EMPLOYERALERTS
OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

BY CHARLES H. FLEISCHER, ESQ.

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Abortion Discrimination Held Covered by Title VII

Title VII of the federal Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, defines sex discrimination to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions." The question before the U.S. Court of Appeals for the Third Circuit, headquartered in Philadelphia, was whether Title VII protects women who elect to terminate their pregnancies. The Court held that it does.

CARS, the employer in the case, insures used automobiles. It hired Jane Doe as a graphic artist. About a year later, Doe learned that she was pregnant. A few months into the pregnancy, Doe's physician ran some tests and informed Doe that her baby was severely deformed. The physician recommended terminating the pregnancy. Doe agreed.

The next day, Doe's husband telephoned Doe's supervisor, explained the situation, and requested that his wife be allowed to take a week off for the procedure and some vacation time. According to the husband, the supervisor approved the leave. A few days after the procedure, Doe and her husband held a funeral for the baby.

While on what she thought was approved leave, Doe learned that she had been fired. Believing that the firing was because she elected to have an abortion, she sued CARS for sex discrimination. In approving the claim, the Third Circuit concluded that an abortion is a "related medical condition" within the meaning of Title VII. In reaching that conclusion, the Court relied in part on Equal Employment Opportunity Commission Guidelines stating that it is an unlawful employment practice to fire a woman because she has had an abortion.

The Court pointedly noted that the employer fired Doe just a few days after it learned about the abortion and on the very day of the baby's funeral. If that weren't enough, the employer went out of its way to embarrass Doe, objecting to her use of a pseudonym during the case, and even complaining that the trial judge should not have sealed the court record. Those kinds of spiteful litigation tactics do little to help an employer's cause.

References: 42 U.S.C. § 2000e; 29 C.F.R. § 1604 App.; *Doe v. CARS Protection Plus, Inc.*, 527 F.3d 358 (3rd Cir. 2008).

Prior Employer Liable for Concealing Doctor's Drug Addiction

Dr. Robert Berry was a partner in Louisiana Anesthesiology Associates (LAA), working at Lakeview Regional Medical Center in Covington, Louisiana. Unfortunately, he had a drug habit. After nurses expressed concern about undocumented and suspicious withdrawals of Demerol – a narcotic similar to morphine – Lakeview investigated and learned of Dr. Berry's drug use. Lakeview and LAA insisted that his Demerol use be monitored and controlled, and Dr. Berry agreed. But some three months later, while on duty at Lakeview, he failed to answer a page. He was later discovered in a call room asleep, groggy, and unfit to work. At this point, Lakeview revoked his privileges and LAA fired him. His termination letter read:

> You have been fired for cause because you have reported to work in an impaired physical, mental, and emotional state. Your impaired condition has prevented you from properly performing your duties and puts our patients at significant risk

Despite recognizing Dr. Berry's drug problem and the danger he posed to patients, neither Lakeview nor LAA reported Dr. Berry's impairment to Lakeview's Medical Executive Committee or its Board of Trustees, nor did anyone report the matter to the Louisiana Board of Medical Examiners or the National Practitioner's Data Bank. In fact, at some point Lakeview's CEO took the unusual step of locking away in his office all files and notes concerning Dr. Berry and the investigation.

Some two months later, Dr. Berry applied for staff privileges at Kadlec Medical Center in Washington State. During Kadlec's credentialing process, it contacted LAA. One of Dr. Berry's former partners at LAA responded by recommending him highly as an anesthesiologist. Another former partner responded similarly that Dr. Berry was an excellent clinician and would be an asset to any anesthesia service. Neither letter mentioned the drug problem. Kadlec then approved Dr. Berry's application and granted him privileges.

On one particular day, Dr. Berry was assigned to Kadlec's operating room beginning at 6:30 a.m., where he worked well into the afternoon. Kimberley Jones was his fifth patient that day. She was in for what should have been a routine, fifteen minute tubal ligation. When they moved her into the recovery room, one nurse noticed that her fingernails were blue, and she was not breathing. Dr. Berry failed to resuscitate her, and she was left in a permanent vegetative state.

When confronted about the incident, Dr. Berry confessed that he was addicted to Demerol. He immediately admitted himself to a drug rehabilitation program.

Jones's family sued Kadlec for negligence. Kadlec eventually settled with the Jones family for $7.5 million, after incurring legal expenses of $744,000 in defending the suit. Kadlec then sued LAA to recover what it had paid out in the Jones suit, claiming that LAA's earlier reference letters were misleading.

The U.S. Court of Appeals for the Fifth Circuit agreed that the reference letters were intentionally misleading on their face. The Court explained that while LAA had no affirmative duty to respond to Kadlec's inquiry, when LAA undertook to do so it incurred a duty to speak truthfully. To recommend an drug addict as an "excellent clinician" and "an asset to any anesthesia service" fell far short of the truth.

Reference: *Kadlec Medical Center v. Lakeview Anesthesia Associates*, 527 F.3d 412 (5th Cir. 2008).

Employer May Change Terms of At-Will Employment

Most states treat the employment relationship as at-will unless the parties have entered into a contract stating otherwise. This means that either party can end the relationship at any time for any reason (except an illegal reason, such as discrimination), or for no reason at all. But can the employer unilaterally change the terms and conditions of employment without actually terminating the relationship?

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A recent District of Columbia case answers a clear "yes."

William Kauffman worked for United Parcel Service in New Jersey. In 1992 he took a leave of absence from UPS to become a representative of the International Brotherhood of Teamsters (IBT). Kauffman's employment with IBT was at will.

In 1993, Mario Perrucci, an IBT official, asked Kauffman to relocate to Washington, D.C. Perrucci agreed that IBT would compensate Kauffman to offset the higher cost of living in Washington. Specifically, IBT offered to reimburse his housing expenses, and Kauffman accepted this offer as a condition of his agreement to relocate. Kauffman maintained his home in New Jersey as his permanent residence and obtained an apartment in Washington. IBT reimbursed him for his housing expenses in Washington until late 1994.

In December 1994 IBT changed its policy somewhat and decided to pay Kauffman a monthly housing allowance of $1,000. As of that time, Kauffman still owned his home in New Jersey, but spent all of his time in Washington because of his assignment and because he and his wife had divorced. In July 1995 Kauffman requested that IBT update its records to show his permanent address as Arlington, Virginia.

In April 1996 IBT's human resources director sent Kauffman a memo stating that he no longer qualified for a housing allowance because he had relocated his permanent residence to the Washington, D.C. area and would not have to maintain two residences. Kauffman protested the change without success.

Kauffman continued to work for IBT for three more years. Finally, in March 1999 he sued IBT for the unpaid housing allowance; IBT fired Kauffman the next day.

The D.C. Court of Appeals rejected Kauffman's claim. The Court ruled that an employer may prospectively modify the terms of at-will employment and the employee's continued service, with knowledge of the modification, amounts to acceptance of the modification. This is so, said the Court, because the ability to *terminate* an at-will employment relationship necessarily includes the ability to *alter its terms*.

Two notes of caution.

First, an employer cannot change employment terms *retroactively*. When an employee has actually performed work with an understanding as to what his compensation and benefits will be, the compensation and benefits are deemed earned and cannot be taken away. For example, if the employer has an announced vacation policy under which an employee accrues a day of paid leave each month, an employee who has been on the job a year cannot be denied his full 12 days of vacation. Of course, the employer can change the policy *prospectively*, saying for example that *from now on* employees earn only 10 days of leave a year.

Second, an employer could be liable in money damages if it *misrepresents* the terms and conditions of employment. Suppose, for example, that an employee quits a secure, well-paying position in Silicon Valley, sells his Marin County home at a loss, and moves with his family to a new job in Maryland, only to find that the stock options he was promised by his Maryland employer will not be forthcoming. It could be argued that, given his at-will status, the employee cannot complain about a change in terms and conditions of employment. The more likely result, however, is that the employee has a good claim for deceit against the Maryland employer. See "Negligent Misrepresentation in the Hiring Process," EMPLOYER ALERTS, Oct. 2000, p. 1; "Misrepresenting Job to Applicant Held Actionable," EMPLOYER ALERTS, Winter 2004, p. 4.

Reference: *Kauffman v. International Brotherhood of Teamsters*, 2008 WL 2367215 (D.C. 2008); *National Rifle Ass'n v. Ailes*, 428 A.2d 816 (D.C. 1981).

Crane Operator Gets A Head

Where's the headlight on a submarine? Why, it's in the head, of course! Apparently that old joke doesn't apply to cranes, however, as shown by a recent case from Ohio.

Cassandra Johnson was one of only seven female crane operators, out of approximately 200, employed at AK Steel, a steel manufacturing company. Prior to being hired by AK Steel, she had worked as a crane operator at LTV Steel for 13 years.

For her first month or so at AK Steel she was assigned to a crane in the "roll shop," where she was required to load rolled steel into waiting trucks. She did not perform to the company's expectation in that position, so she was transferred to a crane in the "slab yard" where her job was to move steel slabs from train cars into combustion furnaces. Access to the cab of the slab yard crane was by climbing three flights of steps, hand-over-hand.

On the first day of her job in the slab yard, Johnson and a shift manager boarded the crane together in order for the shift manager to train her. During the training session, Johnson asked the manager about bathroom breaks and she was told that the slab yard cranes operate continuously and there was no one available to give her a break. Therefore, if she needed to use the bathroom she would have to urinate off the back of the crane. When she stated that, as a female, she wasn't able to urinate off the back of the crane, the manager responded, "Well, I don't know what to tell you."

When the training session was finished, Johnson climbed down from the crane and approached a foreman about the bathroom break issue. According to Johnson, the foreman confirmed that the procedure was to urinate off the back of the crane.

Johnson insisted that she could not perform the slab yard crane job without proper bathroom breaks. When AK Steel was unable to offer her any other crane-operator position, she left the company and sued for sex discrimination.

The U.S. District Court in southern Ohio ruled that Johnson had a good claim and that she was entitled to a jury trial. Given the "obvious anatomical and biological differences between men and women and the unique hygienic needs of women," said the Court, a policy of requiring women to urinate off the back of a crane in lieu of restroom breaks has a significant discriminatory impact on women.

The Court did not mention the equally significant impact of the employer's policy on persons working below the crane.

Reference: *Johnson v. AK Steel Corp.*, 2008 WL 2184230 (S.D.Ohio, 2008).

Don't Mess With Texas

Katrina Haskins worked for a chain of hair salons known as Supercuts in Texas. After about a year on the job, she was promoted to area supervisor. A few months later, two of her subordinates lodged a complaint about her. According to Haskins, the subordinates complained because they did not like being supervised by someone of Haskins's race and color. Also according to Haskins, two members of senior management at Supercuts were aware of the race-based motive for the complaint, but did nothing about it.

Believing that some action should have been taken, Haskins filed a charge with the EEOC. Shortly thereafter she was reassigned.

Haskins apparently did not adjust well to the reassignment. Claiming stress, she took six days off for a single visit to a psychotherapist. She also neglected her job in other ways, such as leaving the salon while on the clock, closing early, refusing to serve customers, and falsifying time records. These deficiencies prompted Supercuts to fire Haskins. (continues)

Haskins sued Supercuts, its parent corporation, and four senior employees, claiming a variety of alleged wrongs, including discrimination under the federal Civil Rights Act and the Age Discrimination in Employment Act, violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution, a Family and Medical Leave Act violation, defamation, and conspiracy. Haskins's husband also sued for loss of consortium – presumably claiming that Haskins was unavailable to him because of the stress Supercuts had caused her.

The U.S. District Court sitting in Houston dismissed all the claims as frivolous and unfounded. The Court said that Haskins should never have filed her suit in the first place and her persistence in the litigation lacked common sense and showed bad faith.

Here's the interesting part: Because of Haskins's improper conduct in filing and pursuing her case, the Court ordered her to pay *$300,000* to Supercuts as reimbursement for legal fees in defending the suit.

Reference: *Haskins v. Davis* (S.D.Tex. No. H-06-2422, decided May 20, 2008) (unreported).

Supreme Court Finds Implied Anti-Retaliation Right

In a 7-2 decision, the Supreme Court has ruled that a civil rights act first adopted in the aftermath of the Civil War prohibits retaliation – even though the act itself says nothing about retaliation. The act, now known as § 1981, guarantees to all citizens of the U.S. the same right as white citizens to make and enforce employment and other contracts. The act plays a significant role in discrimination cases because, unlike Title VII of the Civil Rights Act of 1964, it does not require an employee to file with the EEOC or a state or local administrative agency before suing in federal court. Also unlike Title VII, the act does not have any dollar caps on compensatory damages.

Under this new ruling, an employee who is discharged or who otherwise suffers an adverse action for complaining about race discrimination may now sue under § 1981.

The majority opinion was written by Justice Breyer, with Justices Roberts, Stevens, Kennedy, Souter, Ginsburg and Alito joining. Justices Thomas and Scalia dissented. Justice Thomas's dissent begins with the statutory language itself which, in his view, is on its face a straightforward ban on racial discrimination in the making and enforcing of contracts – and nothing more. A construction of § 1981 as also prohibiting retaliation has no basis in the statutory text, said Justice Thomas.

Ironically, just two years ago the Court paid close attention to the specific statutory language of Title VII in deciding a retaliation claim. In that case the Court concluded that the scope of the *anti-retaliation* provision of Title VII was broader than the scope of Title VII's *anti-discrimination* provision, based largely on the differences in wording of the two provisions. If slight differences in statutory language compel a different result, one would surely think that the complete absence of a retaliation provision in § 1981 should compel a different result as well. But one would be wrong in such thinking, according to the Supreme Court majority.

References: 42 U.S.C. § 1981; *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Burlington No. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

What Happens When You Lose a Discrimination Case?

Many lawsuits are settled by agreement of the parties without actually going to trial. Of course, the settlement terms reflect, at least in some measure, the parties' expectations of what might happen if the case goes to trial. A recent settlement between the Equal Employment Opportunity Commission and Ralphs Grocery provides a good example of where a discrimination case can end up.

In 2007 the EEOC sued Ralphs in Illinois federal court, alleging that Ralphs illegally retaliated against employee

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Doris Martinez when it fired her for filing a charge of discrimination. The EEOC also alleged that the particular mandatory arbitration policy Ralphs had adopted interfered with its employees' rights to file discrimination charges.

Without admitting any wrongdoing, Ralphs agreed to a settlement of the EEOC's suit. The parties then drafted a consent decree reflecting the settlement, which the Court approved and signed. The consent decree:

- enjoined Ralphs and its officers and employees from retaliating against anyone for exercising their rights under the discrimination laws (meaning that if Ralphs retaliates in the future, it not only can be sued, but it is also in contempt of court);
- enjoined Ralphs and its officers and employees from maintaining a mandatory arbitration agreement that interfered with employees' rights to file discrimination charges;
- required Ralphs to pay Martinez $70,000;
- required Ralphs to post a summary of the consent decree at each of its business locations, which had to remain in place for two years;
- required Ralphs to maintain records of all retaliation complaints made against it for the next two years, to make those records available to the EEOC, and to submit semi-annual reports to the EEOC summarizing the information contained in the records;
- required Ralphs to conduct training sessions for all its HR personnel (paid for by Ralphs and subject to EEOC approval), to provide details to the EEOC of who attended and what was taught, and to certify to the EEOC that it had done so;
- required Ralphs to change its form of arbitration agreement and to provide a Spanish language copy to any employee who requested one; and
- required Ralphs to provide the EEOC with a list of all employees who complained informally of discrimination within the past two years and to forego any defense of untimeliness should any of those employees file formal charges of discrimination within the next 120 days.

Reference: *EEOC v. Ralphs Grocery Co.* (N.D.Ill. No. 07 C 5110, decided May 20, 2008) (unreported).

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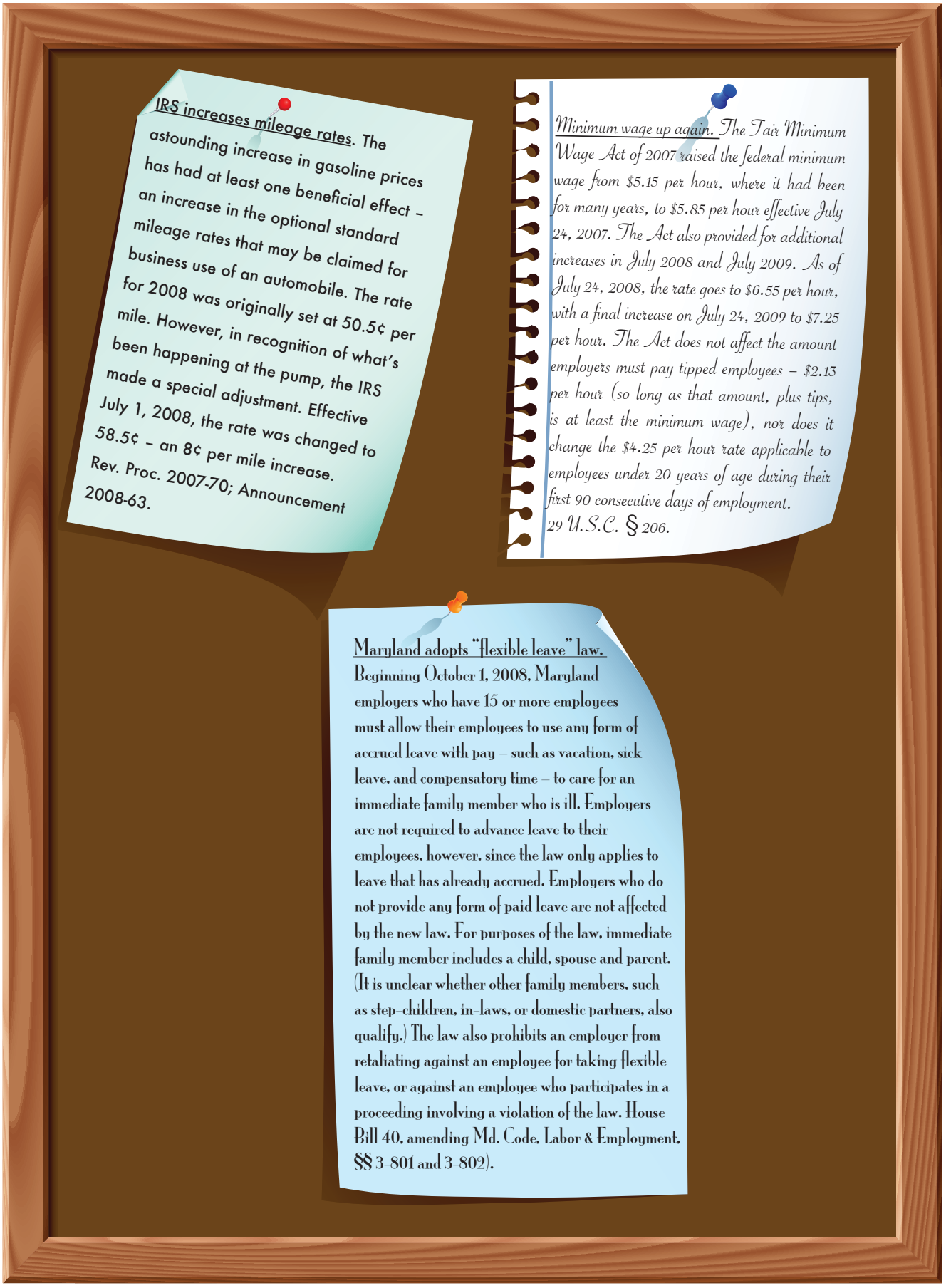

IRS increases mileage rates. The astounding increase in gasoline prices has had at least one beneficial effect – an increase in the optional standard mileage rates that may be claimed for business use of an automobile. The rate for 2008 was originally set at 50.5¢ per mile. However, in recognition of what's been happening at the pump, the IRS made a special adjustment. Effective July 1, 2008, the rate was changed to 58.5¢ – an 8¢ per mile increase. Rev. Proc. 2007-70; Announcement 2008-63.

Minimum wage up again. The Fair Minimum Wage Act of 2007 raised the federal minimum wage from $5.15 per hour, where it had been for many years, to $5.85 per hour effective July 24, 2007. The Act also provided for additional increases in July 2008 and July 2009. As of July 24, 2008, the rate goes to $6.55 per hour, with a final increase on July 24, 2009 to $7.25 per hour. The Act does not affect the amount employers must pay tipped employees – $2.13 per hour (so long as that amount, plus tips, is at least the minimum wage), nor does it change the $4.25 per hour rate applicable to employees under 20 years of age during their first 90 consecutive days of employment. 29 U.S.C. § 206.

Maryland adopts "flexible leave" law. Beginning October 1, 2008, Maryland employers who have 15 or more employees must allow their employees to use any form of accrued leave with pay – such as vacation, sick leave, and compensatory time – to care for an immediate family member who is ill. Employers are not required to advance leave to their employees, however, since the law only applies to leave that has already accrued. Employers who do not provide any form of paid leave are not affected by the new law. For purposes of the law, immediate family member includes a child, spouse and parent. (It is unclear whether other family members, such as step-children, in-laws, or domestic partners, also qualify.) The law also prohibits an employer from retaliating against an employee for taking flexible leave, or against an employee who participates in a proceeding involving a violation of the law. House Bill 40, amending Md. Code, Labor & Employment, §§ 3-801 and 3-802).

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EMPLOYERALERTS OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

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ADA Amendments Act Expands Disability Coverage

Under the Americans with Disabilities Act, an employer cannot discriminate on the basis of an individual's disability. An employer discriminates by, among other things, failing to offer a reasonable accommodation to a disabled individual if, with the accommodation, the individual would be able to perform the essential functions of his or her job. But despite its salutary objectives, the ADA has never been an easy statute to interpret or apply. Some have felt that the courts, including particularly the Supreme Court, have read the ADA too narrowly, resulting in exclusion from coverage of persons whom Congress had intended to protect by the Act.

The ADA Amendments Act (ADAAA), signed by President Bush on September 25, overrules several Supreme Court cases and instructs the courts to read the ADA more broadly and expansively. The likely result is that a larger number of employees and applicants will now enjoy disability discrimination protection. The ADAAA takes effect on January 1, 2009.

The ADA defines "disability" in part as a physical or mental impairment that substantially limits one or more major life activities. A 2002 Supreme Court decision interpreted this definition as requiring that the impairment prevent or seriously restrict an individual from doing activities that are of central importance to most people's daily lives. The ADAAA now says that this interpretation was too narrow and it instructs the courts to apply a broader, more inclusive interpretation.

Another Supreme Court case had interpreted the ADA as requiring consideration of mitigating measures in determining whether a particular impairment amounted to a disability. For example, if a person suffering from insulin-dependent diabetes is able to control the diabetes by diet, insulin injections and blood-sugar monitoring, then that person may not have a disability for ADA purposes. The ADAAA, however, now instructs the courts, when determining whether an impairment is a disability, to disregard the ameliorative effects of most mitigating measures, such as medication, medical equipment or

appliances, low-vision devices, prosthetics, hearing aids, mobility devices, oxygen therapy, and assistive technology. The only exceptions are eyeglasses and contact lenses, which *may* be considered in determining whether an individual has a disability.

The ADAAA provides specific examples of "major life activities," including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. "Major life activities" also now include bodily functions, such as functions of the immune system and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

In yet another expansion, the ADAAA says an impairment that is episodic or in remission is now a disability if it would substantially limit a major life activity when active.

The courts have generally considered temporary impairments as not qualifying as disabilities. But precisely what was and was not temporary was open to some doubt. The ADAAA now says "transitory" and "minor" impairments are not disabilities, and it defines "transitory" as an impairment with an actual or expected duration of 6 months or less.

Under the ADA, it is also illegal to discriminate against an individual who is "regarded as" having a disability, even if the individual is not in fact disabled. A question arose, however, whether an employer must offer a reasonable accommodation to an individual who is regarded as disabled and, if so, just what that accommodation might be. The ADAAA now makes clear that an employer need not provide reasonable accommodation to an individual who is covered solely under the "regarded as" prong of the statute.

References: 42 U.S.C. § 12101; ADA Amendments Act of 2008, S. 3406 (110th Cong., 2nd Sess.); 29 C.F.R. § 1630.1; *Sutton v. United States*, 527 U.S. 471 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Court Denies "Outside Salesman" Exemption Claim

Under the Fair Labor Standards Act's "white collar" exemptions, an employer need not pay time-and-a-half for overtime work of bona fide executives, administrators, professionals and outside salesmen. The Act leaves to the U.S. Department of Labor the task of defining these terms. DOL defines "outside salesman" as an employee whose primary duty is making sales or obtaining orders and who is customarily and regularly engaged away from the employer's place business while performing such primary duty.

Unlike the other white collar exemptions, an outside salesman does not have to be paid on a salary basis to qualify. Instead, he or she may be compensated by base salary plus commission, or entirely by commission. So, for example, an outside salesman who fails to earn any compensation during a particular workweek still qualifies as exempt.

Issues that arises under the exemption include whether the outside salesman is away from the employer's place of business and whether he or she is actually making sales or obtaining orders.

DOL's regulations address the first issue. The regs require an outside salesman to be making sales or obtaining orders *at the customer's place of business*. Sales made by mail, telephone or the Internet are not at the customer's place of business and do not qualify. Similarly, the salesman's own home does not qualify because, for purposes of the exemption, it is considered

the employer's premises. These regulations were applied in denying the exemption to mortgage loan officers who did the bulk of their sales work from their employer's premises or from home through telephone and fax communications.

The second issue – whether the salesman is making sales or obtaining orders – was the subject of a recent case.

The U.S. Army contracted with a company named Serco to help recruit enlistees in the Army and Army Reserves. Under the contract, Serco was paid a commission each time one of its recruits enlisted. Serco in turn hired employees to do the actual recruiting work. The recruiters' duties included cold-calling prospective recruits and giving presentations to educational and social organizations where prospective recruits might be found.

Once a recruit was identified, Serco recruiters would administer pre-screening tests and obtain background checks to determine whether the recruit could qualify. The employees had no authority to enlist a recruit, however. Instead, the recruit had to go to a Military Entrance Processing Center, run by the U.S. Government, where the recruit underwent physical and mental testing and job counseling. If the recruit passed all tests and was interested in enlisting, he or she then took an Oath of Enlistment administered by an Army official.

After a recruit had enlisted, Serco employees would meet with him or her, provide training, and generally reinforce the recruit's decision to enlist.

Serco paid its recruiters a fixed salary, plus a commission if the recruiters reached certain quotas. Serco did not, however, pay overtime, even though the recruiters logged substantial overtime hours. Serco based its no-overtime policy on the outside salesman exemption.

The U.S. Court of Appeals disagreed and ordered Serco to pay its recruiters overtime. The Court reasoned that, even though the recruiters were "selling" the U.S. Army to prospective enlistees, they weren't actually making sales. The touchstone of a sale, according to the Court, is obtaining a commitment. Here, however, the recruiters could not obtain the recruits' commitment, since only a U.S. Army official could administer an Oath of Enlistment. Instead, the recruiters were more like promoters, paving the way for someone else – here, the Army – to make the sale.

References: 29 U.S.C. § 201; 29 C.F.R. § 541.500; *Chao v. First Nat. Lending* Corp., 516 F.Supp.2d 895 (N.D.Ohio 2006), *aff'd*, 2007 WL 2859747 (6th Cir. 2007); *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008).

Yawn Not Evidence of Discrimination

Dennis Arroyo began working for the Puerto Rico Telephone Company in 1981, at the age of 25. He received a series of promotions over the years, until 2001 when the Company was bought by Verizon. Verizon reorganized the Company and, in the process, eliminated Arroyos's position. At the age of 46, Arroyo applied for a newly-created position but was unsuccessful. Instead, he was offered and he accepted a lower position, which he considered a demotion.

As other positions opened, Arroyo continued to apply, but again without success. Some of the positions were filled by persons younger than Arroyo, which led him to believe he was the victim of age discrimination.

In support of his subsequent lawsuit, Arroyo offered evidence that one of his interviewers yawned during the interview. According to Arroyo, this showed that the interviewer had no interest in Arroyo's interview answers, which in turn showed that the interviewer had already made up his mind – presumably based on Arroyo's age.

The U.S. Court of Appeals for the 1st Circuit, headquartered in Boston, didn't bite. It ruled that while the involuntary act of yawning could make an interview awkward, it was no more evidence of discrimination than a sneeze or a cough. While the Court recognized that Arroyo was entitled to all reasonable inferences that could be drawn in his favor from the evidence, imputing an ulterior motive to a yawn is not a reasonable inference.

Reference: *Arroyo v. Verizon Wireless, Inc.*, 527 F.3d 215 (1st Cir. 2008).

Arizona Anti-Immigrant Act Not Preempted by Federal Law

The Constitution gives Congress the power to establish uniform rules of naturalization, and the Congress has done just that. For example, the Immigration Control and Reform Act (IRCA) requires employers to verify the eligibility of each of their new hires to work in the U.S. This requirement is satisfied by completing Form I-9 within three days of the employee's hire.

The U.S. Citizenship and Immigration Services, in partnership with the Social Security Administration, has developed a pilot program known as E-Verify (formerly called the Basic Pilot/Employment Eligibility Verification Program) which, after completing the I-9 process, allows employers to verify eligibility immediately over the Internet. E-Verify is a voluntary program for most employers, although U.S. Government contractors are required by an Executive Order to participate.

Congress has also specified that the IRCA preempts any state law that imposes civil or criminal sanctions on employers who employ unauthorized aliens, *other than through licensing and similar laws*. The question before the U.S. Court of Appeals for the Ninth Circuit, which sits in San Francisco, was whether an Arizona law was preempted by the IRCA, or whether instead it was a licensing law.

Under the Arizona law, employers in that state must use the E-Verify program to verify each

employee's eligibility, although the law does not impose any specific penalty for failing to do so. What the law does penalize, however, is the hiring of illegal aliens. Specifically, the Arizona law says that, for a first violation, the employer must discharge all such illegal workers and must file quarterly reports during a probationary period listing all new hires. A second violation during the probationary period results in permanent revocation of the employer's business license.

A number of businesses and civil rights organizations sued the state, arguing that the Arizona law was preempted by the IRCA. The state defended, claiming the law was a licensing law and therefore excluded from the preemption provision of the IRCA. The Ninth Circuit sided with the state and upheld the law. The Court also ruled that the E-Verify requirement was permissible in that, although the Congress made use of the system voluntary on a national level, it did not expressly forbid states from making it mandatory on a state level.

References: U.S. Const., Art. 1, Sec. 8; 8 U.S.C. § 1324a; E.O. 13465 (June 6, 2008); Ariz. Rev. Stat. § 23-211; *Chicanos Por La Cause, Inc. v. Napolitano*, 2008 WL 4225536 (9th Cir. 2008).

Ethics Complaint No Protection for *Dateline* Producer

Marsha Bartel worked as a journalist for NBC Universal for 21 years. She was a highly regarded investigative reporter, winning awards for her work.

In August 2006 NBC assigned Bartel to produce a *Dateline* segment called "To Catch a Predator." Material for the segment was developed by an organization called Perverted Justice, which uses agents pretending to be minors to lure adult men into Internet chat rooms. Once in the chat room, the parties make a date, the men believing that they are arranging a sexual assignation with a minor. When the men arrive at the meeting place, they are filmed by an NBC crew and arrested. The film is later televised on *Dateline*.

Bartel's duties as a producer of the segment included ensuring compliance with ethical standards of journalism and with NBC's own internal guidelines. Bartel concluded that production of the Predator segment violated a number of those standards and guidelines. For example, she believed that NBC was compensating law enforcement officials who participated in the process; she objected that Perverted Justice did not provide a complete transcript of the chat room encounters or identify all its agents; and she felt that the arrests were staged in such a way as to maximize the humiliation of the target men.

Bartel complained to NBC, without success. She then told NBC she could not continue producing the segment. NBC responded that it would not renew her contract. Bartel then sued for breach of her employment contract and abusive discharge.

A federal appeals court in Chicago, applying New York law (where the Bartel-NBC contract arose), concluded that NBC did not breach the employment contract, since NBC had a right not to renew. Turning to the abusive discharge claim, the Court concluded that even if Bartel could prove the termination was motivated by Bartel's complaint of ethical violations, the termination was not abusive.

The Court contrasted Bartel's situation with an earlier New York case in which a lawyer was fired after complaining about his law firm's violations of legal ethics. In the earlier case the New York court ruled that observance of ethical requirements was fundamental to legal practice and that firing an attorney for complaining about violations was contrary to New York's public policy.

But in this case, journalistic ethics and guidelines do not trigger the same public policy considerations as legal ethics, so that terminating Bartel for her complaints was not an abusive discharge.

Reference: *Bartel v. NBC Universal, Inc.*, 2008 WL 4172247 (7th Cir. 2008).

Automatic Extension Invalidates Non-Compete Covenant

Most courts will uphold a non-compete agreement between an employer and an employee if the restriction on competition after the employment ends is reasonable. "Reasonable" usually involves looking at the geographic area where the restriction applies, the kind of work the employee is prohibited from doing, and the duration of the restriction. A one- or two-year restriction, depending on the circumstances, is likely to be upheld as reasonable.

But what if the former employee violates the restriction and it takes months or more to discover the violation, bring suit, and obtain an injunction against him? By then the restriction may already have expired, so there's nothing left for a court to enjoin.

One possible solution to this problem is to include an automatic extension provision in the non-compete agreement itself, such as the following:

> If I violate the covenant against competition set forth above and the Company brings suit against me for injunctive or other relief, the Company will not be deprived of the protection of the full time period applicable to said covenant as a result of the time involved in discovering the violation, negotiating with me in an attempt to resolve the violation, and obtaining relief in court. Accordingly, in calculating the duration of the Restricted Period, any time period during which I am in violation of said covenants will not be included.

Such a provision seems only fair, since otherwise the employer would get no benefit from the non-compete agreement and the employee would be rewarded for violating the agreement. But that's not what an intermediate appellate court in Wisconsin thought.

The agreement in question, signed by tax-preparer employees in H&R Block's La Crosse, Wisconsin office, prohibited the employees from preparing returns for H&R Block's clients for a period of two years after their employment terminated. It also prohibited the employees from soliciting H&R Block clients or diverting those clients to other tax preparers for two years. And it said that the two-year period "would be extended by any periods of violation."

When a number of H&R Block tax preparers left the company and started a competing business, H&R Block sued for an injunction. Under Wisconsin law, a non-compete covenant is lawful and enforceable only if the restrictions it imposes are reasonably necessary for the protection of the employer. If the covenant imposes unreasonable restrictions, it is void and unenforceable. Thus the question before the Wisconsin courts was whether the two-year restriction, plus any extension of that period during the employees' violation of the covenant, was reasonable.

The Court began its analysis by recognizing that the goodwill flowing from a positive relationship between customer and employee is a valuable asset of the employer's business. The employer therefore has a legitimate interest in protecting its customer base when the employee leaves. The purpose of a time restriction in a non-compete agreement is to give the employer a reasonable chance to keep its customers and protect its asset.

The Court went on to assume that the initial two-year period of the restriction was reasonable under the circumstances, focusing instead on

the "extended by any periods of violation" provision.

H&R Block argued that the extension provision was itself reasonable, because the net effect was simply to assure that the employer would enjoy the full two years of protection. To illustrate, H&R Block pointed out that if there were a one-day violation, there would be a one-day extension, a one-week violation would result in a one-week extension, as so on.

But the Court didn't see it that way. First, said the Court, if a former employee violated the restriction, it would be unclear how long the violation period lasted. Would it be just the day a former employee had contact with an H&R Block customer? Or would it last until the tax services for that customer were finished? This uncertainty, unanswered by the non-compete agreement itself, meant that a former employee could not tell from the agreement how long the extension period would be.

Second, there could be a legitimate dispute between the employee and H&R Block over whether particular conduct violated the non-compete agreement. Not until the dispute was resolved by the courts would a former employee know whether there was a violation and how long it lasted.

For these reasons, said the Court, the automatic extension provision rendered the duration of the non-compete agreement unreasonable.

Reference: *H & R Block Eastern Enterprises, Inc. v. Swenson*, 745 N.W.2d 421 (Wis.App. 2007).

Poverty No Defense to Employment Tax Prosecution

Jack Easterday, who operated a chain of nursing homes in northern California, dutifully withheld payroll taxes from his employees. But he didn't send the money – some $18 million for the period 1998-2005 – to the IRS. So the IRS brought criminal charges against him for willful failure to pay.

Easterday said the Government couldn't prove that he *willfully* failed to pay, because he had spent the money on other business expenses and therefore could not pay it to the Government when it was due. He asked the trial judge to give an "ability to pay" instruction to the jury which in effect would have required the jury to acquit on the basis of his poverty.

The trial judge refused to give the instruction. Instead, the judge told the jury that the tax laws do not permit an employer to choose to use tax money held in trust for the United States for other purposes, such as to pay business expenses. Not surprisingly, Easterday was convicted. He was sentenced to 30 months in prison.

On appeal, the Ninth Circuit affirmed the conviction. The Court said that requiring the Government to prove ability to pay in a payroll tax criminal prosecution would make no sense, since a defendant could always defeat conviction simply by spending the money.

Reference: *United States v. Easterday*, 539 F.3d 1176 (9th Cir. 2008).

Montgomery County's Transgender Law. With the Maryland Court of Appeals' rejection of a petition to overrule Montgomery County's law to prohibit transgender discrimination, the County law took effect September 10. The law was passed in 2007 and was scheduled to be effective in early 2008, but the petition drive against the law delayed its effective date. The law adds *gender discrimination* to the list of qualifications that an employer may not consider in making workplace decisions. The law also makes it illegal for an employer to "deny any person access to the equal use of any restroom, shower, dressing room, lock room, or similar facility associated with the gender identity that the person publicly or exclusively expresses or asserts." For example, a person who identifies as a female must be granted equal access to the ladies' loo, even though the person is a biological male. While the law permits employers to impose workplace appearance, grooming and dress standards, the employer must allow an employee to appear, groom and dress consistent with the gender the employee identifies with. Mont. Cnty. Bill No. 23-07; *Doe v. Mont. Cnty Bd. of Elections*, 2008 WL 4147119 (Md., 2008). A few other jurisdictions, including the District of Columbia, have passed similar laws. See EMPLOYER ALERTS, Winter 2007, p. 1.

OSHA's Bloodborne Pathogens Standard. The Occupational Safety and Health Administration's Bloodborne Pathogens Standard requires employers to make Hepatitis B vaccinations and post-exposure evaluations available to exposed employees *at no cost to the employee*. The Secretary of Labor has interpreted this regulation as requiring employers to compensate employees for non-work time spent traveling to and receiving treatment and to pay the employees' travel expenses. A federal court of appeals in Pennsylvania has now upheld the Secretary's interpretation as reasonable. Employers should note that the OSHA requirement to pay compensation for non-work treatment time trumps normal wage and hour rules that otherwise might not require payment. (It remains unclear whether non-work time spent getting HBV treatment counts toward overtime.) 29 U.S.C. § 651; 29 C.F.R. § 1910.1030; *Secretary of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193 (3rd Cir. 2008).

Deductibility of "Performance-Based" Compensation. *Section 162(m) of the Internal Revenue Code generally limits the deduction a public corporation may take for compensation paid to its top executives to $1 million per year. However, the corporation may deduct compensation in excess of $1 million if the compensation is "performance-based" as determined by a compensation committee of outside directors. According to a new IRS ruling, such excess compensation is not performance-based if the compensation is payable on termination without regard to whether performance goals have been met. The new rule takes effect on January 1, 2009. 26 U.S.C. 162; Rev. Rul. 2008-13 (Feb. 21, 2008). Those few of us whose total compensation package is less than $1 million need not worry about the rule.*

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EMPLOYERALERTS OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

BY CHARLES H. FLEISCHER, ESQ.

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Supreme Court Gives Expansive Reading to Anti-Retaliation Law

The Supreme Court has again taken a strong position in support of employees who suffer retaliation for exercising their rights under federal anti-discrimination laws. In *Crawford v. Nashville*, the Court ruled that the so-called "opposition clause" of Title VII of the 1964 Civil Rights Act – the clause that makes it unlawful for an employer to discriminate against an employee because he has opposed a discriminatory practice – covers employees who simply answer questions during an investigation of possible sexual harassment.

Previously the Court has held that retaliation under Title VII need not be tied to pay or terms or conditions of employment; any materially adverse action by the employer is prohibited. The Court also held that a Reconstruction-era civil rights act, which does not even contain an anti-retaliation provision, nevertheless protects employees from retaliatory actions by their employers.

In the *Crawford* case, the City of Nashville, Tennessee, began looking into rumors of sexual harassment by the employee relations director of the city's school system. A Nashville human resources officer involved in the investigation asked Vicky Crawford, a 30-year employee of the school system, whether she had witnessed "inappropriate behavior" by the director. Crawford responded by describing several instances of sexual harassment. Two other employees also reported being harassed by the director.

Although the school system took no action against the director, it did fire Crawford and the other two accusers soon after completing its investigation.

Title VII's anti-retaliation provision has two clauses – the "opposition clause," described above, and the "participation clause," which makes it unlawful to retaliate against an employee because he or she has made a charge of discrimination, testified, assisted, or participated in an investigation, proceeding, or hearing. Crawford's suit against Nashville claimed that

when her employer fired her, it violated both clauses. Nashville responded that to "oppose" means to take some active, purposeful activity, such as instigating or initiating a complaint. Here, all Crawford did was answer questions during the course of an investigation that she had no other involvement in.

As to the "participation clause," Nashville argued that testimony, assistance or other participation in an investigation is only protected if the investigation is pursuant to a pending EEOC charge.

Both the federal trial court and the court of appeals agreed with Nashville and threw out Crawford's case. The Supreme Court reversed and sent the case back for trial. The Court held that when an employee communicates sexually harassing conduct to her employer, the communication virtually always constitutes the employee's opposition to the activity. The Court did not reach the question whether Crawford was protected by the "participation clause" as well.

References: 42 U.S.C. § 2000e (Title VII); 42 U.S.C. § 1981; *Crawford v. Nashville*, 129 S.Ct. 846 (2009); *Burlington No. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008).

Fired Expense Padder May Have Libel Claim

Alan Noonan was a Staples sales director who traveled extensively for the company. His job included submitting expense reports covering travel, food, lodging, and related business expenses. The company had strict guidelines for incurring expenses and how the reports were to be submitted. For example, it required employees to book travel through the company's travel agent, it prohibited them from charging business-related expenses on their personal charge cards, it required that expenses of more than $75 to be supported by receipts.

As a management-level employee, Noonan had a contract of employment that entitled him to a severance payment upon termination of employment, unless the termination was "for cause." The contract defined "cause" as a violation of the company's code of ethics, an attempt to secure an improper personal benefit, or misconduct that injures Staples in a material way.

Noonan also participated in the company's stock option plan and had been awarded a number of options over the years. Again, however, the plan prohibited employees from exercising any options if they were fired for cause. "Cause" for these purposes meant "willful misconduct ... as determined by Staples."

In November 2005, Staples discovered that an employee named Dorman had been embezzling money from the company through fraudulent expense claims. The company fired Dorman and then undertook an audit of expense reports of some 65 other traveling employees. One of those was Noonan.

The auditors discovered that in one particular month, Noonan submitted an expense reimbursement request in an amount $1,622 greater than he had actually spent. Noonan also had used his personal credit card for some expenses, and he booked travel through a non company agent. Staples then formed a special team composed of CPAs and a former police investigator to look further into Noonan's past expense reports. Additional discrepancies were found.

Noonan claimed that he often "pre-populated" his expense reports – that is, he filled in estimates of expenses before they were actually incurred – and then sometimes forgot to go back and make adjustments. This did not explain, however, why some of his expense entries were exactly $100 more than the actual expense. Nor did it explain a McDonald's meal of $11.29 which was reported as $1,129. Noonan also could not tell the investigators the source of several large deposits to his checking account.

Staples fired Noonan, saying the termination was for cause, but not before Noonan attempted to exercise $290,000 in stock options. Staples responded that because the termination was for cause, Noonan lost his right to exercise the options. For the same reason, Staples refused to pay any severance to Noonan. A Staples Executive Vice President also sent the following email to some 150,000 of its employees:

> It is with sincere regret that I must inform you of the termination of Alan Noonan's employment with Staples. A thorough investigation determined that Alan was not in compliance with our travel and expenses policies. As always, our policies are consistently applied to everyone and compliance is mandatory on everyone's part. It is incumbent on all managers to understand Staples's policies and to consistently communicate, educate and monitor compliance every single day. Compliance with company policies is not subject to personal discretion and is not optional. In addition to ensuring compliance, the approver's responsibility to monitor and question is a critical factor in effective management of this and all policies.

Noonan promptly sued Staples for libel, for his severance payment, and for the right to exercise stock options. The federal district court for Massachusetts dismissed all of Noonan's claims, but the U.S. Court of Appeals for the First Circuit, headquartered in Boston, reversed on the libel issue.

The appellate court recognized that, in general, truth is a defense to a defamation suit. In other words, issuing a derogatory statement which injures a person's reputation for, say, honesty cannot be the basis for a defamation claim if the statement is true. And in this case, everything Staples said in its email was factually accurate. But under a 1902 Massachusetts statute, even a truthful statement can be defamatory if it is made maliciously, with ill will or malevolent intent. So the appellate court sent the case back for a determination of the Executive Vice President's motive in sending the email.

Fortunately, the court did agree that Noonan was fired for cause and therefore he forfeited his severance and stock option benefits. In reaching that conclusion, the court acknowledged that it did not sit as a super personnel departments, with power to second-guess an employer's business decisions. Rather, the court's role was to determine whether Staples's decision to fire for cause was arbitrary, capricious, or made in bad faith. Here, there was ample basis for the decision.

An important point to keep in mind is that employers have a legitimate business reason to publicize a dismissal for cause as a deterrent to other employees. In most states, publicizing such actions in a truthful way – at least within the confines of the company – will not serve as a basis for a defamation claim. See "Defamation Based on Intra-Company Communications," EMPLOYER ALERTS, Spring 2005, p. 5. Even a false statement is protected, so long as it was made in good faith. These principles apparent don't apply in Massachusetts, however.

Reference: *Noonan v. Staples, Inc.*, 2009 WL 350895 (1st Cir. 2009).

Court Dismisses Employee Suit for Malicious Prosecution

If you thought that Alan Noonan had chutzpah, consider the case of Yuming Deng. Deng worked for Sears, Roebuck as a statistical modeler. His job was to develop software and compile data for determining which Sears customers should be extended credit. In February 2001 Deng's supervisors gave him a less than glowing review, resulting in flared tempers. Deng then stopped working, claiming a disability.

While on leave, Deng repeatedly came to his office, contrary to a Sears policy which forbids persons on disability leave from returning to the workplace (something they are supposedly unable to do anyway). On one such visit, he threatened a supervisor. On another visit, he deleted a great deal of data and the statistical models he had been using to analyze the data. Although Sears had much of the material stored on backup tapes it cost Sears some $40,000 or $50,000 to do the restoration and it delayed projects Deng's co-workers were involved in.

Sears concluded that Deng had maliciously deleted the information, so it reported the matter to the local police in Hoffman Estates, Illinois, where Dang had worked. A detective agreed that Deng had violated an Illinois statute which prohibits tampering with computer files without permission of the owner. The detective tried to discuss the matter with Deng, but found that Deng had left Illinois without notifying anyone of his new address.

The local prosecutor also agreed that Deng had committed a crime and filed charges against him. Eighteen months later, Deng was found in Massachusetts, arrested, and returned to Illinois. At a subsequent preliminary hearing a witness failed to appear, with the result that the case against him was dismissed. The case could have been reinstated, but the local prosecutor took no further action.

Deng then turned tables on Sears and sued for malicious prosecution. To prevail on that claim under Illinois law, Deng had to show three things: that the earlier criminal case ended in his favor; that the charge was not supported by probable cause; and that Sears made the charge with malice.

In a sense Deng "won" the criminal case, because the charge was dismissed and not reinstated. But under Illinois law, a dismissal does not count as a favorable conclusion if it occurred for reasons not indicative of the accused's innocence. Here, of course, the dismissal related to the non-appearance of a witness, not a belief that Deng was innocent. In addition, Sears certainly had probable cause to believe that Deng erased valuable data on his way out the door. Since Deng was not even supposed to be at Sears's offices, he certainly lacked permission even to access company computers, no less to delete data. And Deng's flight from Illinois added to the impression that a crime had been committed.

The court therefore dismissed Deng's malicious prosecution suit.

Reference: *Deng v. Sears Roebuck & Co.*, 552 F.3d 574 (7th Cir. 2009).

Department of Labor Issues New FMLA Regulations

The Family and Medical Leave Act generally requires companies with 50 or more employees to grant up to 12 weeks of unpaid leave per year to an employee who has a serious health condition, who needs care for a spouse, child or parent with a serious health condition, or to care for a newborn or newly adopted child.

The National Defense Authorization Act for 2008 (NDAA) amended the FMLA to allow up to 26 weeks' leave for a spouse, child, parent or next of kin to care for a member of the armed forces who has a serious injury or illness. The NDAA also added a provision allowing an employee to take up to 12 weeks' leave because of any "qualifying exigency" arising out of the employee's spouse, child or parent being called to active duty, but this provision was delayed pending adoption of implementing regulations by the U.S. Department of Labor. See "FMLA Now Protects Caregivers of Injured Service Members," Employer Alerts, Winter 2008, p. 3.

An employee is eligible for FMLA leave if he or she has been on the job for a year or more, has worked at least 1250 hours the previous year, and works at a location where there are at least fifty employees within a 75-mile radius.

During the leave period, the employer must maintain health insurance coverage on the same basis as if the employee had continued to work. Once the employee has exhausted FMLA leave or the reason for the leave is resolved, the employer must offer the employee the same position occupied before the leave, or an equivalent position.

While these basic requirements may seem simple to state, they are far from simple to apply. DOL has now revised its regulations, effective January 16, 2009, to clarify many of the issues that have arisen under FMLA, and to implement the "qualifying exigency" provision added to FMLA by the NDAA.

Every HR director whose company is subject to FMLA should have a copy of the new regs close at hand. Some highlights of the regs are set out below.

Notices

All covered employers must post the general FMLA notice, WHD Pub. 1420 (rev. Jan. 2009) in a conspicuous place, whether or not the employer has any FMLA-eligible employees. The general notice is available at *www.wagehour.dol.gov*.

If a covered employer has FMLA-eligible employees, the employer must also provide the general notice to each employee by including it in the employee handbook (if one exists) or by delivery in paper or electronic form.

When an employee requests FLMA leave (or when an employer learns that leave may qualify under FMLA), the employer must provide written notice to the employee as to whether the employee is eligible for FMLA leave on WH Form 381 (rev. Jan. 2009). The form also contains a section entitled, "Rights and Responsibilities for Taking FMLA Leave," in which the employer informs the employee about various employer requirements relating to leave, such as whether additional supporting information must be furnished, arrangements to pay the employee portion of health insurance premiums, whether the employee is required to use any available paid leave coincident with FMLA leave, and the need (if any) for periodic status reports. The consequences of non-compliance must also be stated.

When the employer has determined that leave does in fact qualify under FMLA, the employer must provide a Designation Notice so informing the employee. See WH Form 382 (rev. Jan. 2009).

Substitution of Paid Leave

A FMLA-eligible employee may substitute any form of paid leave then available to the employee (accrued vacation, sick leave, etc.) and the employer may require such substitution. Forms 381 and 382 contain check boxes to indicate whether substitution of paid leave is requested by the employee or required by the employer. Despite substitution of paid leave, the leave still counts against the FMLA leave entitlement. When paid leave is substituted for FMLA leave, the employee must comply with employer requirements applicable to the form of substituted leave.

Fitness-for-Duty Certifications

When FMLA leave is taken because of the employee's own serious health condition, the employer may require the employee to present a fitness-for-duty certification from his or her health care provider, so long as the employer has a generally applicable policy requiring such certifications following an illness or injury that does not qualify for FMLA leave. In addition, the employer may require that the certification specifically address the essential functions of his or her job. To do so, the employer must provide the employee with a list of essential functions at the time the Designation Notice (Form 382) is issued.

Fitness-for-duty certifications must be limited to the specific condition for which FMLA leave was taken.

"Perfect Attendance" and Similar Recognitions

The returning employee is entitled to his or her same job, or an equivalent one, with the same pay and benefits. However, if a bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied. But it should be noted that if the employer's practice is to make such payments to employees on leave other than FMLA leave, the employer cannot discriminate against the employee who took FMLA leave.

"Qualifying Exigency"

The NDAA added a provision for FMLA leave because of a "qualifying exigency" arising from the employee's spouse, child or parent being called to active military duty. The new regs define "qualifying exigency" as any of the following:

- *Short notice deployment*. If a member of the military is called to active duty on less than seven days' notice. The leave is limited to seven days.
- *Military events*. To attend official events related to the active duty status of the member.
- *Childcare and school activities*. To arrange for alternative child care when a call to active duty necessitates a change in child care arrangements, or to provide childcare on an urgent, immediate need basis.
- *Financial and legal arrangements*. To make or update financial or legal arrangements to address the member's absence for active duty.
- *Counseling*. To attend counseling by someone other than a healthcare provider for oneself, for the member, or for a child of the member.
- *Rest and recuperation*. To spend time with a member who is on short-term, temporary rest and recuperation.
- *Post-deployment activities*. To attend arrival ceremonies and events sponsored by the military during the 90-day period following termination of the member's active duty status, or to address issues arising from the death of the member while on active duty.

References: 29 U.S.C. § 2601; 29 C.F.R. Part 825 (2008); 73 Fed. Reg. 68073 (Nov. 17, 2008).

E-Verify on Hold for Federal Contractors

Last June, President Bush signed an Executive Order requiring all contractors who do business with the federal government to use E-Verify in establishing the eligibility of their employees to work in the U.S. E-Verify is a pilot program developed by the Department of Homeland Security, which allows employers to check eligibility electronically against records maintained by the Social Security Administration. See "Arizona Anti-Immigrant Act Not Preempted by Federal Law," EMPLOYER ALERTS, Fall 2008, p. 4.

Various federal agencies then issued regulations to implement the Executive Order beginning early this year. When those regulations came out, the U.S. Chamber of Commerce and a number of other organizations sued the Government in federal court in Maryland, claiming that the regulations violated the underlying federal statute, which prohibits the government from requiring any employer (except the Government itself) to use E-Verify.

The Government has now delayed implementation of the Executive Order to at least May 21, 2009, to give President Obama time to review the regulations.

References: E.O. 13,465; *Chamber of Commerce v. Napolitano*, U.S. Dist. Ct. Md. No. 8-3444 (Jan. 28, 2009).

NY Court Upholds IBM's Restrictive Covenants

Though sometimes disfavored by the courts, restrictive covenants in employment contracts are often invaluable in the right circumstances. A typical restrictive covenant might require an employee to protect the confidentiality of company trade secrets; to refrain from competing with the company both during employment and for a limited period after employment ends; to refrain from soliciting company clients and fellow employees; and to assign to the company any intellectual property (copyrightable or patentable works) the employee may develop.

A recent case from New York shows just how useful such covenants can be.

Mark Papermaster worked for IBM for some 26 years. Most of his career was spent designing and developing products within IBM's Systems and Technology Group. For 15 of those 26 years he worked in microprocessor technology development, eventually becoming Vice President of Microprocessor Technology Development.

Papermaster was a top expert and a well-respected figure in the world of chip design. His work focused primarily on IBM's "power architecture"– one of a handful of architectures used to design, develop and manufacture microprocessors for both large and small devices. IBM considered its power architecture to be superior to other architectures in its scalability, flexibility, and ability to be customized, as evidenced by its use in a wide variety of applications.

Because of his experience and expertise, Papermaster was selected by IBM to be a member of the Integration and Values Team – an elite group that develops IBM's corporate strategy. The approximately 300 IBM executives who are in the Group are considered to be IBM's key leaders. In addition, Papermaster served on the Technical Leadership Team, composed of IBM's top technical leaders, which works to develop and retain a talented and diverse workforce. As a result, Papermaster had access

to technical information unavailable to most IBM employees, let alone to the public generally.

Although Papermaster had signed a non-compete agreement, which prohibited him from working for any major competitors of IBM for one year after termination of employment, he accepted an offer from Apple in October 2008 to become its Senior Vice President for Device Hardware Engineering. IBM and Apple are direct competitors. As recently as 2006, IBM sold microprocessors to Apple based on IBM's power architecture, but it ceased doing so after Apple acquired another microchip design company. Papermaster felt that his new employment would not involve any improper disclosure of confidential IBM information. IBM thought otherwise and sued to enforce the non-compete agreement.

IBM argued that there was a substantial risk Papermaster would inevitably misappropriate trade secrets, and the U.S. District Court for the Southern District of New York agreed. The court characterized Papermaster's knowledge as IBM's "crown jewels," which IBM had jealously guarded and which gave IBM a "leg up" in the competitive world of electronics components. Use of this knowledge for Apple's benefit would irreparably harm IBM, said the court, so it enforced the non-compete agreement by enjoining Papermaster from working for Apple pending a full trial of the case.

Reference: *IBM v. Papermaster*, 2008 WL 4974508 (S.D.N.Y. 2008).

Premium Assistance for COBRA Benefits

The American Recovery and Reinvestment Act of 2009 (commonly called the "Stimulus Act") provides premium payment assistance for certain individuals receiving continuing health insurance coverage under COBRA or a comparable State law. The Act has no effect on which employer group health plans are subject to COBRA.

Under current law, a COBRA-eligible individual must pay the full premium in order to obtain continuation coverage after a qualifying event that would otherwise result in loss of coverage. The employer may also charge a 2% administrative fee. Under the Stimulus Act, the federal government subsidizes the premium and administrative cost in cases of involuntary job loss (except a loss resulting from gross misconduct) by requiring the eligible individual to pay only 35% of the premium and administrative fee; the remaining 65% is initially advanced by the employer but recouped out of payroll taxes the employer owes the government.

Effective Date and Eligibility

The premium assistance provision of the Stimulus Act takes effect on February 17, 2009 – the effective date of the Act. However, for employers whose group health plan is based on a calendar month, the subsidy does not begin until the March 1 premium due date. There is also a two-month grace period for employers who erroneously continue to collect the full premiums, but the employer must either refund the 65% overpayment or credit it against future premiums.

Premium assistance is available to any "qualified beneficiary" who is entitled to elect COBRA coverage as a result of the involuntary termination of an employee's employment during the period September 1, 2008 to December 31, 2009. Qualified beneficiaries are the terminated employee if he or she was participating in the employer's group health plan at the time of termination, plus the employee's spouse and any dependents who were participating in the plan. Under current law, any such qualified beneficiary may elect COBRA continuation coverage. Under the Stimulus Act, each such qualified beneficiary is also entitled to premium assistance.

The qualified beneficiary may elect a coverage option other than the option that was in effect at the time of the involuntary termination, provided that the premium for such other option is no greater that the premium for the coverage option that was in effect at the time of the termination.

Special Election Period

In general, to obtain premium assistance the

qualified beneficiary must have elected COBRA coverage when it was first offered to him or her. However, the Stimulus Act provides a special, 60-day opportunity to elect COBRA even if the qualified beneficiary had not elected COBRA, or had elected COBRA but then lost coverage for failure to pay premiums. The 60-day period begins to run on the date the employer notifies the qualified beneficiary of this special election opportunity. If COBRA is then elected, COBRA coverage (and premium assistance) is retroactive to February 17, 2009 (March 1 for calendar month plans).

The special election opportunity does not extend the period of COBRA continuation coverage. For example, suppose an employee was involuntarily terminated on September 10, 2008, and she could have but did not elect COBRA at that time. On March 1, 2009 the employer gives her notice of the new, 60-day election opportunity and the employee then does elect COBRA. COBRA coverage becomes effective as of February 17, 2009 (March 1 for calendar month plans), but the 18-month maximum continuation period is counted from the date coverage was lost due to the involuntary termination.

With respect to an individual who elects coverage under the special election provision, the period beginning on the date of the qualifying event (September 10, 2008 in the above example) and ending on February 16, 2009 is disregarded for purposes of restricting pre-existing condition exclusions.

Premium Assistance Period

The premium assistance period does not extend for the full period of COBRA coverage. Even though employees and dependents are eligible for premium assistance as a result of an involuntary termination on or after September 1, 2008, there is no premium assistance for coverage periods beginning prior to February 17. In addition, the premium assistance ends on the first to occur of (1) nine months after the premium assistance began, (2) expiration of the maximum, 18-month period for COBRA coverage (or coverage under comparable State law), and (3) the date the individual receiving premium assistance becomes eligible for benefits under another group health plan or Medicare.

Notices

The notice of CORBA continuation coverage that plan administrators provide to qualified beneficiaries under current law must now contain additional information, including the qualified beneficiary's right to premium assistance, a description of the beneficiary's obligation to notify the plan when he or she becomes eligible for benefits under another group health plan or Medicare, and the penalty for failure to do so. (The Act imposes a penalty of 110% of any premium subsidy received by a beneficiary after the beneficiary is no longer eligible for premium assistance.)

The Act also requires that new notices be given to qualified beneficiaries who have not previously elected COBRA of their special, 60-day election opportunity.

Because the Act contains provisions requiring an individual to refund the premium subsidy (in the form of an increase in income taxes) if his or her income exceeds certain threshold levels, the beneficiary may make a permanent election to waive the right to premium assistance.

Employer Reimbursement

Once an employer has received the reduced 35% payment from a participating beneficiary (but presumably paid 100% of the premium to the plan underwriter), the employer claims a credit for the 65% subsidy against its payroll tax obligations (withheld income tax and FICA). If the amount of the credit exceeds the employer's payroll tax liability, the Secretary of the Treasury is required to reimburse the employer directly.

Dispute Resolution

Any individual who is denied premium assistance may request review of the denial by the Secretary of Labor (in the case of COBRA continuation coverage) or by the Secretary of Health and Human Services (in the case of State continuation coverage). The review must be completed with 15 days.

Revised I-9 Form. Beginning February 2, 2009, employers are required to use a newly updated I-9 Form (rev. 2-2-09) when verifying the employment eligibility of new hires or when re-verifying employees whose status is expiring. The new form narrows the list of acceptable identity documents, and it prohibits the use of expired documents such as expired U.S. passports. See 73 Fed.Reg. 76505 (Dec. 17. 2008). The new form is available at the U.S. Citizenship and Immigration Service's website, http://www.uscis.gov. The Service is also in the process of revising the Handbook for Employers - Instructions for Completing the Form I-9.

Reduction in Hours and COBRA. In these tough economic times, it's no surprise that the unemployment rate keeps increasing. As an alternative to layoffs, an employer may be able to keep a worker on by reducing his or her hours. Employers well know that if they employ 20 or more persons and offer group health insurance, they must offer COBRA benefits to laid-off workers. Employers should also keep in mind that if a reduction in hours makes an employee ineligible for group coverage (policies typically have a minimum hours requirement, such as 1000 hours per year), the employee is also entitled to COBRA benefits.

Lilly Ledbetter Fair Pay Act. On January 29, President Obama signed the Lilly Ledbetter Fair Pay Act, effectively overruling the Supreme Court's 2007 case of Ledbetter v. Goodyear Tire & Rubber. That earlier case, dealing with gender-based pay discrimination, held that the Statute of Limitations (the time period within which a suit must be filed) begins to run when an employer makes a discriminatory decision regarding pay, not each time an employee receives a paycheck affected by the decision. Since the employer's decision to pay Lilly Ledbetter less than her male counterparts had been made many years before Ledbetter discovered the discrepancy, she was out of luck. Named after Ledbetter, the Act now says that the Statute of Limitations for pay discrimination begins to run anew each time the employee is affected by a discriminatory decision, i.e. each time he or she receives a wage payment. Lilly Ledbetter Fair Pay Act of 2009 (S. 181, 111th Cong.,1st Sess.); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

DOL Issues New On-Call Ruling Under FLSA. On December 18, 2008, the U.S. Department of Labor issued a letter ruling addressing whether employers must pay employees for time spent on call but not actually working. The employee in question was required to be reachable at all times, he had to abstain from alcohol, and he had to report to work within one hour of notification. It turned out, however, that call-backs were rare. DOL concluded that these particular restrictions, coupled with the infrequency of employer calls, did not prevent the employee from using his time for personal purposes. Accordingly, the on-call time was not compensable. DOL/ESA Op. FLSA2008-14NA (Dec. 18, 2008).

In this issue of Employer Alerts ...

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EMPLOYERALERTS OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

BY CHARLES H. FLEISCHER, ESQ.

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UI Benefits and Quitting for Good Cause

Chimes District of Columbia, Inc., a nonprofit corporation that employs the disabled, hired Patricia King as a custodian in 2002. In May 2005 King became pregnant. Because the pregnancy was high risk, King asked for time off. Chimes granted her up to 16 weeks of leave under the District of Columbia's Family and Medical Leave Act.

During her FMLA leave, King asked to return to work on a light duty basis, citing restrictions imposed by her doctor on lifting, climbing, and pushing and pulling heavy objects. Given the nature of King's duties, Chimes refused and suggested the King remain on FMLA leave until released by her doctor. Shortly after expiration of King's FMLA leave, her doctor released her from all restrictions until the birth of her child, and King returned to work.

About two months later, King complained of lower back pain and dizziness. She told her immediate supervisor that she wanted to stop work and asked that her job be held open. However, she provided no further medical justification for this second leave period, nor did she contact Chimes's HR department to request approval for the leave. Three days later, Chimes informed King that she was not eligible for additional leave, that Chimes could not hold the job open, and that King was therefore terminated.

King then filed for unemployment benefits.

Incredibly, the District's Department of Employment Services initially determined that King was laid off for *lack of work* and was entitled to benefits. After a later hearing, an administrative law judge agreed that she was eligible, but changed the reason to a voluntary quit for good cause.

On appeal, the D.C. Court of Appeals reversed and denied benefits. It ruled that under the District's unemployment insurance statute, an employee who voluntarily resigns is entitled to benefits if he or she does so with "good cause

connected with the work." See "Quitting to Take Better Job Not 'Good Cause' for UI Benefit Purposes," EMPLOYER ALERTS, July 2002, p. 4. While the "good cause" requirement may be satisfied when the employee resigns because of an illness or disability caused or aggravated by the work, the employee must supply the employer with a medical statement showing the relationship between the work and the employee's illness or disability. This allows the employer an opportunity to modify the job or eliminate its aggravating aspects.

In King's case, there was no question that she left Chimes due to her pregnancy. Further, under D.C. law pregnancy is to be treated just like any other physical condition or disability. And while King's pregnancy was not caused by work, the complications she experienced may have been aggravated by work. Here, however, King failed to submit any supporting medical evidence. In fact, the most recent medical evidence provided by King's doctor was that she was able to work without restriction until her child was born. Accordingly, the appellate court ruled against her benefit claim.

Aside from illnesses or injuries caused or aggravated by the work, D.C. law gives other examples of good cause to quit and still collect unemployment insurance benefits, including:

- racial or sexual discrimination or harassment;
- failure to pay the employee;
- unsafe working conditions; and
- transportation problems arising from relocation of the employer or a transfer of the employee.

Under D.C. law, the following does *not* constitute good cause and will *not* justify a voluntary quit:

- refusal to obey reasonable employer rules;
- minor reduction in wages;
- a reasonable and necessary transfer of the employee from one type of work to another;
- marriage or divorce resulting in a change of residence;
- general dissatisfaction with work;
- resignation to attend school or training; or
- personal or domestic responsibilities.

References: D.C. Code § 51-101; 7 D.C.M.R. § 311; *Chimes D.C., Inc. v. King*, 2009 WL 536054 (D.C. 2009); *Bublis v. D.C. Dept. of Employment Services*, 575 A.2d 301 (D.C. 1990).

Late Notice Dooms EPLI Coverage

The American Center for International Labor Solidarity (Center), headquartered in Washington, DC, had employment practices liability insurance coverage. So when one of its employees obtained a "right-to-sue" letter from the Equal Employment Opportunity Commission and filed a Title VII discrimination law suit, the Center promptly notified its insurance carrier, Federal Insurance Company.

To the Center's surprise, Federal denied coverage. Federal's position was that the insurance policy required the Center to give prompt notice of any claim, the term "claim" being defined in the policy to include a "formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document." What the Center should have done, according to Federal, was to give notice when the employee first filed a charge with the EEOC; instead, the Center waited until the EEOC process was completed and the employee sued in court.

(For many types of federal workplace discrimination claims, including claims under Title VII of the Civil Rights Act of 1964, an employee or applicant must first file an administrative charge, either with the EEOC or a comparable state or local agency, before suing in court. The idea is to try to resolve the claim through conciliation with the benefit of the agency's investigative powers and expertise. Only if resolution cannot

be achieved does the claimant get a right-to-sue letter authorizing him or her to go to court.)

The parties agreed that if an EEOC charge is a "claim" as defined in the insurance policy, then the Center's notice came too late. The parties disagreed, however, over whether EEOC proceedings are "formal" proceedings triggering the notice requirement of the policy.

The U.S. Court of Appeals for the D.C. Circuit concluded that EEOC proceedings are indeed "formal" as that term is used in the policy. The Court reviewed at some length the typical EEOC process, including its investigative authority and subpoena power, its procedures for determining whether there is probable cause to believe discrimination has occurred, its power to initiate its own civil actions, and its role in authorizing individuals to sue in court. All this, said the Court, makes the EEOC process a formal one.

The Court also considered an interesting argument raised by the parties. A well-established legal maxim is that ambiguities in an insurance policy are to be construed in favor of the insured party and against the insurance company. That is, if a word or phrase in the policy has more than one reasonable meaning, courts will adopt the meaning that is most favorable to the insured party. The Center argued that the term "formal" as used in the policy was ambiguous and that interpreting the term in the insured's favor required a conclusion that EEOC proceedings do not trigger the policy's notice provision. The insurance company, also citing the maxim, said that in considering which interpretation was more favorable to the insured party, the Court should consider not just the Center but all policyholders; by construing EEOC proceedings as formal, those proceedings would therefore be covered by the policy to the benefit of a large class of insureds. The Court did not decide the point, however, based on its conclusion that there was no ambiguity in the policy.

The bottom line for employers is that their insurance companies are entitled to prompt notice of claims that might be covered by their policies. Whenever a claim is made or threatened, the employer should review coverage and at least consider giving notice to its carrier.

Reference: *American Center for Int'l Labor Solidarity v. Federal Ins. Co.*, 548 F.3d 1103 (D.C. Cir. 2008).

The Hairy Issue of Religious Accommodation

An employee's right to practice religion as he or she sees fit can sometimes conflict with an employer workplace policies. See "Dress Code Trumps Duty of Religious Accommodation," Employer Alerts, Winter 2005, p. 4. Although the employer doesn't always lose those conflicts, it did in the following two cases involving employer grooming standards.

Potter v. District of Columbia

The Religious Freedom Restoration Act (RFRA), was passed by Congress in 1993 to overrule an earlier Supreme Court decision. In the earlier case, the Court ruled that the First Amendment to the Constitution did not prohibit application of State drug laws to ceremonial ingestion of peyote, so that the State could constitutionally deny unemployment compensation to employees who were fired for use of the drug.

(Although the Supreme Court has the last word in interpreting the meaning and intent of a federal statute, Congress can always change the statute if it doesn't like the Supreme Court's interpretation.)

In overruling the Court's decision, Congress presumably did not intend to promote peyote use. Instead, Congress apparently felt that the decision had broader implications which might interfere with other, more mainstream religious practices. So in passing the RFRA, Congress said that the government may substantially burden a person's exercise of religion only if it demonstrates a "compelling governmental interest" and is the "least restrictive means" of furthering that interest. The RFRA defines "government" as the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. State and local governments are excluded.

A decade after passage of RFRA, a group of bearded D.C. firefighters invoked the law in a suit attacking a requirement that they be clean-shaven. The District had imposed the requirement out of concern that beards could interfere with the breathing masks firefighters must sometimes wear, thus exposing them to toxic atmospheres; the firefighters wanted to keep their beards for religious purposes.

The parties to the suit – the firefighters on the one hand, and the District government on the other – agreed that the firefighters wore beards based on the sincere religious beliefs. Further, the parties conceded that the safety of the firefighters themselves, and those they assist, is a compelling government interest. So the issue was whether the clean-shaven requirement was the least restrictive means of protecting safety.

The evidence showed that firefighters can be in atmospheres that are immediately dangerous to life and health: active fires, other oxygen-deprived environments, and environments where highly toxic contaminants may be inhaled. Firefighters protect themselves from these atmospheres by wearing various forms of respiratory equipment, all of which use a tight-fitting face mask. One such device, known as a self-contained breathing apparatus (SCBA), consists of an air take, a regulator and a mask. A SCBA is designed to maintain positive pressure inside the mask (i.e., pressure that is greater than the surrounding atmosphere), so that if a leak occurs, air flows out of the mask rather than into it.

Another device, known as an APR, or air-purifying filter, contains a mask and a filter. It is used when

contaminants are present but are not immediately life-threatening. When a firefighter takes a breath while wearing an APR, negative pressure is created inside the mask, forcing outside air into the mask through the filter. Still another device is a PAPR, or battery-powered APR which is equipped with a fan to keep positive pressure inside the mask.

Although the District sought to defend its clean-shaven requirement before the court, its litigation strategy was somewhat muddled. For example, although negative-pressure APRs clearly presented some dangers, the District's position on whether positive-pressure SCBAs were adequate to protect bearded firefighters was unclear. Furthermore, bearded firefighters who might otherwise be assigned to environment where a PAPR would be adequate, could be redeployed to an environmentally safe area or to an area where SCBAs were needed.

In light of procedural defects in the District's handling of the case, the U.S. Court of Appeals for the D.C. Circuit concluded that the District had not met its burden of showing that the clean-shaven requirement was the least restrictive means of protecting safety.

In a concurring opinion, Judge Stephen Williams agreed that the District had not met its burden. But he pointed out some disturbing matters, such as expert evidence that a bearded firefighter wearing an SCBA and engaged in strenuous activity could over-breathe and pull contaminated air into the mask. Even the federal Occupational Safety and Health Administration has a regulation barring use of tight-fitting respirators by employees who have facial hair that comes between the face and the sealing surface of the mask.

Judge Williams characterized the Court's decision as an "experiment" and he concluded with the hope that the bearded firefighters would not be proved wrong.

Brown v. F. L. Roberts & Co.

Bobby Brown, a practicing Rastafarian, worked as a lube technician at a Jiffy Lube service station in Massachusetts. He not only serviced motor vehicles in the upper and lower bays of the station, he also worked as a greeter, salesperson and cashier when he was assigned to the upper bay.

In January 2002, the station instituted a new grooming policy requiring all employees who have contact with customers to be clean-shaven. This conflicted with Brown's religion, which does not permit him to shave or cut his hair. Brown requested that he be exempted from the policy, but Jiffy Lube refused and said unless he complied, he would be assigned exclusively to the lower bay and could not have customer contact.

As it turned out, Brown was the only employee assigned to the lower bay. This meant he could not take breaks. In addition, Brown found working conditions in the lower bay to be dangerous and uncomfortable. Brown left Jiffy Lube in May 2002 for unrelated reasons and, several years later, sued the company for religious discrimination under Massachusetts law.

In Massachusetts, an employer is required by statute to make reasonable accommodation to the religious needs of its employees. For these purposes, "reasonable accommodation" means an accommodation that does not cause undue hardship in the conduct of the employer's business. This standard is similar to the religious accommodation requirements of Title VII of the federal Civil Rights Act. However, the courts have historically taken a narrow view of the employer's obligation under federal law, holding that anything more than minimal cost to the employer is an undue hardship.

Although Massachusetts is generally guided by federal courts' interpretations of Title VII, here, the Massachusetts Supreme Court took a substantially more liberal reading of its own statute. It ruled that Jiffy Lube should have engaged in

an interactive process with Brown to determine if there was an accommodation other than complete exemption from the policy. Just because Brown requested a complete exemption did not excuse the employer from considering other possible accommodations.

References: 42 U.S.C. § 2000bb; *Potter v. District of Columbia*, 2009 WL 564630 (D.C. Cir. 2009); *Brown v. F. L. Roberts & Co.*, 896 N.E.2d 1279 (Mass. 2008).

Hospital's Peer Review Immunity Upheld

The federal Health Care Quality Improvements Act encourages health care entities such as hospitals to establish peer review procedures to oversee their physicians. The encouragement is in the form of immunity from civil liability for any "professional review action," defined as an action or recommendation based on the competence or professional conduct of a physician.

A hospital's professional review actions must meet minimum standards of reasonableness and fairness to the physician involved. For example, a hospital must make a reasonable effort to obtain relevant facts, it must provide notice to the physician, it must provide a hearing or other procedures that are fair to the physician, and it must have the reasonable belief that any professional review action it takes is in furtherance of quality health care.

When a hospital revokes a physician's clinical privileges, suspends privileges for more than 30 days, or takes other adverse action, it must report the action to the National Practitioner Data Bank (NPDB). Failure to make those reports can result in loss of immunity under the Act.

A recent case involving Williamsburg Regional Hospital in South Carolina shows how this process works.

Dr. Blake Moore was a general surgeon who treated both adults and children at the Hospital. He apparently had problems at home, however. The South Carolina Department of Social Services (DSS) took Dr. Moore's three adopted children into emergency protective custody because of allegations that Dr. Moore's wife had physically abused the children. DSS then filed a complaint against Dr. Moore and his wife and placed the children in foster care.

While in foster care, Dr. Moore's adopted daughter told her therapist that she had been sexually abused by Dr. Moore and his wife. Although the State DSS found the evidence of sexual abuse to be inconclusive, the County DSS also investigated and found by a preponderance of the evidence that sexual abuse had occurred. The County DSS filed its own complaint to terminate Dr. Moore's and his wife's parental rights.

When Hospital officials became aware of these charges, they obtained copies of the court files, including the daughter's detailed statements of sexual abuse. Hospital officials also learned of a prior case that had resulted in a finding of abuse and neglect against Dr. Moore and his wife. The officials then summarily suspended Dr. Moore's clinical privileges pending resolution of the sexual abuse charge.

Immediately thereafter, the Hospital's Medical Executive Committee met to consider the matter. Dr. Moore was invited to the meeting and he attended and presented argument in his own favor. However, the Committee decided to continue the suspension. Believing it was required to do so, the Hospital also reported the suspension to the NPDB, stating that its action was based on "serious allegations of sexual misconduct" involving a minor.

Dr. Moore then requested and obtained a review hearing before a panel of Hospital officials. At the hearing, both the Hospital and Dr. Moore called witnesses, cross-examined the other's witnesses, and presented documents. The panel even held the record open for an additional two months to enable Dr. Moore to present any additional evidence he might have. Ultimately, the panel upheld the decision to continue the suspension.

Dr. Moore appealed the panel decision to the Hospital's Board of Directors. After receiving further evidence, the Board voted unanimously to continue the suspension.

A few months later, DSS dismissed the sexual abuse case on the ground that it would not be in the child's best interests to have to testify, and since Dr. Moore's parental rights had already been terminated. With dismissal of the case, Dr. Moore applied to have his privileges reinstated. Oddly, however, he refused to allow another hospital where he had temporarily been practicing to provide necessary credentialing information. For that reason, the Hospital denied his reinstatement request.

At that point, Dr. Moore sued the Hospital and a number of its officials in federal court on a variety of claims relating to suspension of his privileges and the report to NPDB. The defendants raised immunity under the Health Care Quality Improvements Act. Dr. Moore then argued that immunity did not apply because allegations of sexual abuse outside of the professional context (i.e. not involving patients) are not related to his competence or his professional conduct as a doctor.

The U.S. Court of Appeals for the Fourth Circuit, headquartered in Richmond, did not buy Dr. Moore's argument. The Court concluded that a physician's competence can be implicated by conduct outside a health care facility if there is a clear nexus between that conduct and the ability to render patient care. A peer review committee could surely conclude, as the Hospital did here, that it was only a matter of time before erratic or destructive behavior outside any medical setting would manifest itself in patient care.

In this case, Dr. Moore's surgery practice brought him in contact with child patients. The Hospital had a legitimate concern that the alleged sexual abuse put those patients at risk. Further, the Hospital conducted lengthy proceedings and saw the matter through three levels of review in an effort to determine Dr. Moore's competence to practice medicine. While the case may have involved some difficult judgment calls, denying immunity to the Hospital and its officials in close cases would defeat the purpose of the Act.

The Court therefore dismissed Dr. Moore's suit.

References: Health Care Quality Improvements Act, 42 U.S.C. § 11101; *Moore v. Williamsburg Regional Hosp.*, 2009 WL 621619 (4th Cir. 2009).

DOL Allows Two-Week Work Schedule in Computing Overtime

Normally, an employer must pay overtime at time-and-a-half rates to non-exempt employees who work more than 40 hours in any given workweek, regardless of the employer's payroll periods. (For wage and hour purposes, a "workweek" is any 168-hour period as established by the employer.) For example, an employer who pays every two weeks must pay five hours of overtime to an employee who works 45 hours in week #1, even though the employee only works 35 hours in week #2. In other words, the employer cannot average the two workweeks together and pay only straight time for 80 hours.

There are limited exceptions to this rule. See "Alternative Overtime Arrangements," Employer Alerts, Jan. 2003, p. 2; "New Wage and Hour Rulings," Employer Alerts, Summer 2006, p. 4. A recent U.S. Department of Labor opinion letter may have created a new exception, or at least a clever interpretation of the rule.

The employer involved in the opinion letter required its employees to work 9 days during

each two-week pay period. Each employee worked 9 hours a day on Monday through Thursday and 8 hours on alternating Fridays,taking the other Friday off. The employer also established two different workweeks – one that began on at 11:31 a.m. on Friday and ended on 11:30 the following Friday; and a second that began on 12:31 p.m. on Friday and ended on 12:30 p.m. the following Friday. Employees could chose which workweek they wanted. An employee who chose the first workweek started at 7:30 a.m. on alternating Fridays and worked for 8 hours. Under the second choice, the employee started at 8:30 a.m. on alternating Fridays and again worked eight hours. The employer paid only straight time.

Viewed from the perspective of a traditional workweek – say one beginning Monday morning and ending Sunday night – employees were working a 44-hour week the first week and a 36-hour week the second, in effect averaging the two weeks. But by starting the workweek on midday Friday, half of the 8-hour day fell into the first workweek and the other half fell into the second. Furthermore, the employer got full, 9-hour coverage on Fridays, albeit with just a portion of its workforce.

The Department of Labor blessed this arrangement. DOL noted that under its regulations the employer gets to choose the workweek and it is free to have different workweeks for different groups of employees. The only requirement is that the employer cannot keep changing its workweeks to avoid overtime.

References: Fair Labor Standards Act, 29 U.S.C. § 201; 29 C.F.R. § 500; DOL Op. Ltr. FLSA2009-16 (Jan. 16, 2009).

Get Ready for GINA. In May 2008, then President George Bush signed into law the Genetic Information Nondiscrimination Act (GINA). Title II of GINA prohibits the use of genetic information in employment, including the intentional acquisition of genetic information about employees and applicants. Title II of GINA will become effective in November 2009.

In the meantime, the Equal Employment Opportunity Commission, which will enforce GINA, is busy developing regulations, a proposed form of which was recently issued. Under the statute, those regulations must be in place by May 2009. Lest employers think they can use genetic information until November, they should be aware that the Americans with Disabilities Act currently prohibits any pre-employment medical testing, including genetic testing. Furthermore, many states and local jurisdictions already prohibit discrimination on the basis of genetics. P.L. No. 110-233 (110th Cong. 2nd Sess., May 21, 2008); Proposed Rules, 74 F.R. 9056 (March 2, 2009).

Overtime Restrictions and the ADA. United Airlines had a policy prohibiting employees who were on light or limited duty from working overtime. United employees who worked at San Francisco International Airport charged that the policy had greater repercussions for employees with disabilities, since these employees were more likely to be assigned light duty. For example, one such employee had epilepsy and was restricted from operating heavy machinery or working at heights, but there was no restriction on the number of hours he could work. Yet under United's policy, he was barred from working overtime. The EEOC agreed that this amounted to a violation of the Americans with Disabilities Act, and it filed suit against United on behalf of all disabled employees. United and the EEOC then reached a settlement under which United agreed to rescind its policy and pay damages of $850,000 to employees impacted by the policy. EEOC v. United Airlines, Inc., U.S. Dist. Ct. N.D. Cal. No. 09-784 (Consent Decree filed March 17, 2009).

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