC made clear the potential violations of Title VII and the ADEA. This may be important since the emphasis at the Commission's meeting seemed to be on violations of the ADA.

The EEOC will hold the Wellness Commission meeting record until May 23. It is expected that the new or revised regulations or guidance pertaining to wellness programs will be issued in the next few months.

EEO Tips: While it is clear that the Commission's meeting on May 8 concerned technical, legal refinements in the EEOC's regulations pertaining to wellness programs, employers should be aware that there are many items that can be included in such programs that involve little or no risk in terms of legality and may be implemented at minimal cost. For example:

- Cafeteria Menus: If you have a cafeteria, offer "healthy choice" items at a discount.
- Wellness Library: Set up a wellness library with books and tapes on topics involving good health diets and habits.
- Office Publications: Publish or post healthy tips in newsletters, paycheck stuffers, bulletin boards, etc.
- Work Schedules: Establish a program of flexible work schedules so that employees can participate in weight loss programs.
- Smoke-Free Workplace: Create a smoke-free workplace and smoke-free grounds.
- Vending Machines: Add healthy alternatives to existing snack options in vending machines.

The foregoing is only a small sample of the wealth of information concerning the contents of workable wellness programs which can be found on the internet.

Obviously, our concern in this article is not with the construction of wellness programs, *per se*, but with those which contain provisions that could violate the ADA, Title VII or the ADEA. The most critical components of wellness programs are those which leave some question as to the voluntariness of the medical information which may be obtained from employees, and those which include rewards and penalties as incentives for attaining positive medical outcomes and, thus, may require a reasonable accommodation for employees with disabilities. Such wellness programs usually have many legal complications and require the assistance of legal counsel. Please call this office at 205.323.9267 if you have questions and need legal assistance with respect to your wellness program.

OSHA Tips: OSHA and Temporary Employees

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.

There is a significant volume of published and anecdotal accounts, as well as hard data, that point to an increased risk of injuries to new, part-time and temporary employees. In one such case, OSHA's investigation found that the employee had his head inside a machine when he turned a control the wrong way causing him to be struck in the head and killed. He had been with the employer for only four days.

In a second case, an employee was moving roofing material on a roof without receiving any training or instructions. He fell eighteen feet onto a concrete floor. It was his first day on the job.

Another case drew a significant penalty from OSHA when the agency found temporary employees welding in an area where there was the likelihood of exposure to significant levels of lead. The employer failed to provide respirator fit testing and allowed work in this environment for about two weeks.

In a recent case, an employee was issued willful citations when a twenty-one year old temporary employee was crushed to death by a palletizer machine. The resulting violation alleged that the employer failed to develop lock-out procedures and to train employees in such procedures.

OSHA violations have frequently involved the failure to provide leased or temporary employees the required protective equipment or to provide the proper training. This suggests that there may be a reluctance to invest the necessary time and expense for short-term employees. Employers should be aware that even for a very brief job, an employee must be adequately prepared and instructed so as to perform the work safely while utilizing all necessary protective gear.

OSHA addresses the issue of the respective responsibilities of the lessor-employer and the client-employer. The labor supply agency, in its continuing relationship with the employee, must assume some record keeping and perhaps generic training responsibilities. The client-employer who creates and controls the work environment has primary responsibility regarding exposures to workplace hazards.

On "Worker Memorial Day," April 29, 2013, OSHA announced an initiative to further protect temporary employees from workplace hazards. The agency will begin entering a code in its data base to denote when temporary workers are found exposed to safety and health violations. They will assess whether temporary workers receive training that is understandable to them. The implementing directive to OSHA staff states as follows: To better identify this vulnerable population, we need your assistance gathering and tracking certain information during inspections of work sites where temporary workers are employed. For purposes of this information gathering, "temporary worker" includes those who are working under a host employer/staffing agency employment structure.

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.

The minimum wage continues to be a hot topic today as it has been throughout the 21st century. For example, records shown on the U.S. Courts website indicate that over 8000 Fair Labor Standards Act suits were filed in federal district courts during the fiscal year ended September 30, 2012 (the Northern District of Alabama had the 2nd highest number of suits in the country during 2012). Currently, there are at least two bills pending to increase the minimum wage. In addition, an Alabama Congresswoman has introduced a bill to provide for the use of comp time by private employers.

Minimum Wage Increase. The President, in the State of the Union address, indicated that he would like to increase the minimum wage to $9.00 per hour by the end of 2015 and to index the minimum wage to inflation thereafter. Information from the White House website indicates this would directly raise the wages of over 15 million workers and millions more would be affected by employers choosing to raise wages for workers making more than the minimum wage. The website also lists several large retailers that have indicated they are in favor of increasing the minimum wage, including quoting a VP of Costco who states that their beginning wage is $11.00 per hour. They also point out that the minimum wage has been raised 22 times from the initial $.25 per hour that was established in 1938 and that this increase would restore the real value of the minimum to what it was in 1981.

Earlier this year, Senator Tom Harkin of Iowa and Representative George Miller of California introduced a bill to increase the minimum wage by $.95 per hour each of the next three years. This would increase the minimum wage to $10.10 per hour. Additionally, the minimum wage for tipped employees would increase to $3.00 per hour immediately, with further increases to bring it to 70% of the minimum wage. Further increases of each of the amounts would be tied to the Consumer Price Index. Senate Majority Leader Harry Reid has announced that the Senate will consider this bill in July 2013.

The Small Business Majority, an advocacy group, released an on-line survey conducted by Greenberg Quinlan Rosner Research in March 2013 with 500 small business owners. The poll found that 67% of the respondents said the minimum wage should increase, while 33% opposed an increase. The release also stated that 65% of the respondents felt that an increase in the minimum wage would help the economy. Recently, employees of fast food establishments in New York, Chicago, and at least two other large cities have conducted walk-outs in an effort to obtain increases in the minimum wage.

Comp time. Congresswoman Martha Roby of Montgomery has introduced the Working Families Flexibility Act of 2013. The purpose of this Act is to allow employees of privately owned firms the flexibility of being able to take time off in lieu of being paid overtime as the FLSA now permits public employers to do. The proposal would allow employees to voluntarily accrue 1.5 hours of comp time, in lieu of cash overtime, for each hour of overtime worked with a maximum of 160 hours. Employers would be required to cash out the employee's balance if the employee leaves the employer or at the end of each year. The employee would be entitled to use comp time "within a reasonable period" unless this would "unduly disrupt" the employer's operations. However, the employer could not require employees to accept comp time in lieu of cash overtime. On May 8, 2013, the U.S. House of Representatives passed this bill by a vote along party lines of 223 to 204. However, indications are that it will not pass the Senate and, even if it does, the President has said he will veto it.

I am sure that many employers would be very happy to have the ability to allow employees to accrue and use comp time, but I recently read an article published by a national employment law firm entitled "Be Careful What You Wish For." The article pointed out several pitfalls of attempting to use comp time. As pointed out above, public agencies such as schools and local governments have been able to use comp time since 1985; however, I have found that many of these employers do not use this provision. They have determined that it is not the panacea that most people think it is because of the potential liability incurred by carrying the comp time on the books, the additional recordkeeping required and also

the difficulty in scheduling coverage when you have employees that are requesting to use their comp time.

In looking at the budget request for FY 2014 (beginning October 1, 2013), Wage and Hour is requesting a full time equivalent of 1872 employees, which includes all staff. There has been a more than 50% increase from the low of 1200 in FY 2007. As in previous years, Wage and Hour proposes to target certain industries that employ vulnerable workers for investigations. Those include industries with substantial subcontracting and independent contracting workers such as residential construction. Also targeted are hospitality, home health care, childcare and janitorial companies. Further, the budget request also states they expect to spend some 40% of their resources conducting directed investigations. Thus, I would expect if you are in one of the industries mentioned above, you have an above average chance of being investigated. In view of the extra scrutiny being put on employee compensation, I recommend employers take a very close look at their pay practices to ensure they are paying employees in compliance with the Fair Labor Standards Act. If I can be of assistance do not hesitate to give me a call.

2013 Upcoming Events

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Birmingham – September 25, 2013
Rosewood Hall

Huntsville – October 9, 2013
U.S. Space & Rocket Center

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…

…President Obama this month acknowledged that federal agencies have a role to play in ending pay disparity, where women in the federal government earn 77 cents for every dollar paid to men? As a result, the President ordered each federal agency to develop a plan to address pay disparities between men and women. The federal agencies employ over 4.4 million employees. Each agency must submit its policies on salaries and promotions to the Office of Personnel Management, and include agency-specific policies to help employees return to careers after extended time off, such as for female employees who left work to raise children.

…In the case of *EEOC v. Hill County Farms, dba Henry's Turkey Service*, (S.D. Iowa, No. 3:11-cv-00041-CRW-TJS), the EEOC claimed a jury verdict totaling $240 million on behalf of 32 men with intellectual disabilities who allegedly had been subjected to verbal and physical harassment and other discriminatory terms and conditions of employment over a two year period? According to the EEOC this was the largest verdict in the agency's history for disability discrimination and severe abuse.

…a group of 200 opt-in plaintiffs and potentially 5,000 class members will receive proceeds from a $2.2 million settlement of FLSA and ERISA claims paid by UMass Medical Center, Inc. (*Cavallaro v. UMass Mem'l Health Care, Inc.* (D. Mass No. 4:09-cv-40152))? The employees' suit alleged up to 40 hours per week in unpaid, interrupted meal breaks, and post-shift work, and that UMass failed to maintain adequate records of this time worked in a breach of its fiduciary duty to them under UMass's ERISA-governed benefits plans. This case is yet another example of the growing trend of expanding an FLSA case into an ERISA case where the untracked and unpaid hours also affected employee eligibility for or benefits received from an employer's health and welfare and retirement benefit plans.

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