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An update on new federal law and regulation affecting your workplace

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FAMILY AND MEDICAL LEAVE

FMLA rules up for grabs

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On December 1, 2006, the Employment Standards Administration, Wage and Hour Division, of the U.S. Department of Labor (DOL) issued a request for information on the Family and Medical Leave Act of 1993 (FMLA). The request seeks public comment and information regarding the FMLA regulations based on the actual experiences of employers and employees over the last decade. This article highlights a few of the critical FMLA issues that have confronted employers in recent years. These issues likely will be at the forefront of the debate over whether and how the existing FMLA regulations should be changed.

Serious health condition

One controversial area relates to what constitutes a serious health condition warranting FMLA leave. The regulations require some period of incapacity on the employee's part. Incapacity from one job, however, doesn't preclude an employee from working at another one. In the case of *Conrad v. Eaton Corp.*, despite testimony from a treating physician that the employee's depression limited only his capability to work at the employer involved in the suit but didn't seemingly affect his ability to work for a different employer, the court held that he was "incapacitated" and suffered from a "serious health condition," contrary to the fundamental purpose of the FMLA.

A similar area of controversy likely will be related to employees' claims that they're incapacitated from working overtime but not their regular schedules. In *Reich v. Standard Register*, the court found that arthritis wasn't a serious health condition because the employee claimed it merely prevented him from working overtime, not his regular hours.

Notice to the employer

Another area that causes employers a great deal of difficulty is the level of notice employees are required to provide regarding their need for leave. Vague requests, for example, don't provide adequate notice. In one case, an employee who was fired for attendance reasons after calling in "sick" for two days didn't establish a claim under the FMLA because she gave no indication until the suit was filed that she suffered from clinical depression.

An employee's statements regarding her symptoms, however, may give the employer sufficient notice of an FMLA-qualifying reason. For example, an employee who

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Insider Interview

Responding to the DOL's request for information on FMLA regs

This month's interview is with Dr. Tevi Troy, deputy assistant to the president for domestic policy. He manages domestic policy progress within the White House. He was the Bush-Cheney deputy director of policy in 2004. Previous to that, he had been deputy assistant secretary of labor for policy and was involved in DOL regulatory initiatives from the earliest days of the Bush administration. He has a unique understanding of both the problems with the FMLA regulations and competing domestic policy issues that will determine, in all probability, whether this is the first or last step in an FMLA initiative.

Troy

Insider: Before we focus on the request for information (RFI) published by the DOL on December 1, 2006, regarding the FMLA, can you first give our readers a brief overview of administrative rulemaking and how this request fits?

Troy: An RFI isn't a required part of the administrative rulemaking process. But agencies often publish RFIs when they need to gather information to get a better sense of what is occurring in the regulated community, among employers and employees alike.

Insider: This seems to be the third major initiative the DOL has made to balance or correct previous regulations (the first two being a much needed update of the so-called "white-collar exemptions" to the minimum wage law and Reports LM1 and 2, the labor union reporting regulations). Can you comment on this administration's overall goals in the area and how the FMLA request fits in?

Troy: The first two initiatives you mention were very important. LM2 increased unions' accountability to their members by laying out clear rules for statutorily required disclosure requirements. The white-collar exemptions updated some regulations that were outdated and needed clarification. The FMLA RFI is an attempt to gather some clear information on how the medical leave part of the FMLA is working. From everything we've heard, we're confident the family part is working well. But we have heard some concerns from both the employee and employer side on medical leave, and we're looking to get more information.

Insider: Most administrative rulemaking proceeds from stakeholder meetings to the publication of proposed amendments to regulations. Can you cast any light on why the DOL has chosen to issue an RFI?

Troy: A number of court cases have been decided since the DOL held stakeholder meetings on the FMLA with employer and employee groups in 2002 and 2003, and the department believed it was important that the record be updated. Many in the public may not have been aware of those court decisions, and this helps make them aware.

Insider: Responses by persons opposed to changes in the white-collar regulations and LM1s and 2s were extensive. I recall reading of thousands of letters received by the DOL opposing proposed changes, congressional opposition, and a massive disinformation campaign claiming that millions would lose overtime rights, when, in fact, the amendments increased the number of workers eligible for overtime. Do you anticipate a similar response to the FMLA request, and if so, how should the business community respond?

Troy: I think it is hard to predict what the RFI record will yield. Certainly, widespread use of the Internet, e-mail, and blogs has increased public awareness of government actions. Each year, the increased availability of technology makes it exponentially easier to generate and submit comments — whether substantive or merely short expressions of opinion. Any party interested in this issue — whether employee or employer — should take this opportunity to respond to the RFI.

Insider: It's common knowledge that the current FMLA regulations have been proved costly and even disruptive of business operations. What should businesses that have experienced disruption and abuses do in response to the DOL's request?

Troy: Those interested in the issue should read the RFI and respond if they believe they have relevant information about how the FMLA works and problems that may have developed in implementing the current regulations. Although we have received numerous complaints, we don't yet know whether the conclusion stated in your question is true. That is the purpose of the RFI — to gather additional information from all sources on how the law works in practice.

Insider: Is it sufficient for businesses to rely on either the two national trade associations (the National Association of Manufacturers or U.S. Chamber of Commerce) or their industry associations? What is the role for "affected" individual businesses?

Troy: I think the DOL believes the more information, the better — whether from employers or employees, groups or individuals. Comments from trade associations are certainly helpful, and we hope they can provide some statistical basis for their claims. But individual businesses in some cases may be better able to provide specific data

to answer the questions in the RFI. Similarly, comments from employee groups may be helpful, but individual employees may also have specific data that would answer questions in the RFI.

Insider: What kind of information would be most useful — anecdotal or statistical — and can you provide guidance on the manner and content of responses by individual employers that would be most useful to the DOL in analyzing the need and drafting correctives to the FMLA regulations?

Troy: We are interested in all kinds of information, but I think there is a particular dearth of statistical information. Again, I would encourage interested parties to read the RFI. The DOL is asking some very detailed questions. I think it would be difficult to answer the data-specific questions with anecdotes.

Insider: Is there anything else our readers should keep in mind, whether they favor or oppose changes in the FMLA regulations?

Troy: I would say to your readers that if they have views on how the FMLA regulations have worked, now is the time to respond. That's what the RFI is all about. Further information on the RFI, including how to submit comments, can be found on the DOL's website at www.dol.gov/esa/whd/fmlacomments.htm. ❖

Family and medical leave — is there action at last?

In 1993, Congress passed the FMLA, which provides for up to 12 weeks of non-compensated time off for qualified employees for family or "serious health" reasons. As with most employment legislation, the Act provided a basic skeleton that was fleshed out by regulations. Over the last 13 years, employers have found increasing difficulty in applying some parts of the regulations.

Pressure for corrective changes to the regulations has been building in the employer community for some years. Following the 2000 election of President George W. Bush, the employer community expected that the DOL would address FMLA shortcomings, and anticipation increased in 2002 and 2003 when a DOL task force met with representatives of trade associations, labor unions, and stakeholders to review their experience with FMLA regulations.

Many of us anticipated a notice of proposed rulemaking in 2004, but instead, the DOL initiated rulemaking in two other areas: required union reports (LM1s and 2s) and updating the almost 50-year-old definitions of "white-collar" exemptions to the Fair Labor Standards Act. Both proposals encountered considerable political opposition, although final regulations were published and became effective. There was speculation in Washington that the White House was discouraged by what it perceived as the business community's lack of support for the first two initiatives and that, as a result, the administration wasn't anxious to propose FMLA changes. The political cost of significant changes increased substantially with the loss of the Republican majority in Congress this fall.

FMLA rules up for grabs

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indicated she would be off for "depression again" put her employer on notice that her time off qualified for FMLA leave. A change in work habits or an employee mentioning the need for time to "get her life back together" after pregnancy and domestic violence also may be sufficient to put an employer on notice of potential FMLA obligations.

Designation of leave as FMLA leave

The FMLA regulations state that employers must notify employees promptly if time off will be counted against their FMLA entitlement — and in no event later than the end of the leave. In addition, the regulations state that if the employer doesn't designate leave as FMLA leave, then the time off can't be counted against the employee's leave entitlement.

The regulations thus permitted an employee to sue her employer, even after she received all the leave to which she was entitled, simply because it failed to refer to the leave as FMLA leave. In *Ragsdale v. Wolverine World Wide, Inc.*, the U.S. Supreme Court held that this "categorical penalty" was incompatible with the FMLA and invalid because it fundamentally altered the Act.

Intermittent leave and medical certification

Finally, perhaps the most challenging aspect of the FMLA for employers is the use of intermittent leave. Under the FMLA, the 12-week entitlement need not be taken in a single block (other than for birth/adoption) but may be taken intermittently as needed for a serious health condition. This is the area in which most employers report cases of employee abuse. A single certification may cover several occurrences of intermittent leave over several months. With chronic conditions, there's no need to have seen a physician during the leave, and there's no mechanism for employers to verify that a specific absence was caused by a previously certified FMLA condition.

Moreover, even if a certification is inadequate, an employer must give an employee the opportunity to correct any defect in an incomplete or inadequate certification. Therefore, the employer's only real option when abuse is suspected is to seek a second and possibly third medical opinion, which may still permit the employee to take intermittent leave even after the process is complete.

Conclusion

These issues highlight the need for changes to and clarification of the FMLA regulations. You should take advantage of this limited window of opportunity to submit comments to the DOL to document these real-world problems with the Act and its regulations. ❖

Inside the DOL

DOL opinion letter: Registered representatives exempt from overtime

On November 27, 2006, the DOL issued a precedent-setting opinion letter concluding that securities industry employees who perform the duties of a registered representative (also known as a financial adviser, financial consultant, or stock broker) are exempt from federal overtime requirements. Below we review the key provisions of the DOL's opinion letter, describe the steps that companies can undertake for greater compliance, and discuss how to use the letter as a legal safe harbor against overtime claims. A copy of the opinion letter is available through FortneyScott's website at www.fortneyscott.com.

The basics

The DOL opinion letter addresses many questions about whether registered representatives are entitled to overtime under the federal wage and hour law, known as the Fair Labor Standards Act (FLSA), as amended. Until recent litigation challenges arose under federal and state wage and hour laws, registered representatives generally had been compensated based on a combination of some basic salary or draw plus commissions or fees; overtime historically hadn't been paid to them.

The compensation of registered representatives has been consistent with long-standing regulations and guidance issued by the DOL providing that they were exempt from overtime. Nonetheless, in the wake of recent amendments to the federal overtime regulations in 2004, the securities industry has faced a growing number of class-action lawsuits claiming that registered representatives were due overtime because they (1) performed nonexempt job duties and/or (2) were paid on a commission basis. The litigation claims were based in part on confusing and conflicting prior DOL opinion letters.

The DOL addressed both the duties and compensation arguments and acknowledged that the general industry practices for registered representatives' duties and compensation comply with the requirements for the "administrative" exemption from the overtime laws and related recordkeeping obligations under both the current and former overtime regulations. The opinion letter also clarified previous ambiguous DOL interpretations and specifically overruled prior opinion letters that were contradictory to the conclusions reached in the present opinion letter.

The opinion letter enables securities industry employers and others in the financial services field to ensure that their employment practices affecting registered representatives comply with the federal wage and hour requirements and provides employers with a legal safe harbor against potential future claims.

Key points

The opinion letter concludes that registered representatives' duties fall within those that are performed by employees who are exempt from overtime. To be exempt from the overtime requirements, registered representatives' duties and compensation both must meet the legal criteria. The opinion letter focuses on the overtime exemption that governs "administrative" employees, whose primary duty is defined in the DOL regulations as "the performance of office . . . work directly related to the management or general business operations of the employer or the employer's customers" and includes the exercise of "discretion and independent judgment with respect to matters of significance."

The DOL concluded that the registered representatives met those requirements, stating that "the registered representatives service their employer's financial services business by engaging in promotion and business development activities, including the marketing, servicing, and promoting of the employing firm's financial services and products, and by making themselves visible to the appropriate segments of the public in order to meet and retain potential new clients for their employing firm." The 2004 regulations recognized that many financial service employees qualify for the administrative exemption, even if they're involved in some selling to consumers, although selling can't be the primary duty.

The opinion letter also addresses the requirement of exercising discretion and independent judgment on matters of significance. The DOL noted that the duties of registered representatives include evaluating clients' individual financial circumstances and investment needs and assessing and comparing the alternatives before recommending investment options to them. Those duties satisfy the discretion and independent judgment requirement of the administrative exemption.

The correct application of the DOL letter requires that the duties tests be fully satisfied by registered representatives to be exempt from overtime.

The compensation practices involving a guaranteed minimum draw plus additional commissions or fees must meet the salary basis compensation requirements to be exempt from overtime. In addition to the duties tests, the registered representatives' compensation must meet the

legal salary requirements for the employees to be exempt from overtime.

The DOL reviewed and approved the common compensation practices governing registered representatives. In seeking the opinion letter, the department was advised that the registered representatives received a guaranteed minimum amount that meets or exceeds the $455 minimum salary requirement for the exemption. The minimum guaranteed amount isn't subject to reduction based on the quality or quantity of work performed.

The opinion letter concludes that the compensation arrangements meet the salary basis requirements. Additionally, the DOL specifically withdrew prior opinion letters that created confusion about similar compensation schemes.

As the DOL explained, it doesn't matter what specific terms or schemes are followed, such as draw against commission, draw plus extra compensation, or the offset method. What matters is that:

(1) the employee receives no less than the guaranteed minimum of $455 per week as a guaranteed salary constituting all or part of the compensation;

(2) the salary amount isn't subject to reduction because of quality or quantity of work; and

(3) the salary amount isn't subject to repayment by the employee even if he fails to earn fees or commissions that are sufficient to offset any portion.

Those rulings may be significant in a number of workplaces in which employees are compensated in a comparable fashion.

> The DOL specifically withdrew prior opinion letters that created confusion.

The opinion letter provides employers with significant latitude in implementing compensation systems that satisfy the $455 minimum weekly salary requirements for registered representatives or other employees to be exempt from overtime and can include properly designed draws, offsets, and other common compensation program elements.

Portal-to-Portal Act. The DOL opinion letter not only provides important guidance to employers on compliance issues but also may provide legal defenses under the Portal-to-Portal Act to challenges against their efforts to comply with the FLSA's wage and hour requirements.

Section 10 of the Portal-to-Portal Act provides an employer with a complete and absolute defense against liability and damages in any claim filed against it for violations of the minimum wage and overtime provisions of the FLSA if the employer shows that the act or omission at issue was in good faith and based on reasonable grounds. To use that defense in reliance on an opinion letter, the employer must prove that its actions were taken:

- following the guidance in an opinion letter issued by the wage and hour administrator to a similar type of employer;
- in reliance on that opinion letter; and
- in good faith.

Employers should obtain necessary counsel to understand how to fully use the opinion letter to create a legal defense against liability and damages if they face overtime claims by registered representatives.

What the opinion letter doesn't cover

The opinion letter addresses representatives who are (1) registered with a self-regulatory organization, such as the New York Stock Exchange or the National Association of Securities Dealers, and licensed under Series 7 and other requirements and (2) are supervised by the U.S. Securities and Exchange Commission. Other sales support and administrative staff personnel who don't meet those requirements aren't subject to the opinion letter.

Additionally, an employee whose primary duty is inside sales can't satisfy the duties requirements of the opinion letter. The DOL hasn't provided comparable guidance on the exempt status of registered representatives under different overtime exemptions, including the retail and service establishment exemption governing certain inside sales employees.

Finally, the opinion letter addresses only the federal wage and hour law and regulations. Although many state wage and hour laws essentially track the federal law, there are a number of significant states that have different overtime requirements. In particular, both California and New York have wage and hour laws that impose more stringent requirements to be exempt from overtime. Employers should carefully review their state's wage and hour laws.

Bottom line

The opinion letter provides securities industry and related employers with significant guidance for registered representatives' overtime status under the FLSA's administrative exemption. Employers should understand the limits of the opinion letter and consult with experienced wage and hour counsel for advice on how the letter affects their obligations under the applicable state wage and hour laws.

For further information about the DOL opinion letter and related compliance matters, please contact Fortney & Scott, LLC, at www.fortneyscott.com or (202) 689-1200. ❖

Under the Capitol Dome

109th Congress passes tax extensions, enhanced HSAs before closing. On the last day of the 109th Congress, lawmakers managed to pass a series of tax breaks, including research and development tax credits for businesses and tax deductions for reimbursements of college tuition. But the biggest surprise in the tax bill was a series of changes to health savings accounts (HSAs).

The changes to HSAs will allow users to make penalty-free transfers from flexible spending and health reimbursement accounts until 2012 and make one-time distributions from individual retirement plans to fund their HSAs. Employers also will be permitted to increase their contributions to HSAs opened by lower-paid employees.

Business groups applauded the changes, saying they would make HSAs much more attractive to employers and their employees. The number of people who use HSAs for health care coverage has grown dramatically over the past two years. According to government statistics, nearly half a million individuals were covered by HSA-type insurance plans at the end of 2004. Today, more than three million people are covered by HSA plans.

The tax bill also includes provisions that will extend and expand the Work Opportunity Tax Credit program, which offers tax credits to employers that hire individuals with barriers to employment, such as welfare recipients, ex-convicts, and younger workers.

Finally, the bill extends the 1996 Mental Health Parity Act (MHPA) for another year for all insured, self-insured, and public health plans. The MHPA prohibits benefit plans from setting annual or lifetime limits on the amount of coverage for mental health care unless similar caps are placed on medical and surgical benefits.

Minimum wage tops new Congress' agenda. House Democrats have pledged to tackle key labor issues in their "First 100 Hours" agenda, starting with minimum wage. Congressman George Miller (D-California), incoming chairman of the Education and Workforce Committee, said he hopes to "usher a clean bill through the House" without any offsets. He further said a minimum wage bill could be approved without holding hearings.

In addition to the committee's focus on raising the minimum wage, Miller gave his support for the Employee Free Choice Act, the key issue for organized labor, which would require employers to recognize a union when a majority of workers sign union authorization cards. Miller downplayed opposition from the business community, saying that many employers already implement neutrality agreements that permit card checks.

Despite Miller's optimism, the committee's current chairman, Congressman Howard P. McKeon (R-California) stated the proposal was one that would face strong opposition from Republicans.

Pension oversight also is expected to be tackled by the committee but is unlikely to be dealt with during the first 100 hours. Miller voted against the Pension Protection Act, saying he was concerned for workers who stood to lose the most if their workplace pension plans were allowed to terminate and wanted to see all possibilities exhausted before allowing companies to turn over their underfunded plans to the Pension Benefit Guaranty Corporation for termination.

Finally, Miller signaled that he would use the committee's oversight functions to ensure that worker and job protections standards were given top priority, citing a Government Accountability Office study he requested. The study recommended changes to the defined-contribution plan system so that participants and the DOL would have increased disclosure of information on fees charged to sponsors of and participants in 401(k) retirement plans.

New Congress at odds with administration over immigration enforcement. Mississippi Democrat Bennie Thompson, in line to become chairman of the House Homeland Security Committee, has sent a letter to the nation's largest uniform supplier, Cintas Corporation, that it would face criminal charges if it follows a White House proposal to recheck workers with mismatched social security numbers and fire those who can't resolve the discrepancy in 60 days. Thompson's letter said the company could be charged with "illegal activities in violation of state and federal law" if any of its 32,000 employees are terminated because they gave incorrect social security numbers to be hired.

In June, President Bush proposed new guidelines concerning "no-match" letters from the Social Security Administration, saying he wanted to make it easier for employers to verify workers' eligibility and continue to hold them accountable for those they hire. On November 27, the Department of Homeland Security (DHS) followed up on the president's directive, announcing new regulations to help businesses comply with hiring requirements intended to reduce the hiring of illegal aliens — including guidelines for businesses for handling "no-match" letters from the Social Security Administration. The proposed regulation is subject to a 60-day public comment period.

DHS Secretary Michael Chertoff said the new rules provide the necessary tools employers need to ensure they're complying with the law and help identify and prosecute employers that are blatantly abusing immigration laws. But Thompson called the "no-match" letters a threat to workers who fail to reverify their information. He further noted implementing a regulation not yet final

could be in violation of federal immigration law. Cintas issued letters to 400 employees in five states telling them they will be indefinitely suspended if they can't resolve their mismatched social security number within 60 days.

Senate adjourns before confirming key vacancies. Before adjourning, the Senate failed to vote on the pending nominations of Paul DeCamp as the new wage and hour administrator or on David Palmer for a Republican seat on the Equal Employment Opportunity Commission.

The nominations were returned to the White House, giving President Bush the option of giving the nominees a recess appointment, resubmitting their names to the 110th Congress, or nominating another individual for the vacancy. ❖

ALIENS

Homeland Security conducts largest work site raids in history, promises more

On December 12, 2006, agents of the U.S. Immigration and Customs Enforcement (ICE), part of DHS, executed civil search warrants at six facilities owned by Swift & Company, one of the nation's largest processors of pork and beef, and arrested 1,282 people. The raids were the largest in U.S. history.

Homeland Security steps up enforcement

ICE raided Swift work sites in Colorado, Nebraska, Texas, Utah, Iowa, and Minnesota. Sixty-five of those arrested have been criminally charged with identity theft or other violations, such as reentry after deportation. The remaining apprehended workers were charged with administrative immigration violations.

DHS Secretary Michael Chertoff promised more investigations and raids: "I will pretty much guarantee you we're going to continue bringing in these cases." The raids resulted from an investigation dating back to February 2006 and are only the most recent of numerous work site actions conducted by ICE this year.

As reported in our May issue, soon after the arrest for immigration law violations of seven current and former managers of IFCO Systems North America, Inc., the largest pallet services company in the United States, Chertoff announced: "Employers and workers alike should be on notice that the status quo has changed." At that time, he promised that DHS would find "employers who knowingly or recklessly hire unauthorized workers" and would "use every authority within our power to shut down businesses that exploit an illegal workforce to turn a profit."

No charges have yet been filed against Swift, however. Chertoff acknowledged that the company cooperated with the government's Basic Pilot program, which verifies social security numbers. In a press release issued on December 13, 2006, ICE explained: "By using valid Social Security numbers and birth certificates of U.S. citizens, these illegal aliens were able to thwart the Basic Pilot Employment Eligibility Verification System ('Basic Pilot'), a federal program designed to help employers detect unauthorized workers. Swift has used the Basic Pilot program since 1997." The assistant secretary for ICE, Julie L. Myers, added, "The genuine identities of possibly hundreds of U.S. citizens are being stolen or hijacked by criminal organizations and sold to illegal aliens in order to gain unlawful employment in this country. Combating this burgeoning problem is one of ICE's highest priorities."

ICE had informed Swift of the raids on December 4, and the company asked a federal judge to bar them, arguing that they would cause it substantial and irreparable harm. That request was denied. According to court papers filed by Swift, it voluntarily interviewed 450 suspected employees at several of its plants between October 19 and November 17, 2006, and found that between 90 and 95 percent weren't who they said they were. Four hundred were fired or quit, but the company stopped the self-review at ICE's insistence.

Be prepared

Chertoff's promise of continuing investigations should alert employers to take protective actions. Employers should conduct an audit of I-9 forms and their I-9 program to ensure compliance with relevant law and take corrective actions. In some cases, employers may conclude that additional or new documents verifying workers' identities and work eligibility are needed.

Before requesting such documents, employers should consult counsel to ensure that the requests wouldn't violate the antidiscrimination provisions of the Immigration and Nationality Act or Title VII of the Civil Rights Act of 1964. Employers also may want to consult counsel about whether it would be advisable to participate in the Basic Pilot program or solicit ICE's assistance as part of efforts to improve compliance with relevant law.

ICE had previously reported that it would randomly select employers in each ICE region and district based on its designation of target industries with a history of employment of unauthorized aliens. Those designated industries include construction, hotels, restaurants, food processing plants, business and personnel services, and apparel and textiles. Employers in those industries would be well advised to take some of the protective actions recommended above.

For further information and assistance, please contact David Z. Izakowitz at (434) 977-2574 or Jacquelyn E. Stone at (804) 775-1046. ❖

Inside the EEOC

EEOC wins appeal of $3.4 million in preemployment case

As part of the Equal Employment Opportunity Commission's (EEOC) systemic enforcement initiative, the EEOC recently obtained a significant appellate victory in a preemployment testing case. The Eighth U.S. Circuit Court of Appeals, which includes Midwestern states such as Iowa and Nebraska, affirmed a $3.4 million back pay and damages award to 52 women denied employment at a meatpacking plant after failing a preemployment strength test. The employer, Dial Corporation, had implemented the test to curtail on-the-job injuries reported by employees in entry-level jobs with a repetitive 35-pound lifting requirement.

Despite evidence that injury rates dropped following its implementation and expert testimony that the test was "highly representative" of day-to-day job duties, the Eighth Circuit held that Dial had failed to establish either that it was justified by business necessity or that the test had been validated as required by the EEOC's regulations. The court emphasized that:

- men and women had worked the job together for many years;
- the injury rate had begun to drop two years before the test was instituted;
- women suffered fewer injuries than men before the testing; and
- while both men and women received similar comments on their test evaluation forms, the men were hired and many women were rejected.

Accordingly, the Eighth Circuit refused to disturb the trial court's holding that the company had engaged in unlawful sex discrimination against female applicants in violation of Title VII.

The Eighth Circuit also rejected the company's challenges to the back pay and benefits awarded to all but one of the 52 women, citing its obligation to grant "the most complete relief possible." The court didn't reduce the back pay award based on the company's average tenure calculations — specifically, the high turnover rate for the entry-level jobs at issue — which suggested that the women wouldn't have remained employed for the entire back pay period.

The court also refused to disturb the trial court's award of lost medical insurance premiums, rejecting the employer's contention that the women should have been required to prove they actually incurred medical expenses. Deeming such an award reasonable, the court emphasized that it's insurance coverage, not reimbursement for health care costs, for which the employer must be held liable. This ruling may prove to be the "silver lining" in an otherwise dark cloud because it supplies a basis for arguing that out-of-pocket medical expenses incurred by employees filing suit under Title VII aren't chargeable to the employer as part of a back pay award.

The federal employment oversight agencies, including the EEOC and the DOL's Office of Federal Contract Compliance Programs, continue to focus on testing issues. All preemployment physical testing must be job-related, based on actual day-to-day requirements, and documented by a current, accurate job description. Generally, employment tests also must be validated. *EEOC v. Dial Corporation,* No. 05-4183 (8th Cir.)(November 17, 2006). ❖

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