Legislative and Legal Update
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New Mental-Health Manual Likely to Impact HR

In psychiatry, unlike other branches of medicine, there is no laboratory test that can confirm the existence of a particular mental disorder. Psychiatrists and other mental health professionals rely on the Diagnostic and Statistical Manual of Mental Disorders, known as "DSM-5" to diagnose patients. The American Psychiatric Association has just released a new fifth edition of the manual and human resources executives should take note. It contains new diagnostic categories not listed in its predecessor and loosens the criteria for some diagnoses which will likely result in more people qualifying for these diagnoses. DSM-5 is likely to impact HR by expanding the number of employees who will qualify as disabled under the Americans with Disabilities Act and be entitled to reasonable accommodation.

While DSM-5 cautions that the assignment of a diagnosis does not imply a specific level of impairment or disability, this distinction has little practical meaning given the enactment of the ADA Amendments Act in 2008 in which Congress decreed that the definition of "disability" for purposes of the ADA is to be construed broadly in favor of coverage. The Equal Employment Opportunity Commission's regulations issued under that law even decreed that certain psychiatric disorders, including Posttraumatic Stress Disorder, Major Depressive Disorder and Bipolar Disorder, will almost always qualify as disabilities. Employees with other diagnosed mental disorders can qualify for the ADA's protection simply by showing that they are limited in their ability to interact with others, one of the "major life activities" recognized under the amended ADA.

Critics of DSM-5 say the new manual permits more of the ordinary quirks and travails of everyday life to be diagnosed as mental disorders. As a result, requested accommodations by employees are likely to extend beyond mere leaves of absence or adjusted work schedules to permit therapist visits.

Within the next few years, HR professionals could be inundated with requests for job modifications from employees who are simply forgetful or do not communicate well, for more time off for employees with severe PMS or who are grieving the loss of a loved one, and forgiveness of misconduct from the personality disordered. Indeed, DSM-5 is likely to bring some daunting new challenges to HR professionals.

Fisher and Phillips

Breastfeeding Rights Bill for Exempt Employees Introduced In House, Senate

Legislation that would require employers to provide breaks for salaried employees who are nursing mothers was introduced recently in both the House and Senate. The "Supporting Working Moms Act of 2013" (H 1941/S 934), introduced by Carolyn Maloney (D-NY) in the House and by Sen. Jeff Merkley (D-Ore) in the Senate, would amend Sec. 13(a) of the FLSA to expand to salaried employees protections that were afforded to hourly workers under the Affordable Care Act.

In 2009, Maloney and Merkley sponsored the Breastfeeding Promotion Act of 2009, which made its way into the comprehensive health care reform legislation signed by President Obama in 2010. That provision requires that employers provide nonexempt employees with "reasonable break time" and a private, non-bathroom place to express breast milk during the workday, up until the child's first birthday. Their current bill would expand this right to exempt employees as well.

Employers would not be required to compensate an employee for the break time to express milk, and an employer with fewer than 50 employees who is unable to meet the requirements under the provision is exempt if it would pose an undue hardship.

Merkley estimates the measure would cover approximately 12 million salaried women who work in traditional office environments.

According to "The Business Case for Breastfeeding," published by the Department of Health and Human Services, employers that provide support for breastfeeding mothers experience lower health care costs, lower rates of absenteeism, and better retention of experienced employees, Merkley noted in a statement announcing introduction of the legislation.

The House bill has nine cosponsors and has been referred to the House Workforce Committee. The Senate measure was introduced on May 13; it currently has two cosponsors, Tom Harkin (D-Iowa) and Elizabeth Warren (D-Mass), and has been referred to the HELP Committee.

Wolters Kluwer

Affordable Care Act: Employers Must Soon Provide Marketplace Notices To Employees

Employers have until October 1, 2013, to provide notice to current employees of coverage options available through the Health Insurance Marketplace established under the Affordable Care Act. On May 8, 2013, the U.S. Department of Labor (DOL) issued Technical Release 2013-02, providing temporary guidance on the notice to employees of coverage options available through the Marketplace. The notice requirement generally applies to employers with one or more employees and at least $500,000 in annual revenue but also

specifically applies to certain health care entities, schools, and government agencies.

Following are the key requirements of the written notice:

By October 1, 2013, the notice must be provided to all current employees.
Beginning October 1, 2013, it must also be provided to each new employee within 14 days of the start date.
The notice must inform the employee of the existence of the Marketplace and contain a description of the services available and how to contact the Marketplace.
It must state that the employee may be eligible for a premium tax credit for coverage purchased through the Marketplace if the employer's plan does not provide "minimum value."
It must also note that the employee may lose the employer contribution to the employer-sponsored plan if the employee obtains coverage through the Marketplace, and that such employer contribution is typically excludible from income for Federal income for tax purposes.

The DOL has issued model notices for employers who offer a health plan and for employers who do not. The model notices are divided into parts A, general information, and B, plan-specific information. Employers are not required to use the model notices, but if used they will satisfy the requirements.

Technical Release 2013-02 also provides updated guidance for the model COBRA election notice. Group health plans generally must provide an election notice describing rights to continuation coverage and how to make an election. The new notice updates the prior one issued by the DOL to change and add information as it relates to the Marketplace and requirements under the Affordable Care Act.

A Rose Isn't Necessarily a Rose in PPACA's Baffling Terminology

5/23/2013 By Allen Smith

One reason for the Patient Protection and Affordable Care Act's (PPACA) many critics is the way the law is worded.

In addition to being well over 1,000 pages long, the act contains layers of definitions on top of definitions that make it almost impossible to understand. It's as though Congress played hide and seek with the law's requirements.

Other employment laws use the simplest of language to state the threshold number of employees needed for the law's requirements to apply. Not so the PPACA, which asks employers to stay on their toes to ensure they use the right threshold for different requirements.

It will likely take years to tease out the law's confusing terminology. Consider just the following examples.

"Essential health benefits" sound like, but are different from, "minimum essential coverage," which sounds like but also is different from "minimum value coverage." And "minimum essential coverage" means two completely different things. Clear as mud, right?

Linda Rowing, compliance director at United Benefit Advisors (UBA), pointed out the confusing overlap in the law's terminology in a recent interview. She said the most confusion arises from the similarly sounding "minimum essential coverage" and "minimum value coverage."

Essential Health Benefits

But there is confusion, as well, between "essential health benefits" and "minimum essential coverage," she noted. As of 2014, individual and small group market plans must provide coverage for **10 essential health benefits**:

Ambulatory/outpatient patient services.

Emergency services.

Hospitalization.

Maternity and newborn care.

Mental health and substance abuse services, including behavioral health treatment.

Prescription drug coverage.

Rehabilitative and habilitative services and devices.

Lab services.

Preventive and wellness services and chronic disease management.

Pediatric services, including dental and vision care for children.

Don't expect the definition of a small plan to be anything as simple as one number, though. Instead, small plans are believed to be those with fewer than 50 employees. A plan that has more than 100 employees is large. But in between—who knows?

Minimum Essential Coverage

Also in 2014, the "pay or play" penalty ($2,000 per employee, excluding 30 full-time employees) will apply to "**large employers**" if plan sponsors with more than 50 full-time workers (30 or more hours a week or **full-time equivalent employees**) do not offer minimum essential coverage.

This requirement is not to be confused with the minimum essential coverage that each American must have in 2014 or face a tax penalty. Yes, these different requirements are sometimes referred to with the exact same words. That individual penalty is 1 percent of income or $95, whichever is greater.

A way to keep these two types of minimum essential coverage distinct is to refer to the requirement for all

Americans to obtain minimum essential coverage as the "individual mandate."

Minimum Value Coverage

Confused yet? Wait, there's more.

Minimum essential coverage is different from minimum value coverage.

Shorthand references with this law just muddies the waters that much more. "Minimum coverage," for example, begs the question—minimum essential or minimum value coverage?

To make matters worse, the law has a plethora of varying penalties for different sections of the law. Minimum essential coverage has a $2,000 penalty per employee, while minimum value coverage has a $2,000 to $3,000 penalty.

A what?

Here is the actual requirement for determining something usually as straightforward as a penalty. When 50 or more employees are offered coverage, if an employee receives a premium tax credit on an exchange, the employer would be penalized the lesser of an annual $3,000 for each full-time employee who declines coverage and gets coverage on the exchange or $2,000 for each full-time employee, according to Gallagher Benefit Services' ***Healthcare Reform Questions & Answers for Employers***.

Sounds sort of like a $2,000 penalty for each employee. But is the minimum value coverage penalty of $2,000 imposed annually, like the $3,000 penalty, or just one time, like the minimum essential coverage penalty? And is the minimum essential coverage penalty per full-time employees, like the minimum value coverage penalty, or is it per any employee, regardless of whether the worker is part time or full time? When, exactly, does the employer find out that the employee has been given a premium tax credit, so it can budget for that?

Law's Merits

Of course, the law is not without some merit. Congress presumably didn't write it to intentionally drive employers up the wall.

In a May 14, 2013, press conference at the White House, President Barack Obama said, "Basically, there are two main things that the American people need to know about this law and what it means. First, if you're one of the nearly 85 percent of Americans who already have health insurance—whether it's through your employer, or Medicare or Medicaid—you don't have to do a thing. This law already provides you with a wide array of new benefits, tough new consumer protections, stronger cost-control measures than existed before the law passed. And those things are already in place—you're benefitting from them. you just may not know it. Making sure that insurers can't take advantage of you. Making sure that your child can stay on your health insurance until they're 27 years old. So a lot of those provisions are already in place, providing help and assistance to people all across the country. Now, second, if you're one of the tens of millions who don't have health insurance, beginning this fall, you'll finally be able to compare and buy quality, affordable private plans that work for you. So that's what you need to know. If you've already got health insurance, this has just enhanced it. And if you

don't, you're going to be able to get it."

Was that just two things? Maybe, maybe not. As with many things, the devil's in the details.

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New Employees Must Receive Health Coverage within 90 Days of Hire

Under proposed health care reform law regulations, newly hired employees must be offered health insurance coverage no later than 90 days after they begin work. Issued by the Internal Revenue Service and the Departments of Labor and Health and Human Services, the regulations involve a provision in the Patient Protection and Affordable Care Act that, effective in 2014, will limit health insurance coverage waiting periods to 90 days. Regulators noted that several commenters on previous guidance said it has been "common practice" for coverage to become effective the first day of the month after the 90-day waiting period. But regulators said "due to the clear text of the statute," waiting periods may not extend beyond 90 days, with all calendar days, including weekends and holidays, counted.
In the case of where an employer imposes a 90-day waiting period and the 91st day is a weekend or holiday, the employer could make coverage prior to the 91st day for administrative ease. But coverage, regulators said, cannot be later than the 91st day.
Business Insurance

SHRM Seeks Flexibility on 90-Day Health Care Waiting Period Rule

5/21/2013 By Stephen Miller, CEBS

The Society for Human Resource Management (SHRM) has submitted **comments** about **proposed regulations** that would incorporate into the Patient Protection and Affordable Care Act (PPACA) section 2708 of the Public Health Service Act, which prohibits health plans from imposing any waiting period for coverage that exceeds 90 days. SHRM submitted the comments on May 20, 21013, to the federal agencies that oversee the PPACA.

"The vast majority of [SHRM] members work within organizations that currently offer coverage to employees starting with the first day of the month following 90 days of employment (or the first day of the third month), or the first payroll period following some waiting period. Thus, many small and medium employer plans would be out of compliance with the approach taken in the proposed regulations that would limit waiting periods to no more than 90 *calendar* days," wrote Michael P. Aitken, SHRM's vice president for government affairs.

"Existing practice reflects a reasonable approach taking into consideration HR and payroll systems, insurance company requirements, and the need for consistent employee

communications and a controlled process," Aitken continued. "Most small and medium-size employers simply do not have the staff nor resources to undertake the changes to processes, systems, communications, and other functions that would be needed to switch from current practice to a strict 90 calendar day waiting period at the same time as significant other changes must be implemented to comply with different [PPACA] provisions taking effect in 2014."

A three-month waiting period also helps prevent adverse selection, where an individual accepts a position solely to obtain health insurance to cover a medical condition, which could impose unfair risk on an employer, Aitken noted. "From an administrative perspective, this eligibility approach allows for a single entry date each month that conforms to insurance carrier requirements, and facilitates efficient payment of premiums and collection of employee contributions. We are concerned that disrupting current practices could actually result in more harm to newly eligible employees as implementation is almost always accompanied by 'glitches.' "

Transition Period Sought

SHRM is recommending a transition period or enforcement safe harbor for the first plan year in which the new rule takes effect. "With the many changes facing employers in 2014, transition relief for section 2708 is appropriate and needed," Aitken wrote. "We do not believe that Congress intended, in adopting section 2708, to disrupt current practice or to require employers to extend coverage to probationary employees."

He added, "Granting some leniency to the first of the month following 90 days after an employee has met eligibility requirements makes sense."

Stephen Miller, CEBS, is an online editor/manager for SHRM

Employers Adjust Health Benefit Strategies in Reform's Wake

Many remain confused about new requirements and how they work

5/22/2013 By Stephen Miller, CEBS

Many employers are making changes to their health plans as a result of health care reform coverage mandates, according to the International Foundation of Employee Benefit Plans' ***2013 Employer-Sponsored Health Care: ACA's Impact*** report.

Key findings from the survey of more than 950 U.S.-based employee benefits professionals include:

- Employers' confidence in their sponsored health care plans increased year to year, but many organizations are planning to modify their plans because of effects from implementing the Patient Protection and Affordable Care Act (PPACA).
- The vast majority of employers (90 percent) have moved beyond a wait-and-see mode and are taking steps to deal with new rules and regulations stemming from the health care reform law.
- For the first time, employers were more likely to say their top health care focus is developing tactics to handle implications of the PPACA.

Sixty-nine percent of employers will definitely continue to provide group health coverage to their employees when health exchanges begin operating, in 2014 — a 23-point increase from 2012 (46 percent). Another quarter of respondents are very likely to continue their employer-sponsored health care plan.

Increasing Cost-Sharing

Nearly one in five (18 percent) employers has already increased participants' share of plan premiums, and an additional quarter of respondents plan to increase the portion that employees pay for their premiums over the next year.

Of those employers planning to make changes, one in four is increasing its emphasis on high-deductible health plans (HDHPs) with health savings accounts (HSAs), while another 14 percent are assessing the feasibility of adding HDHPs with HSAs.

Companies are also encouraging healthy behavior in employees, with 19 percent developing or expanding organized wellness programs within the past year. Additionally, 14 percent of employers adopted or expanded the use of financial incentives to encourage healthier lifestyles within the past year; another 25 percent intend to do so next year.

More organizations are redesigning their plans to avoid the 2018 excise tax on high-cost or "Cadillac plans." In 2011 only 1 in 10 companies intended to redesign its plan to avoid the additional tax, but a steady increase over the past two years suggests this number will likely soon double.

Focusing on Compliance

Similar responses to health care reform were revealed in a series of roundtables with mostly large employers, held in New York, Chicago and Atlanta by consultancy PricewaterhouseCoopers (PwC). In the wake of PPACA implementation, "employers are confronting broader strategic considerations relating to health coverage for their employees," stated PwC's May 2013 report on the roundtable findings, ***An HR Perspective: Focusing on the***

Future of Healthcare Benefits.

Compliance and reporting requirements were the biggest concern of about 15 percent of roundtable participants. “Overall, participants had a broad awareness of the issues involved, but there was some confusion about the existence of some of the requirements and how they work and many questions about the details,” the report noted. For example, “New rules will limit out-of-pocket maximums in most plans starting in 2014, but many employers were unaware that co-payments must count toward those maximums, or that it will be difficult to administer the requirement to have co-payments (generally imposed when a patient receives a medical service) apply to the out-of-pocket maximum.”

Nearly half (41 percent) of roundtable attendees considered the two highest priorities for their health benefit strategy going forward to include bringing health care consumerism “mainstream” (by offering high-deductible plans with health savings accounts and by educating employees on their use, for instance) and improving participation in wellness and health management programs.

Options for replacing employer-sponsored coverage and paying penalties were still too new for most employers to seriously consider for their active employee population, the roundtables revealed.

Employers Weigh 'Strong Penalty' vs. 'Weak Penalty'

Health care reform's employer mandate actually consists of two different penalties, based on two different categories of employer behavior, **according to an analysis in *Forbes*** by Avik Roy, a senior fellow at the Manhattan Institute for Policy Research.

Under the strong penalty, an employer that fails to offer full-time employees minimal essential coverage risks a fine of $2,000 times the total number of full-time equivalent employees minus 30.

Under the weak penalty, an employer that offers employees any health insurance plan legally available within the state risks a penalty of $3,000 for each full-time employee that purchases coverage through a public exchange and qualifies for a premium tax credit or subsidy because their employer-sponsored plan is not deemed "affordable."

Roy notes an emerging recognition among some employers that they can better control their health care costs by offering minimum-value coverage (in some cases, costing around $600 per employee per year) just sufficient to avoid the $2,000 per employee penalty, while paying $3,000 per each full-time employee that seeks exchange-based coverage and qualifies for a government subsidy—assuming that most low-income employees that would qualify for a subsidy won't actually want to pay for coverage beyond the minimal plan that the employer provides.

Stephen Miller, CEBS, is an online editor/manager for SHRM.

Employers Trip Over FMLA Basics

Most employers know whether they are covered by the Family and Medical Leave Act (FMLA) and that the Act requires covered employers to provide eligible employees with up to 12 weeks of unpaid leave in a year in certain circumstances (e.g., the birth of a child, or to deal with a serious illness). If you do not, consulting the Department of Labor's (DOL) online fact sheet is a good start. Even employers that know about notice, eligibility, certification, and other FMLA basics can make costly mistakes. Learn from these examples and avoid your own missteps.

Eligibility

Employers need to fully understand eligibility requirements and communicate them clearly to employees. Indeed, a federal district court in Texas ruled that an employee's detrimental reliance on her employer's mistaken acknowledgement that she was eligible for FMLA leave could estop the employer from asserting that she was not covered by the Act (Allen v MidSouth Bank). A federal court in Colorado refused to dismiss an FMLA claim by an employee with recurring kidney stones who exhausted her FMLA leave and was technically no longer eligible (Bourne v Exempla, Inc). Her supervisor kept granting leave without notifying her that she did not qualify under the FMLA. Generally, an employer must notify an employee of FMLA eligibility within five days of receiving notice of the employee's intent to take leave.

One issue that has not been settled is whether a pre-FMLA eligible employee is entitled to some FMLA protections after notifying an employer of plans to take medical leave once eligible. For example, a federal court in Tennessee declined to follow another circuit's conflicting precedent and dismissed the FMLA claims of a pre-FMLA eligible employee who had cancer, and who was fired after she told her employer of her post-eligible plans to take leave to undergo surgery (Dunn v Chattanooga Publishing Co). Stay tuned for further developments on this issue. Until the law is settled, err on the side of caution.

Notice of Need for Leave

To be entitled to FMLA protections, an employee must give the employer notice of the need for leave. Under DOL regulations, when timing is not foreseeable, notice should be given "as soon as practicable under the facts." This requirement frequently crops up in litigation; employers are wise to take a broad view of what constitutes notice. For example, courts may find an employer had notice if an employee previously took leave for an ongoing condition; asks about medical leave; or has a known health condition and is seen having symptoms at work. A federal court in South Dakota recently found an employer had notice where it knew an employee had neck pain and headaches and a supervisor observed her lightheadedness and sent her to the emergency room (Jones v Bracco Ltd Partnership).

Exercising caution by taking a broad view of notice does not mean an employer cannot require employees to follow call-in or other procedures for absences. For example, the Eighth Circuit affirmed the dismissal of an employee's FMLA claims because she missed a month of work due to

health issues but failed to give adequate notice of her need for FMLA leave (Bosley v Cargill Meat Solutions Corp). The attendance policy included a call-in procedure for absences and she knew of the system, which she had used many times. To the court, her vague communications through a coworker, who told a supervisor the employee was "sick," fell short of FMLA notice.

Medical Certification

The FMLA permits an employer to ask an employee to submit a medical certification showing the need for leave and the employee has 15 days to do so. If the certification is incomplete, the employer must provide an opportunity to cure deficiencies. Whether a certification is sufficient is frequently disputed in litigation. For example, a federal court in Michigan ruled that an employer did not unlawfully deny leave for an employee's neck pain (and her interference and retaliation claims failed) because the only FMLA certification she provided before being fired for violating the attendance policy indicated her absences were due to a hand condition that did not prevent her from doing her job (Clum v Jackson National Life Insurance Company). Employers can obtain DOL certification forms online for an employee's and for an employee's family member's serious health condition, along with other FMLA forms.

Reinstatement

After FMLA leave, an employee is entitled to return to the same position held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. However, before reinstatement, an employer may require a doctor's note indicating that the employee is fit to return to their job. The note need only be a simple statement that the employee is able to return, but an employer concerned about the adequacy of the fitness-for-work statement may seek clarification from the health care provider (Chaney v Providence Health Care). Note that a "key employee" who has been given proper notice of that designation is not entitled to reinstatement to the same position unless the employer has waived the right to impose those restrictions (Lane v Grant County).

Other Provisions

Obviously there are many other ways in which employers can make basic mistakes when dealing with their FMLA rights and responsibilities. For example, it is a bad idea to place an employee on a performance improvement plan shortly after his or her return from FMLA leave because that could easily form the basis of an FMLA retaliation claim. Employers also need to keep up with their recordkeeping, notice and posting requirements (employers must display a poster summarizing the FMLA's major provisions and how to file a complaint). The DOL provides a plethora of information online, including required notices and recent developments (e.g., a final rule took effect March 8, 2013 with respect to military families).

The important thing is to stay informed and to make sure that the decision makers in your organization mind their p's and q's with respect to the Act's basic requirements. Using the above examples of what NOT to do and why it matters may help in that regard.

Wolters Kluwer

The Employment Law You Are Probably Breaking

How you pay your employees is governed by federal law. Violating it is easy, so be careful.

Here are the questions: If an exempt employee had to go to the doctor and missed an hour to three hours of work, can an employer dock pay? For example, a pregnant employee had an appointment and missed two hours of work. Can I dock her for two hours? Regardless of the circumstance, can an employer dock a couple of hours of pay at all for any reason?

These are very common conundrums for employers. The short answer is no. Docking pay from an exempt employee is illegal. There is a law titled the Fair Labor Standards Act (FLSA). If an employee is subject to this law (non-exempt), when they reach more than 40 hours in a given work week, they have to be paid at time and a half for any additional hours. If they are not subject to the law (exempt), they aren't eligible for overtime, but there are other rules that come with, like no docking pay.

This means that no matter how much it annoys you, if you have an exempt employee who takes off two hours early to do anything--doctor's appointment, soccer tournament, just plain bored and wanted to go home--you cannot dock her pay. It's helpful to think of this in terms of a "touch the wall" rule. That is, if your employee shows up for work, even if it's just for 15 minutes, you must pay for the entire day. (In the case of remote workers, if they so much as log onto their computers, call on one customer, or do any anything work related, that counts as touching the wall.)

You can discipline, fire, demote, yell at, or dock vacation time. But, you may not dock pay. And if you do dock pay? You've just made that person non-exempt. Which means you not only owe overtime going forward, you owe it going backwards. So your attempt to save $50 by docking two hours pay, could mean you'll be out thousands in back overtime pay.

Now, not only pay docking violations occur all the time, but regular violations occur where people are labeled exempt when they really should be non-exempt. And it's not necessarily easy to tell where people should be. If it's not abundantly clear to you, categorize someone as non-exempt and pay by the hour.

What makes this extra complicated is that the FLSA hasn't been adequately updated to reflect today's knowledge workforce. Here are some general guidelines for determining exempt status. Consult the FLSA website for specific questions.

In order to be considered an exempt employee, employees have to meet several qualifications. They must be paid a minimum of $23,600 per year, receive an identical paycheck each week (bonuses and commissions can be added on top of this, but you can't pay someone less), and perform "exempt" job duties. For instance:

Manager: If they supervise two or more employees, and managing these people is a big part of the job description, and have hire/fire authority (or at least strong input) over these people, they count under a manager exemption. Just slapping a "manager" title on someone does not make them

exempt. If, for instance, if the bulk of a shift manager's job is to help customers, stock shelves, keep the store tidy, and run a cash register, but this person is also responsible for seeing that the other employees get their daily breaks, the person should be classified as non-exempt, and eligible for overtime.

Professional: Some of these are easy to classify. Doctors, registered nurses (but not other nursing staff), lawyers, accountants (but not accounts payable/receivable people), and almost everyone making more than $100,000 per year are considered exempt. People who have considerable professional discretion are also exempt. That is, an analyst who works independently can be exempt. Most creative workers are also considered exempt professional staff.

Administrative Professionals: This sounds awfully similar to "admin" roles, which are decidedly non-exempt. These are really people who have a big impact on the business, work independently and make decisions on their own. The person who organizes your schedule, answers your phone, and orders office supplies does not count under this exemption. These are people who work in things like finance, HR, quality assurance, IT (although IT has its own exceptions), public relations, and other things that keep the business going but don't necessarily manage others.

Outside Sales: These people call on customers and make sales. If they are sitting inside your office making phone calls, they are considered inside sales and are non-exempt.

Pretty much everyone else needs to be paid by the hour. Which means, that if your accounts payable clerk checks her email at home, she needs to record that time on her time sheet and be paid for it. It also means that even if you don't authorize overtime, if the employee works it, you must pay him. You can fire him after paying it, but you must pay.

Inc.

US Department of Labor Recovers More Than $1 Million In Back Wages and Damages For 196 Employees Misclassified As Independent Contractors

The U.S. Department of Labor has obtained a consent judgment in federal court ordering Bowlin Group LLC and Bowlin Services LLC to pay 196 employees a total of $1,075,000 in back wages and liquidated damages. The judgment resolves a Labor Department investigation conducted by the Wage and Hour Division which found that the defendants misclassified 77 employees as independent contractors and violated the Fair Labor Standards Act by denying those workers and others overtime compensation, and failing to maintain accurate payroll records. The judgment also permanently enjoins the defendants, as well as former Bowlin Group Vice President James "Jay" Martin, from violating the FLSA in the future.

"This judgment rightfully provides wages to the workers who earned them," said acting Secretary of Labor Seth D. Harris. "The misclassification of employees as independent contractors cheats workers of wages and benefits to which they would otherwise be entitled to under the law, subsequently hurting our economy. It also leads to unfair competition because businesses that play by the rules operate at a disadvantage to those that don't."

Bowlin Group LLC maintains its principal office in Walton, Ky., and operates five subsidiaries

throughout Ohio and Kentucky. One such subsidiary is Bowlin Services LLC, which until May 2012 performed installation services under contract to Insight Communications, a cable, telephone and Internet provider in Kentucky. An investigation by the division's Louisville District Office found that this employer classified some of its cable installers as employees but misclassified other installers doing the same work as independent contractors.

The agency's investigation found that all nonexempt employees, regardless of their classification by the employer as either an employee or independent contractor, were paid based upon the pieces of equipment they installed rather than at an hourly rate. They were thereby denied overtime compensation, which should have been time and one-half their regular rates of pay for hours worked beyond 40 in a workweek. Additionally, the employer failed to keep accurate records of the number of hours worked by each installer as well as employees performing fiber optic splicing, and falsified payroll records to minimize the numbers of hours worked.

"The misclassification of workers as something other than employees, typically as independent contractors, presents a serious problem for affected employees and employers, and to the economy," said Mary Beth Maxwell, acting deputy administrator for the Wage and Hour Division. "Misclassified employees often are denied access to critical benefits and protections to which they are entitled, such as minimum wage and overtime, family and medical leave, and unemployment insurance. Misclassification of workers may also generate losses to the U.S. Treasury, and Social Security and Medicare funds, and to state unemployment insurance and worker compensation funds."

The Department of Labor and the Internal Revenue Service, through an interagency memorandum of understanding, are working together and sharing general information to reduce the incidence of misclassification of employees, reduce the tax gap and improve compliance with federal labor laws. Memorandums of understanding with the IRS and state government agencies arose as part of the department's Misclassification Initiative, with the goal of preventing, detecting and remedying employee misclassification. In addition, under the terms of the information-sharing agreement, the department may share specific case information with the IRS. This case is typical of those the department may refer to the IRS. More information is available on the department's misclassification Web page at http://www.dol.gov/misclassification.

The FLSA requires that covered employees be paid at least the federal minimum wage of $7.25 for all hours worked, plus time and one-half their regular rates, including commissions, bonuses and incentive pay, for hours worked beyond 40 per week. Employers also must maintain accurate time and payroll records. The FLSA provides that employers who violate the law are liable to employees for their back wages and an equal amount in liquidated damages. Liquidated damages are paid directly to the affected employees. For more information about whether a worker is an "employee" under the FLSA, visit http://www.dol.gov/whd/regs/compliance/whdfs13.htm.

DOL.gov

Guard Against Retaliation Claims

According to the U.S. Equal Employment Opportunity Commission, of the 99,412 new charges of discrimination it received in Fiscal Year 2012, allegations of employment retaliation under all of the federal statutes enforced by the EEOC led with 37,836, or 38.1% of all charges - a new high, continuing the upward trend. A retaliation claim can arise when an employee engages in some form of "protected activity" under a federal or state law and is then subjected to an "adverse employment action." If the employee can show the protected activity was causally connected to the adverse employment action, his or her employer may be liable under the applicable statute. However, each statute provides different remedies and may define "protected activity" and "adverse employment action" differently.

A retaliation claim can be brought under an alarming array of federal and state statutes, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Florida Civil Rights Act, the Florida Whistleblower Act, and the Florida Workers' Compensation Act, among others.

Giving employers encouraging news, the U.S. Court of Appeals for the Eleventh Circuit, which rules on cases from Florida, Georgia, and Alabama, has issued some favorable decisions recently. For example, in Miller v. Roche Surety and Casualty Co., Inc., the Court rejected the employee's claim for unlawful retaliation under the FLSA. The employee claimed she engaged in protected activity when she requested the employer provide her with time and a private place to express milk. The Court stated that, unlike under the Family and Medical Leave Act, merely requesting an employer comply with the FLSA is not "protected activity." The employee must make a complaint about a potential violation.

In another FLSA retaliation case, the Court upheld the rejection of liquidated damages, holding that in retaliation cases, unlike overtime or minimum wage cases, liquidated damages are not mandatory and are left to the discretion of the court. Moore v. Appliance Direct, Inc. A jury had found the employer retaliated against its employees for filing a suit alleging FLSA violations. Before the plaintiffs filed their first lawsuit for overtime violations, the employer began converting all of its delivery drivers, except for the plaintiffs, from employees to independent contractors. In upholding the jury verdict, the trial court found the employer's failure to offer the plaintiffs an opportunity to become independent contractors was an "adverse employment action" under the FLSA. However, it denied liquidated damages even though the employer did not prove it acted in good faith, finding that liquidated damages are discretionary in retaliation cases.

In Morgan v. Orange County, the Eleventh Circuit rejected an employee's FMLA retaliation claim because he failed to follow the employer's routine absence notification procedure. While employed with Orange County, the plaintiff told a supervisor who was not his immediate superior that he would be absent from work the next day due to an FMLA-related illness. He failed to report his continuing absence over the next five days. Following an investigation, the employer found the plaintiff had violated its call-in procedures for reporting FMLA leave and had committed "fraud or dishonesty." The plaintiff's employment was terminated. Finding that the termination was not retaliation for requesting or taking FMLA leave, the Court upheld the termination for violating the call-in procedures.

Finally, in Brush v. Sears Holdings Corp., the Eleventh Circuit adopted the "manager rule" for Title VII and Florida Civil Rights Act retaliation claims, concluding the retaliation provisions do not make an employee's mere expressed disagreement with her supervisor's actions protected activity.

Under the "manager rule," a management employee who, in the course of her normal job performance, disagrees with or opposes the employer's actions does not engage in "protected activity" for purposes of a retaliation claim. Instead, to qualify as "protected activity," the action must cross the line from being the employee performing her job to lodging a personal complaint. Thus, the employee in this case did not engage in protected activity when she complained about the way the company was investigating another employee's harassment claim.

Even given the recent employer-friendly decisions from the Eleventh Circuit, employers need to lower the risk of such claims being brought in the first place. Employers should consider training (and retraining) supervisors on handling complaints that may be brought directly to them, instead of human resources, and ensuring that employees are not discouraged from reporting concerns for fear of retaliation. The key to prevailing in these cases is often good documentation of the employee's discipline and performance history.

Jackson Lewis

Sexual Misconduct Ruled Not Unlawful

What happens when a co-worker makes crude sexual comments and the supervisor stands idly by? Sounds like a recipe for litigation. But not all crude conduct in the work place rises to the level of unlawful "sexual harassment." Crude conduct that is occasional, isolated, sporadic, or trivial might violate company policy, but not the law. Where does it cross the line? In a recent Ninth Circuit Court of Appeal decision titled Westendorf v. West Coast Contractors, a federal court decided if the line was crossed.

Ms. Westendorf worked as a project manager assistant for West Coast, a construction contractor. During her five months of employment, she experienced the following:

- Supervisor once referred to her job duties as "girly work" but immediately apologized. She didn't complain but the president heard about it and spoke to the supervisor. Supervisor complained to Westendorf.
- Co-worker referred to a female vendor as "Double D" and made other comments about how he admired her chest size.
- Same co-worker made boorish comments about feminine care products.
- Same co-worker spoke enviously about how women can have multiple origami (well, actually another word that wouldn't get past your spam filter).
- Same co-worker suggested she clean the trailer while wearing a French maid's costume.
- Same co-worker repeatedly told her to "f----" off during a disagreement.
- The supervisor heard some of the co-worker's comments but did nothing to stop them.

Ms. Westendorf complained to the company president. The president conducted an investigation and even hired a court reporter to record the statements of each witness. The president reprimanded the supervisor for failing to stop the co-worker's misconduct. He was warned that he would be fired if it happened again.

After the investigation, Ms. Westendorf felt that the supervisor began nit picking her work and belittling her in front of subcontractors. The supervisor lost his temper when Ms. Westendorf told a subcontractor that no company employees would attend the subcontractor's social event because they were all going to the supervisor's daughter's wedding. The employees whined and tattled to

the president, who in a moment of frustration declared that he was tired of listening to the drama. He told Ms. Westendorf that she had a problem getting along with her supervisor and that it would be best if she gathered her belongings and left. She was escorted from the building.

The Lawsuit

In the lawsuit, Ms. Westendorf filed suit in federal court alleging sexual harassment based on a hostile work environment, as well as retaliatory discharge. The federal district court granted judgment in favor of the employer. The trial court judge found that the conduct was not "severe or pervasive." The court also determined that the company had a legitimate reason for terminating the employee.

What Is "Severe or Pervasive"?

Employers usually pronounce a "zero tolerance" policy for sexual harassment, and justifiably so. But the law is not so draconian. To establish sexual harassment as a matter of law based on a hostile work environment, the employee must prove that she "was subjected to verbal or physical conduct of a sexual nature, that was unwelcome; and that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment."

Courts examine how often the conduct occurred, how "severe" (offensive) it was, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with the victim's work performance, among other factors. In other words, the sexual misconduct must reach a threshold level of frequency and offensiveness before it amounts to unlawful harassment. Courts have struggled to define exactly where that threshold stands. Here, the Ninth Circuit appellate panel determined that Ms. Westendorf failed to make out a case for sexual harassment because the offensive sexual conduct was not sufficiently severe or pervasive. The court noted that Ms. Westendorf was infrequently exposed to the offensive comments. "Although we certainly do not condone the co-worker's crude and offensive remarks," wrote the court, "we note that Ms. Westendorf went to his workplace only once a week for three months and often did not stay an entire day. Other than his references to the French maid's costume, the co-worker reportedly made offensive sexual remarks to Ms. Westendorf on only about four occasions."

The supervisor's role was minimal. "The supervisor joined the co-worker in the 'Double D' comments but otherwise made no sexual remarks to Ms. Westendorf, and he quickly apologized for his 'girly work' remark, which she did not deem serious enough to complain about." The court added that "the harassment was not physical and Ms. Westendorf did not say that her work suffered because of it." Summarizing its holding, the court wrote: "Because we conclude that the evidence, viewed favorably to her, did not show sexual harassment that was sufficiently severe or pervasive to alter the terms of Ms. Westendorf's employment and subject her to an abusive environment, we affirm the judgment for West Coast on her sexual harassment claim."

Retaliation

The appellate court determined that Ms. Westendorf did present enough evidence to support a claim for retaliatory discharge. "To make out a prima facie retaliation case, she had to show that she engaged in protected activity, that she suffered a materially adverse action, and that there was a causal relationship between the two," explained the court. The court determined that the company president fired Ms. Westendorf after she complained about harassment. Based on the sequence of events, he could have done it in retribution for the complaints. But wait, didn't the court just decide that the employee failed to present evidence of harassment? Yes. But that does

not preclude a legal claim for retaliation. Employees are protected when they make complaints about discrimination or harassment, even if the conduct complained of is not technically a violation of the law. The court put it this way: "Even though we have held that the evidence did not support Ms. Westendorf's sexual harassment claim, we think that it could support a reasonable belief that she was subjected to actionable sexual harassment, and that she had such a belief. In such circumstances, her complaints about that conduct would be protected activity."

The court noted that although the president fired Ms. Westendorf after the argument concerning the wedding party, which arguably had nothing to do with harassment, the context of the recent prior complaints could not be ignored. The court left it to a jury to decide whether or not these facts proved retaliatory discharge.

Practical Tips:

- Don't Tolerate. This case is not an invitation to allow sexual misconduct. Quite the contrary. It is important promptly investigate and take responsive action, even if it only takes the form of a reprimand.
- Get Advice. This case illustrates that some misconduct may be improper but is not unlawful sexual harassment. You need an employment law attorney to sort that out.
- Stay Cool. Let's assume the president in this case did not intend to retaliate against the employee. After all, he did go to some lengths to investigate and reprimand after she complained. But let's assume he just lost his cool when his employees came whining to him about petty arguments. Maybe the employee deserved to be fired for picking a fight with her co-worker, but the president muddled it. He didn't do enough to separate those issues from the harassment complaints. The lesson is to stay cool. And again, before acting rashly, get professional advice.

Barker Olmstead

Cussing Out Your Employee May Get You Sued...By OSHA?

All forms of whistleblower and retaliation claims continue to escalate, including under the 20+ Anti-Retaliation laws enforced by special investigators from OSHA's Whistleblower group. One of OSHA's recent news releases states that the Labor Department has filed a lawsuit in the federal district court against Duane Thomas Marine Construction, and its owner Duane Thomas, for terminating an employee who reported workplace violence, in violation of Section 11(c) of the OSH Act. OSHA asserts that an employer fired an employee for complaining about unsafe work conditions. However, the case has a unique twist because the complained-of hazard was actually the owner.

When the Owner Is the Hazard
The employee alleged that, on numerous occasions between 2009 and 2011, Mr. Thomas committed workplace violence and created hostile working conditions. He allegedly behaved abusively, made inappropriate sexual comments and advances, yelled, screamed, and made physically-threatening gestures, in addition to withholding the employee's paycheck.

The employee, who worked directly for Thomas, reported to him that he was creating hostile conditions. On Feb. 25, 2011, the employee filed a timely whistleblower complaint with OSHA

alleging discrimination by Thomas for having reported the conditions to him.

On March 18, 2011, Thomas received notification of the complaint filing. Five days later, Thomas had computer passwords changed in order to deny the employee remote access to files and then terminated the employee. OSHA's subsequent investigation found merit to the employee's complaint. OSHA seeks back wages, interest, and compensatory and punitive damages, as well as front pay in lieu of reinstatement. Additionally, OSHA seeks to have the employee's personnel records expunged with respect to the matters at issue in this case and to bar the employer against future violations of the OSH Act.

Lessons and Action Points
This atmosphere may or may not have presented a valid safety hazard, but under the law, the violation is the act of terminating the employee for complaining about a safety concern. Importantly, supervisors should be trained to behave professionally regardless of the setting, and reminded of all the many behaviors, including some of the offbeat ones, that are protected as Whistleblowing.

Laborlawyers.com

LinkedIn Case A "Mixed Bag"

In Eagle v. Edcomm, upon termination from employment the plaintiff, Linda Eagle, the defendant employer, Edcomm, took over her LinkedIn account by using her username and password, replacing her picture with that of another employee, but left Eagle's honors, awards, recommendations and connections in tact within the profile. Eagle claimed she was wrongfully locked out of the account and that Edcomm hijacked her identity and invaded her privacy.

Eagle, prevailed on three of her claims - misappropriation of identity, invasion of privacy, and violation of a Pennsylvania statue prohibiting unauthorized use of someone's name - but she was not able to prove that she suffered any damages. Eagle claimed she had suffered damages in excess of $248,000. The court, was not convinced and noted that Eagle "failed to point to one contract, one client, one prospect, or one deal that could have been, but was not obtained during the period she did not have full access to her LinkedIn account." As a result, she could not prove her damages with the required level of certainty.

In addition to the damages issue, one of the other aspects of this case was who actually owned Eagle's LinkedIn account. The Court noted that Edcomm did not have a policy in place informing the employees that their LinkedIn accounts were the property of the employer, and it was questionable whether such a policy would have been binding in the first place because it contravenes LinkedIn's "User Agreement" which states that the account belongs to the individual ("If you are using LinkedIn on behalf of a company or other legal entity, you are nevertheless individually bound by this Agreement even if your company has a separate agreement with us.").

Additionally, take a look at these emails Edcomm sent internally (with Eagle as one of the recipients) discussing ownership of Eagle's LinkedIn account:

From: Cliff Brody
Sent: Tuesday, March 2, 2010 1:36 PM

To: Linda Eagle; David Shapp; Kathy Luczak
Subject: few loose ends

David...
Can you look into what our requirements/responsibilities are as far as LinkedIn accounts and former employees.

CB
Clifford G. Brody
Founder & Chief Executive Officer
The Edcomm Group Banker's Academy

From: David Shapp
Sent: Tuesday, March 2, 2010 2:17 PM
To: Cliff Brody; Linda Eagle; Kathy Luczak
Subject: few loose ends

I think we can leave it up forever and mine the information contained within as long as we do not pretend to be her. The company/employer owns all data on its hardware, including email archives. The employee has no rights at all in his email identity. Ordinarily, as a courtesy, employers tend to keep old accounts active for a limited time in order to avoid rejecting business-related communications, and forward personal emails to the former employee. There would potentially be an issue if the employer used the former employee's email to perpetuate a false impression that the employee remained with the company, but simply mining the incoming traffic is certainly within the employer's rights.

David
David Shapp
Partner & Senior Vice President
The Edcomm Group Banker's Academy

From: Cliff Brody
Sent: Tuesday, March 2, 2010 3:23 PM
To: David Shapp; Linda Eagle; Kathy Luczak
Subject: few loose ends

What about LinkedIn - not on our hardware. The question is who really owns that account? Ideally it would be us. We could leave it up as-is and she would have to create a new one.

CB
Clifford G. Brody
Founder & Chief Executive Officer
The Edcomm Group Banker's Academy

From: David Shapp
Sent: Tuesday, March 2, 2012 3:53 PM
To: Cliff Brody; Linda Eagle; Kathy Giola
Subject: few loose ends

We do. It was created with an email account that is ours, on our computers, on our time and at our direction. She cannot use that account because she does not own the email address that opened it.

I think as long as we just read from it and do not write to it, we are not breaking any laws. Same thing with her email account - as long as we only read and do not write, we are within our rights to do so.

David
David Shapp
Partner & Senior Vice President
The Edcomm Group Banker's Academy

Networked

Immigration Reform Passes Senate Committee

5/22/2013By Roy Maurer

The U.S. Senate Judiciary Committee approved a sweeping immigration reform bill May 21, 2013, voting to send it to the entire Senate for debate.

After five markup sessions and hundreds of amendments offered and debated, the committee approved the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 by a 13-5 vote, leaving it largely intact.

The bipartisan Gang of Eight senators—four Democrats and four Republicans—lived up to their promise to band together to fight off the most serious challenges to the bill, including an amendment by Sen. Patrick Leahy, D-Vt., that would have given same-sex couples the same legal protections in immigration issues as heterosexual couples.

The vote was able to proceed after a breakthrough compromise was reached on H-1B visas for high-tech workers, after several days of negotiations between Sen. Orrin Hatch, R-Utah, and Sen. Charles Schumer, D-N.Y. The deal relaxes some restrictions on high-tech companies that seek to hire foreign tech workers.

"We commend members of the Senate Judiciary Committee for working on a bipartisan basis to take us one step closer to finally fixing America's broken immigration system, by strengthening enforcement and focusing future immigration policy on welcoming those who will come here to work hard and contribute to America," said Greg Brown, chairman & CEO of Motorola Solutions Inc. and chair of the Business Roundtable's Select Committee on Immigration.

President Barack Obama issued a statement in support of the legislation, describing it as "largely

consistent" with the principles he had outlined. "None of the committee members got everything they wanted, and neither did I," Obama said, "but in the end, we all owe it to the American people to get the best possible result over the finish line."

Some Republicans on the committee cautioned that this comprehensive reform package could be a repeat of 1986, when Congress last passed a sweeping immigration bill that granted citizenship to illegal immigrants, but then failed to effectively enforce the immigration laws put into place.

"Today we're right back at the same place, talking about the same problems and proposing the same solutions," said Sen. Charles Grassley, R-Iowa.

H-1B Compromise Reached

Consolidated from several amendments offered by Senator Hatch, the Hatch amendment was adopted by voice vote before the final vote.

The Hatch amendment raises the base cap of H-1B visas from 110,000 to 115,000 while keeping the maximum at 180,000 a year. The cap would float, depending on market conditions.

Another change concerns the spouses of H-1B workers. The original bill gave work authorization to spouses only if their home country reciprocated authorization for spouses of U.S. employees. The amendment gives that discretion to the State Department.

The original bill barred all companies from displacing U.S. workers within 90 days of when they file an H-1B visa petition, but the worker-displacement language was changed so that it does not apply to all employers but just to H-1B-dependent employers (defined as companies in which more than 15 percent of the workforce is H-1B visa holders).

The compromise amendment lifts the requirement that companies first offer tech jobs to U.S. workers except for H-1B-dependent employers. All companies would be required to make a good-faith effort to hire U.S. workers first.

A change was also made to the prohibition on outplacement of L visa holders. L visas allow companies to transfer certain classes of employees to the U.S. for temporary assignments.

The ban on businesses outsourcing their L visa transferees to another employer will apply only to companies with 15 percent or more L visa employees.

Reaction

The Hatch-Schumer compromise is a "good deal for the American economy," commented Compete America, a coalition representing corporations, universities, research institutions and trade associations that advocates for reform of immigration policy for highly educated foreign professionals.

The coalition includes Microsoft, Google, Accenture, the American Council on International

Personnel and the Society for Human Resource Management.

"We believe that both labor and tech organizations made compromises that will benefit the American economy and create new jobs and new growth. We look forward to supporting this provision and this bill as it goes forward to the full Senate," the coalition said in a statement.

The nation's largest labor federation, the AFL-CIO, opposes Hatch's amendments, claiming they're hurtful to American workers. AFL-CIO President Richard Trumka said in a statement: "Hatch's amendments change the bill so that high-tech companies could functionally bring in H-1B visa holders without first making the jobs available to American workers. [This] would mean that American corporations could fire American workers in order to bring in H-1B visa holders at lower wages."

What's Next?

Senate Majority Leader Harry Reid, D-Nev., said he will introduce the immigration bill to the full Senate in June. Minority Leader Mitch McConnell, R-Ky., said he will not block the bill from debate and a vote. Meanwhile, the Congressional Budget Office will begin to assess the financial cost of the legislation.

Roy Maurer is an online editor/manager for SHRM.

EEOC Guidance Gives Examples of Reasonable Accommodations

5/20/2013 By Allen Smith

Four informal guidances released by the Equal Employment Opportunity Commission (EEOC) on May 15, 2013, highlight specific types of reasonable accommodations for people with **cancer**, **diabetes**, **epilepsy** and **intellectual disabilities**.

"Nearly 34 million Americans have been diagnosed with cancer, diabetes or epilepsy, and more than 2 million have an intellectual disability," said EEOC Chairwoman Jacqueline Berrien. "Many of them are looking for jobs or are already in the workplace. While there is a considerable amount of general information available about the ADA [Americans with Disabilities Act], the EEOC often is asked questions about how the ADA applies to these conditions."

Cancer

More than 12 million Americans had cancer in 2008, the most recent year for which incidence data is available.

The EEOC provided examples of accommodations that organizations could make for people with

cancer, such as:

Leave for doctors' appointments and/or to seek or recuperate from treatment.

Periodic breaks or a private area to rest or to take medication.

Modified work schedule or shift change.

Permission to work at home.

Modification of office temperature.

Permission to use work telephone to call doctors if the employer's usual practice is to prohibit personal calls.

Reallocation or redistribution of marginal tasks to another employee.

Reassignment to a vacant position if the employee can no longer perform her job.

Diabetes

Approximately 18.8 million Americans get diabetes And nearly 2 million more are diagnosed each year.

In its questions and answers on people with diabetes, the EEOC listed the following examples of reasonable accommodations that employers could make:

A private area to test blood-sugar levels or to administer insulin injections.

A place to rest until blood-sugar levels return to normal.

Breaks to eat or drink, take medication or test blood-sugar levels.

Leave for treatment, recuperation or training on managing diabetes.

Modified work schedule or shift change.

Use of a stool for someone who has difficulty standing a long time because of diabetes-related nerve damage (i.e., neuropathy).

Reallocation of marginal tasks to another employee.

Reassignment to a vacant position if the diabetic no longer can perform his duties.

Epilepsy

Almost 3 million people in the United States live with epilepsy, and each year brings about another 200,000 new cases of seizure disorders. One in 10 adults has seizures during her lifetime. There isn't a cure yet, but drugs prevent seizures in many epileptics who take them regularly. Seizures can be controlled for substantial periods in 50 percent of epileptics, the EEOC noted.

Suggested accommodations include:

Breaks to take medication.

Leave to seek or recuperate from treatment or adjust to medication.

A private area to rest after a seizure.

A rubber mat or carpet to cushion a fall.

Adjustments to a work schedule.

A consistent start time or schedule change.

A checklist to help remember tasks.

Permission to bring a service animal to work.

Someone to drive to meetings and other work-related events.

Permission to work at home.

Reassignment to a vacant position if the employee no longer can perform his job.

Intellectual Disabilities

Individuals with intellectual disabilities (formerly referred to as the mentally retarded) have an intelligence quotient below 70 to 75, the agency noted.

Suggested accommodations for the mentally disabled include:

Reallocation of marginal tasks to another employee.

Tweaked training on how to do the job, such as instructions at a slow pace, additional time to finish training, descriptions of job tasks in sequential steps, and the use of charts, pictures or colors.

Extra training when necessary.

A tape recorder to record directions as a reminder of steps in a task.

Detailed schedules for completing tasks.

A job coach, who can help the employee learn how to do the job; provide intensive monitoring, training, assessment and support; and help develop a healthy working relationship between management and the employee by encouraging appropriate social interaction.

Modified work schedule or a shift change.

Help in understanding job evaluations or disciplinary proceedings.

Acquired or modified equipment.

Reconfigured placement of workstation from a large open area to a quieter part of the office.

Reassignment to a vacant position if the worker no longer can perform his or her duties.

The EEOC also noted that since Congress enacted the **ADA Amendments Act of 2008, which took effect in 2009**, individuals with a wide range of impairments—including cancer, diabetes, epilepsy and intellectual disabilities—have been presumed to have an ADA disability. So, courts now more frequently reach the question of whether persons with disabilities have been reasonably accommodated.

*Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him **@SHRMlegaleditor**.*

Hospital Worker Was Not Qualified Individual Under ADA

5/28/2013 By G. Bryan Adams III

A hospital mammography technologist who suffered numerous epileptic seizures at work, even after her employer implemented several workplace accommodations, was not a "qualified individual" under the Americans with Disabilities Act (ADA), the 8th U.S. Circuit Court of Appeals ruled.

In 1993, Capital Region Medical Center (CRMC) hired Andrea Olsen as a mammography technologist. Olsen operated the radiographic equipment and performed mammograms. She was required to follow all associated CRMC protocols and safety standards. Olsen's duties included positioning patients in the mammography machine, controlling the table movement, collecting specimens, managing paperwork, and addressing the patients' physical and psychological needs.

Between 2004 and 2011, Olsen experienced unpredictable and recurring epileptic seizures while

on duty. Between 2008 and 2010 alone, she had 14 seizures at work. During the seizures, Olsen lost orientation and muscle control, occasionally stopped breathing, and suffered falls and numerous injuries, resulting in cuts and bruises to her face. After a 2008 seizure in which she fell, bit her tongue and cheek, and hit her head, the CRMC placed Olsen on paid administrative leave so she could consult a neurologist. A few months later, the neurologist cleared her to return to work, but she had another seizure on the job, resulting in a serious head injury. Two seizures occurred in front of patients, one of whom was "very shaken" by the episode and filed a complaint expressing concern for the safety of patients under Olsen's care.

CRMC management concluded that Olsen's seizures presented too significant a risk to Olsen and her patients and again placed her on paid administrative leave. During her absence the medical facility made several accommodations to eliminate workplace conditions that triggered her seizures, including removing mold, installing anti-glare filters on lights, covering X-ray films to reduce brightness, allowing Olsen to wear sunglasses and having other technicians handle patients. Unfortunately, the facility's workplace modifications were not effective in reducing the frequency of Olsen's seizures.

The CRMC placed Olsen in an alternate position as a temporary file clerk, but after she had two more seizures, management placed her on unpaid administrative leave. Olsen later notified her employer that a new medication had her seizures under control. The CRMC offered to reinstate Olsen at her prior pay rate with full benefits. She rejected the proposal, so the CRMC terminated her.

Olsen filed suit, alleging that the medical center violated the ADA. The trial court ruled in the facility's favor, and the appeals court agreed that Olsen was not entitled to relief under the ADA. The 8th Circuit explained that Olsen was not qualified to be a matechnologist because she could not carry out the essential functions of the position—even with accommodations—when she was having a seizure. While Olsen was undoubtedly disabled, the appeals court noted that she still had to prove she was a qualified individual with a disability under the ADA. The CRMC had not only engaged in the interactive process with Olsen to explore reasonable accommodations but had implemented a variety of measures to help her perform her job. Even with these accommodations, Olsen continued to suffer frequent seizures and was, therefore, unable to perform her essential job functions, including the crucial obligation of ensuring patient safety. The appeals court observed that Olsen simply could not perform her patient-safety duties when incapacitated by a seizure for an indefinite period. Accordingly, the appeals court concluded that Olsen could not prove that she was terminated because of her disability or that the CRMC had otherwise violated the ADA.

Olsen v. Capital Region Medical Center, 8th Cir., No. 12-2113 (May 7, 2013).

Professional Pointer: This case demonstrates that an employer can potentially shield itself from ADA liability by exploring a variety of accommodation options—from leave to workplace modifications—when a disabled employee struggles to perform his or her job.

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