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Personnel Issues That Made the News

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Occupational Safety and Health Administration

OSHA Issues “Double Buddy” Rule

The Occupational and Safety Health Administration (OSHA) issued a respiratory protection regulation effective April 8, 1998. The rule not only addresses the use of respirators in dangerous situations, requiring firefighters to wear self-contained breathing apparatus, but also requires firefighters to travel in groups of four. It affects private companies, the federal government, and jurisdictions in the 25 states that have opted for coverage under OSHA. Its greatest impact is likely being felt in small jurisdictions because large jurisdictions usually have at least four people at a scene already.

This provision requires that at least two firefighters enter a structure and remain in visual and voice contact. Moreover, at least two additional firefighters must be on standby at the scene to offer assistance or perform a rescue when the firefighters are inside a burning structure. The rule offers examples of situations where it is believed that firefighters’ lives could have been saved by additional personnel on the scene.

A copy of the rule is available on the Internet at: www.osha-slc.gov/FedReg_osha_data/FED19980108.html.

OSHA Reform Bills Become Law

On July 17, 1998, President Clinton signed into law two OSHA reform bills. H.R. 2864, the Compliance Assistance Authorization Act, requires the secretary of labor to establish outreach programs on OSHA compliance and permits OSHA personnel to give on-site advice on compliance instead of simply issuing citations. The other bill, H.R. 2877, prohibits OSHA supervisors from imposing a quota on the number of citations and fines issued by inspectors. A copy of the new laws is available on the Internet on the Thomas home page at: GOTOBUTTON BM_1 http://thomas.loc.gov. (Search by bill number under the 105th Congress.)
Drug and Alcohol Testing

Low Incidence of Alcohol Use Allows for Reduced Testing Rate

A low rate of alcohol use by interstate truck and bus drivers, coupled with industry promotion of alcohol-free driving, led the Federal Highway Administration (FHWA) to reduce the random alcohol testing rate for this year to 10 percent of all drivers. The industrywide requirement previously was 25 percent of all drivers.

The alcohol testing "violation" rate was just .18 of all drivers tested in 1996, the FHWA said. Because the violation rate was below .5 percent for two consecutive years, the testing regulations specify that the testing rate may be lowered. Commercial drivers who violate these strict alcohol regulations can lose their commercial driver's license if they register a blood alcohol concentration of .04 or more or if they refuse to test. No change is being made to the testing rate for illegal drugs, which remains at 50 percent of all drivers. The positive rate of violators using these controlled substances must drop below 1 percent for two consecutive years before the FHWA can reduce the testing rate to 25 percent. The rate for positive tests was 2.8 percent in 1995 and 2.2 percent in 1996. If the alcohol testing violation rate goes above .5 percent in the future, the FHWA can increase the rate of random testing.

(Released Jan. 13, 1998, U.S. Department of Transportation.)

Drug-Free Workplace Act Rules Adopted

On Jan. 9, 1998, the attorney general signed the final rules for the Drug-Free Workplace Act, which was part of the 1996 Workers' Compensation Act. Employers who adopt a drug-free workplace program that complies with the rules in all respects may be entitled to important benefits, including premium deductions on workers' compensation insurance. (This applies only if your workers' compensation insurance is provided by the state workers' compensation program.)

Although the secretary of state has to ensure that the rules conform to the Administrative Procedures Act, applications are being accepted now for certification. The earliest certification date was 75 days after the secretary of state signs the rules. To receive information about establishing a drug-free program, employers can write to: Loren Frost, Director of Drug-Free Workplace Program, Tennessee Department of Labor, Andrew Johnson Tower, 2nd Floor, Nashville, TN 37243-0655; or call (615) 532-2403.

Tennessee State Courts

Tennessee Human Rights Act: Individual Liability and Punitive Damages

The Tennessee Human Rights Act (THRA) prohibits discrimination in employment. During 1997, the Supreme Court of Tennessee issued two decisions of special interest to employers in Tennessee under the THRA.

In *Carver vs. Citizen Utilities Co.*, 1997 Tenn. Lexis 601 (Tenn. 1997), the Supreme Court of Tennessee held that punitive damages are available under the THRA only for claims involving discriminatory housing practices and malicious harassment. Consequently, it is not clear if punitive damages are available to plaintiffs who bring employment discrimination or hostile work environment harassment claims under the THRA.

In *Carr vs. United Parcel Service*, 1997 Tenn. Lexis 511 (Tenn. 1997), the court addressed the issue of whether supervisors may be held individually liable under the THRA. In *Carr*, the Tennessee Supreme Court held that, in the absence of evidence that the supervisor encouraged or prevented the employer from taking action to remedy discrimination or harassment, a supervisor cannot be held
individually liable under the THRA. Consequently, an individual supervisor could be held individually liable under THRA if he encourages or prevents the employer from taking action to remedy discrimination or harassment.

(Reprinted from Bass, Berry & Sims Employment Law Report, Winter 1998.)

U.S. Supreme Court

Same-Sex Harassment Violates Title VII

On March 4, 1998, the U.S. Supreme Court ruled unanimously that Title VII prohibits same-sex harassment. In an opinion that broadens the scope of the law, Justice Scalia wrote, "[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." The court rejected not only the Fifth Circuit's (where this case arose) outright denial of same-sex harassment cases but also rejected those lower court opinions that require the person doing the harassing to be homosexual.

The case is Joseph Oncale vs. Sundowner Offshore Services, Inc., Docket No. 96-568. Joseph Oncale worked on a Chevron U.S.A., Inc. oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew. During this time, he was sexually harassed, assaulted, and threatened with rape by three of the crew members, two of whom had supervisory authority. Oncale's complaints to supervisory personnel went unanswered, and the safety compliance clerk told Oncale that the same people picked on him all the time, too. Oncale resigned and brought a suit under Title VII that states, "It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

The Supreme Court previously held that the term "because of ... sex" applies to both men and women. Further, said the court, "[W]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." Simply because the law applies to both men and women equally does not mean that it will prohibit all harassment. It only prohibits discrimination based on sex and behavior that is so offensive that it alters the conditions of the victim's employment. A copy of the case is available on the Internet at: http://www.supct.law.cornell.edu/supct.


Supreme Court Clarifies Law of Sexual Harassment

Get those anti-harassment policies in place and make sure all of your employees are well-aware of them. That's the message issued June 26, 1998, by the U.S. Supreme Court in a pair of decisions interpreting Title VII.

The court also blurred the line between hostile environment sexual harassment claims and those based on quid pro quo harassment, where the employee alleges that the terms of employment depend on sexual favors.

The court said the distinction was of limited usefulness and focused instead on an employer's liability. The court dismissed the idea of automatically holding employers liable when a supervisor harasses an employee. Instead, the court ruled that employers would be able to defend against a suit by showing that they had used "reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided."
Supreme Court Rules on COBRA Pre-existing Coverage

On June 8, 1998, the U.S. Supreme Court ruled that it *does* matter when qualified beneficiaries obtain other group health coverage. The ruling has resulted in major administrative changes for many COBRA programs. In *Geissal vs. Moore Medical Group*, No. 97-689 (U.S. S. Ct., June 8, 1998), the Court unanimously concluded that an employer cannot deny COBRA coverage to an "otherwise eligible, qualified beneficiary because he is covered under another group health plan at the time he elects COBRA coverage."

In other words, the court's decision means that employers can no longer cut off or deny COBRA coverage to qualified beneficiaries who had other group health coverage before the date of their COBRA election. Now, COBRA coverage can only be terminated if: (1) the qualified beneficiary gets coverage under another group health plan after the COBRA election, and (2) the other group health coverage does not limit or exclude the qualified beneficiary's pre-existing condition. Furthermore, the court's interpretation likely applies in the case of qualified beneficiaries who are entitled to Medicare – they cannot be terminated or denied COBRA coverage.


ADA, FLSA, and EEO

Employers Win Most ADA Suits

A study conducted by the American Bar Association (ABA) shows that employers prevail in most ADA cases. In fact, 92 percent of the time the employer wins, while an employee prevails in only 8 percent of the cases. The study covered the 1,200 cases filed since 1992 under Title I of the ADA. At the administrative level, employers prevailed 86 percent of the time. These are cases that are resolved by the Equal Employment Opportunity Commission (EEOC).

Title I of the ADA prohibits public and private employers from discriminating against qualified individuals with disabilities in the terms, conditions or privileges of employment. The study was conducted by the ABA's Commission on Mental and Physical Disability Law and published in the May/June 1998 issue of *Mental and Physical Disability Law Reporter*. The ABA believes this shows that the definition of a disability under the ADA is more restrictive than previously thought.

For more information on the study, check the ABA home page on the Internet at: http://www.abanet.org/media/jun98/disrept2.html. General information on the Americans with Disabilities Act is available on the EEOC's home page at: http://www.eeoc.gov.

DOL to Raise Financial Penalties Against FLSA Violators

The U.S. Department of Labor (DOL) recently unveiled a new plan to raise certain civil financial penalties imposed on employers for violations of the Fair Labor Standards Act (FLSA).

Currently, employers who willfully or repeatedly violate the FLSA's minimum wage or overtime provisions can be assessed a penalty of up to $1,000 for each violation. In addition, employers who violate the FLSA's child labor provisions can be assessed a penalty of up to $10,000 for each employee who is the subject of a violation.

DOL in an April 27, 1998, *Federal Register* notice predicted that it will soon issue a proposed rule that will ultimately allow the agency to raise the penalties for inflation. DOL expects that the penalty adjustments will apply across the board: Consequently, all fines levied by the agency will be increased.
Plan Administrators Could Be Liable Under COBRA Notice and ERISA Disclosure Rules

If a plan administrator fails to send a COBRA notice as required, the administrator could be liable for a penalty of up to $110 per each day of the failure. However, many administrators do not realize that it is possible to face separate $110 per day penalties due to COBRA violations if they fail to provide notices and don’t comply with the general ERISA disclosure requirements. This occurred in a recent federal court case in Pennsylvania, Fox vs. Law Office of Shapiro & Kreisman, 1998 U.S. Dist. LEXIS 5096 (E.D. Penn. 1998). The case also reinforced the point that a qualified beneficiary’s knowledge of COBRA rights does not negate a plan administrator’s obligation to provide COBRA election notice.

This case points out two key administrative issues. Most importantly, employers that become aware of new employee addresses must establish a system to notify in-house benefits administrators and third party administrators of the new address. Secondly, an employer must respond when former employees or qualified beneficiaries ask for information about their benefits. Employers must not allow requests for information to go unanswered because they think participants do not need the information. All relevant information should be sent, regardless of whether the employer believes that information is really needed.

If you have any questions or would like a copy of the legislation faxed or mailed to you, please call the IPMA Government Affairs Department at: cott@ipma-hr.org or (703) 549-7100.

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MTAS Mission Statement

The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee’s Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, communications, and wastewater management. MTAS houses a comprehensive library and publishes numerous documents annually.

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