

WINTER 2008

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A CONSUMER'S GUIDE TO EPLI

Ken Carlson

For many companies, employee management is the greatest pleasure – and the greatest legal risk – in conducting business. Companies are no better and no worse than their workers, and as a general rule the 95 percent who do a fine job and are a pleasure to be around make management efforts seem all worthwhile.

Then there's the other five percent. You know, the ones who cause most of the problems.

For them the risk is higher, no matter what their role in the company. And over the past 15 years, the insurance industry has increasingly developed a product to address that risk – employment practices liability insurance, commonly known as "EPLI."

Depending on the coverage and size of deductible, EPLI premiums can range from mere thousands to tens of thousands of dollars, and even into six digits. But when balanced against the risks of employment law cases, especially large and quite public ones, some would say it's a bargain at any price.

Regardless of the corporate philosophy, EPLI is an insurance product that merits consideration. Here is a quick guide to five of its key principles and concerns:

Type of policy. EPLI is normally purchased as a stand-alone policy specifically dedicated to EPLI coverage, or as part of a larger liability or universal insurance policy, whether written into the policy itself or attached as a rider. Most companies prefer stand-alone coverage because the policies are tailored to EPLI matters with definitions and damage allowances/exclusions that may be present in other types of insurance. (For example, most general liability policies exclude intentional acts. However, "intent" is at the heart of discrimination, harassment and wrongful discharge claims, which are the primary matters covered by EPLI.)

Amount of coverage/premium/size of deductible. As with other forms of insurance, as a general rule more EPLI coverage means higher premiums. And the higher the premium, the smaller the deductible (also called a "retention") – and vice-versa. The employer should explore with its broker or EPLI carrier the combination that works best for the employer. Generally, the more an employer's own money is at stake – whether through high premiums or large deductibles – the more bargaining power it may have over various terms and conditions of the policy, including selection of legal counsel for defending EPLI claims.

Punitive damages and costs of defense. In states that allow punitive damages to be insured, make certain that your policy covers them. Examine your EPLI policy to determine whether your own attorney fees and other costs of defense apply against the deductible and, if a case is ever lost, whether any future award of attorney fees against your company is included in the policy's coverage amount.

Settlement authority and "hammer" clauses. Virtually all EPLI policies make any case settlement a joint decision between the insurance company and the insured employer. After you've determined that this is also true for your policy, closely review the language for any so-called "hammer" clause. This common provision essentially says the following: If the insurance company wants to settle a case at a certain amount but the employer refuses, then any eventual settlement or award that exceeds that amount must be paid by the employer, not the insurance company.

Selection of counsel. One of the most important aspects of an EPLI policy is also one of the most overlooked: Who represents the insured employer when litigation comes? The employer typically gets its choice in two situations: (1) when the selected legal counsel is on the insurance

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from the
**EDITOR'S
DESK**

**FLSA—IT'S STILL
WHERE THE MONEY IS**

The Wage and Hour Division of the U.S. Department of Labor has recently issued its 2007 enforcement statistics, and they teach quite a lesson. Many employers may be surprised to see that settlements of claims under the Family and Medical Leave Act have *decreased* more than 33 percent since 2003. (Of course, these statistics would not include resolution of cases that went to court with private plaintiffs.)

One would like to think that the good news on the FMLA front is a result of some positive developments: (1) employers have their act together, and really understand and know how to comply with this law, which was so difficult and confusing in the beginning; (2) courts have taken a reasonable approach in interpreting the regulations – including the Supreme Court's decision in *Ragsdale v. Wolverine World Wide*, which held that an employer is normally entitled to count otherwise-qualifying leave against an employee's FMLA entitlement even if the employer technically failed to properly "designate" it; and (3) employees are getting the message that this law is not a windfall.

(A less rosy interpretation is that employers have given up on challenging any illness-related absences and are promptly settling whenever a complaint is filed with the Department of Labor. But since the rest of our news is bad, let's stick to the rosy interpretation.)

Whether one is rosy or gloomy, another reason for the moderate FMLA statistics is no doubt because many FMLA violations result in no monetary liability. It's not uncommon for an employee to file a complaint with the DOL when the employer improperly charges as an "absence" a day off that should have counted as FMLA leave. Complaints like this are easy to resolve – if the employer determines that it did wrong, it "fixes" the employee's record, and everyone lives happily ever after. If the employee has not been terminated, there is no backpay liability.

Oh, if only this were true of the Fair Labor Standards Act! FLSA claims almost always involve backpay unless the employer is completely in the right. Settlements of claims under the FLSA have increased significantly since 2003, and even since 2006. This is particularly the case with overtime claims in higher-wage industries.

Anyone who keeps abreast of FLSA litigation should not be surprised at this news. However, the magnitude of the difference between FMLA settlements and FLSA settlements is alarming. In Fiscal Year 2007, a grand total of 1,675 employees received FMLA settlements through the DOL, for a total of \$1,573,501. During the same period, 295,129 employees received FLSA overtime settlements through the DOL, for a total of \$163,391,549.

(And, of course, the DOL overtime statistics also do not include court cases involving private plaintiffs.)

In other words, about 150 times as many employees received FLSA settlements through the DOL as did employees who received FMLA settlements. And the dollar value of the FLSA settlements was approximately 100 times the dollar value of the FMLA settlements.

Why might this be the case?

First, the plaintiffs' bar is aware of and feeding hungrily at the FLSA trough. For the same reasons, employees have heightened awareness, and even if they don't, disgruntled employees who go to plaintiffs' attorneys to complain about unfair treatment at work are "encouraged" to recast their claims as FLSA claims.

Second, FLSA claims almost never involve a single employee. If an employer is paying one employee improperly (for example, because it misclassified a job as "exempt," or because it failed to pay for certain "preparation" time), it is probably paying a large number of employees improperly. A "nuisance" back pay claim of \$2500 balloons into a major claim when multiplied by 100 employees, going back two to three years.

Third, by definition, "erroneous exemption" cases involve relatively well-compensated employees who are at the lower end of the "exempt" job grades. Minimum-wage cashiers at the local burger joint are always classified as non-exempt, but pharmaceutical representatives, insurance claims adjusters, and computer technicians are often classified as exempt and claim to be non-exempt. These employees have relatively high backpay potential because their pay was relatively high to begin with.

Fourth, in many FLSA exemption cases, the employer has failed to keep records of time actually worked *precisely because* it considered the time non-compensable. This lack of records allows employees to let their imaginations run wild. Employees can "remember" like it was yesterday every minute they stayed at work past 5 p.m. but have an amazing ability to "forget" that they were ever out sick, on vacation, late coming to work, or on a long lunch hour.

These are just a few of the reasons that FLSA claims appear to be here to stay. Constangy recommends that employers review their overtime pay policies and regularly reassess job classifications at the "borderline" between exempt and non-exempt. The reassessment should take into account, among other things, evolution of the job duties and the availability of technology to "perform" duties that used to be performed by human beings. It is not uncommon for a given job to "evolve" from exempt to non-exempt over time. With respect to non-exempt employees, employers should also examine and periodically reassess, in light of current law, significant portions of the day that are uncompensated, including preparation and clean-up time, commuting time, and telecommuting.

Oh . . . and don't forget to keep up the good work on the FMLA!

Robin E. Shea, Editor

**We'd love to hear
your feedback.**

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suggestions, please
feel free to contact**

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IS THAT POST-OFFER MEDICAL EXAM THE VERY LAST STEP IN YOUR HIRING PROCESS? IT HAD BETTER BE.

Kelli Hill

“At this point in our recruiting process, I am pleased to make you a conditional offer of employment. It is important, however, that you fully understand the conditions of this offer as they are detailed below...our offer is contingent upon your successful completion of a drug test, a medical examination, and a satisfactory background check....”

Many employers perform their “post-offer” screens in exactly that order: medical examination/drug test, and background check. What they may not realize is that, if the medical examination is not the very last step in the process, the medical examination might violate the Americans with Disabilities Act.

The ADA has always prohibited “medical examinations” before a conditional offer of employment has been made. A “medical examination,” for ADA purposes, is defined loosely as virtually any inquiry that is likely to elicit information about a physical or mental disability. Most employers do their best to schedule medical examinations “post-offer,” in accordance with the law.

However, in the 1990’s, the Equal Employment Opportunity Commission issued guidelines making clear the EEOC’s position that to qualify as “post-offer,” the medical examination normally has to be delayed until the employer has determined that the applicant has satisfied all non-medical criteria for hire. Otherwise, the EEOC says, the medical examination is “pre-offer” and therefore is unlawful.

Not all employers, it appears, have gotten the memo. It is fairly common for employers to schedule the background check (non-medical criteria) at the same time as, or even after, the medical examination. And some are being burned as a result.

In *Leonel v. American Airlines, Inc.*, the plaintiffs applied for flight attendant positions with the airline, which conducted initial interviews and

then issued conditional offers of employment that were contingent upon successful completion of background checks and medical examinations. However, the airline conducted the medical examinations (including drawing of blood samples) before conducting the background checks. None of the plaintiffs disclosed that they had Human Immunodeficiency Virus, but their blood samples revealed that they had the condition. American withdrew its offers of employment on the ground that they had not been forthcoming in their “post-offer” medical examinations.

The plaintiffs sued for violation of their privacy rights (the airline had not obtained written consent to test the plaintiffs’ blood samples), violation of California’s Unfair Competition Law, and for intentional infliction of emotional distress. The airline obtained summary judgment in the trial court, arguing that the plaintiffs were rejected for reasons that were lawful under the ADA and the California Fair Employment and Housing Act.

Normally, this would be an open-and-shut reason for withdrawing a conditional offer of employment. But the plaintiffs contended that they were not required to disclose their HIV-positive conditions because the medical examination was not the final step in the hiring process and therefore was “premature” and improper under the ADA and FEHA.

The U.S. Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam) agreed with the plaintiffs and reversed the grant of summary judgment to the airline (with the exception of the intentional infliction claim).

OK, so it’s the Ninth Circuit. Lest you think that this is one of those California aberrations, the Seventh (Illinois, Indiana, Wisconsin) and Fifth (Louisiana, Mississippi, Texas) Circuits have come to similar conclusions.

In *O’Neal v. City of New Albany*, the Seventh Circuit affirmed summary judgment for the city on a failure-to-hire claim but also affirmed the EEOC guidelines requiring that the post-offer medical examination be the final step in the hiring process, after all non-medical information was considered. In the *O’Neal* case, the court found that the city had done this, and therefore that it had lawfully

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QQ

QUARTERLY QUIZ

Supervisor Evil-Lyn terminates her employee, Vic, because he is a man. At the termination meeting, Evil-Lyn tells him, “Even though you are my best employee, I want an all-female department, so you’ve got to go.”

Vic bypasses the company and sues Evil-Lyn for sex discrimination under Title VII, and for intentional infliction of emotional distress. Who wins, and why?

(answer on page 5)



2008 WORK-LIFE BALANCE AWARDS

Constangy is pleased to announce that nominations are now being accepted for the Third Annual Corporate Counsel Work-Life Balance Award and for our firm’s inaugural Work-Life Balance Award honoring a human resources department. Nominations are due July 1. For details, go online at <http://www.constangy.com/WorkLife.html>.

GETTING TO KNOW US



CARLA GUNNIN (*Atlanta, GA, labor relations, and occupational safety and health*) received her bachelor's degree in international relations from the University of Alabama. She received her law degree from Cumberland School of Law and was a member of the Environmental Law

Society. Before joining Constangy, Carla was an attorney with the the U.S. Department of Labor in the Office of the Solicitor in Birmingham, Alabama. Carla enjoys gardening, music and tennis.



KRISTINE SIMS (*Winston-Salem, NC, employment litigation prevention and defense, affirmative action*) received her bachelor's degree in government with a minor in economics from the University of Virginia. She received her law degree from the T.C. Williams School of Law of the University of Richmond, where

she received the Excellence for the Future Award and was named the outstanding graduate in labor and employment law by the American Bar Association/Bureau of National Affairs. Before joining Constangy, Kristine was an assistant attorney general with the Appellate Division of the state of West Virginia. She is chair of Constangy's Women's Network, a member of the personnel committee of the Children's Museum of Winston-Salem, and a permanent honorary member of the Board of Directors of Cancer Services, Inc. When she is not practicing law, Kristine enjoys tennis, swimming, movies, University of Virginia sports, and NFL football. Most of all, she enjoys spending time with her daughter, Madison.



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He has been named by the Labor Relations Institute as one of the top 100 labor attorneys in the United States, and is a popular speaker and writer on labor relations topics. Steve also volunteers as Chapter Attorney for the Heart of America Chapter of the Associated Builders and Contractors.



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University School of Law. Before law school, Robin worked in a variety of jobs, including newspaper copy editor. At Wake Forest, Robin was an editor of the Law Review and received The *Law Review* Award for best student writing. Robin is Editor in Chief of most of Constangy's client publications, including *Labor & Employment Insights*. She is in her second year as Chair of the Professionalism Committee of the North Carolina Bar Association and is a member of the NCBA's Continuing Legal Education Committee as well as the Society for Human Resources Management. Robin is a popular speaker and has published articles in a variety of publications, including *HR Magazine*. In her spare time, Robin enjoys reading, singing, walking, and spending time with her two grown sons.



JACK WALLACE (*Jacksonville, FL, employment litigation prevention and defense, training, and affirmative action*) received both his bachelor's and law degrees from the University of Florida. His bachelor's degree was *cum laude* in business administration, and he was a member of the Golden Key

National Honor Society. While in law school, Jack was chair of the Moot Court Team, a member of the Trial Competition Team, and a member of the Order of the Barristers. He is a frequent speaker on a wide variety of employment law topics. In addition to being a lawyer, Jack is a stage actor. He also enjoys exercise, billiards and creative writing.

The Orwellian “Employee Free Choice Act” **THINK IT’S DEAD? THINK AGAIN.**

Zan Blue

The so-called “Employee Free Choice Act” was introduced in Congress in 2007, and it almost passed. It will be introduced again, probably in 2009. If the Democrats can gain control of the White House, the Senate and the House, there is a good chance this proposed legislation could become law.

This would be the most important change in labor law since the National Labor Relations Act passed in 1935. Let’s look at how the process of obtaining representation rights works now, and we’ll look at how the process will work if this proposed legislation becomes law.

The Current System

Currently, for a union to gain representation rights, the union must present to the National Labor Relations Board signatures supporting a “showing of interest” along with a petition asking the Board to schedule an election. Usually – in fact, almost always – the signatures are obtained on union organizing cards. The union usually tries to keep its efforts to get signatures secret as long as possible, because it knows that a smart employer will start educating employees as soon as the union activity becomes known. The union support tends to drop off as the employees learn how to ask questions of the union organizers.

Technically, the union must present signatures of 30 percent of the employees who would be eligible to vote, but in the real world the union won’t submit the “showing of interest” until it has signatures from at least 60 percent. Once the union presents the “showing of interest,” the Labor Board asks for a list of employees to see whether the union has submitted enough signatures. If the union has submitted enough

cards, the Labor Board will start the process of setting up a secret ballot election.

The election usually is set within 42 days of the date the petition is filed. During this period the company and the union work hard to persuade the employees how to vote. The employer usually uses speeches, small group meetings, posters, supervisor talking points and other communications techniques to educate the employees. The education process covers unions and how they operate, the negotiating process, strikes and what happens during strikes, and other relevant points. The union, meanwhile, is using fliers, home visits, meetings at bars or restaurants, phone calls and email to persuade the employees to vote in favor of the union. The way the process works right now, the campaign period may be, and often is, the first time employees really learn anything about unions.

Then the day of the election arrives. A Labor Board agent comes to the plant with a voting booth, a ballot box and a stack of ballots. The employees come in one by one, are given a ballot, go into the booth and mark the ballot in secret, and then put the ballot in the ballot box. Once the voting period has ended, the Labor Board agent counts the ballots immediately in public. It is very exciting. The union wins or loses. If the union loses, then it may file objections claiming the employer did bad things, or it may just move on. Either way, for now the election is over.

If the union wins, then the parties must bargain in good faith in an effort to reach a contract. No one has the power to make either party agree to anything. Both sides are free to make proposals and reject the other party’s proposals. Ultimately, if the parties bargain in good faith and are unable to reach an agreement, the matter is resolved through economic bargaining power. This means the union can try to persuade the employees to go on strike. Sometimes the parties cannot reach an agreement and the union cannot persuade the employees

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ANSWER

(from Quarterly Quiz, page 3)

Evil-Lyn will probably win on the Title VII claim – not because she didn’t discriminate, but because individuals usually cannot be sued under Title VII.

Although individuals can be sued for intentional infliction of emotional distress, Evil-Lyn is likely to win on that claim, too, because most courts say that a “mere” discriminatory termination is not enough to give rise to such a claim. An intentional infliction claim must be based on behavior that is “extreme and outrageous,” and that is intended to cause and does in fact cause severe emotional distress. Courts have interpreted this to mean that aggravating circumstances are required – for example, harassment, threats of violence, or severe psychological abuse.

All that having been said, Evil-Lyn’s actions were clearly unjustified and unlawful. Vic could have successfully sued her in many states for wrongful discharge, and he certainly could have sued the employer for discrimination based on Evil-Lyn’s actions as a supervisor. And apart from litigation, Evil-Lyn has probably guaranteed her own termination.

EFCA: HERE'S HOW IT COULD HAPPEN

The Employee Free Choice Act will become law in 2008 or 2009 unless employers stop it. Here's a likely scenario:

The unions, being smart and politically savvy, will reintroduce the law this year when everyone is preoccupied with presidential politics. Then they'll make a deal to drop the part about doing away with the secret ballot election in exchange for the mandatory arbitration of first contracts. Then they'll come back in 2009 and do away with the secret ballot election.

The legislation passed in the House in 2007 but failed in the Senate because of a filibuster, which is a parliamentary tactic that cannot succeed unless at least 40 senators support the maneuver. If the Democrats win control of 60 seats, or are able to persuade a few Republicans or Independents to support this law, then EFCA will pass the Senate in 2008 or 2009. Several leading Democratic presidential candidates have said they would sign this legislation. There is a very real possibility this legislation could become law in early 2009.

ZAN BLUE



EFCA *(continued from page 5)*

to go on strike. The union can file unfair labor practice charges and can use other pressure tactics, but the union still may wind up without a contract. In these cases, the union is just out of luck. The unions claim this happens frequently.

The EFCA Way

If the Employee Free Choice Act passes, there will be three major changes to the labor laws. First, the employer will be required to recognize and bargain with the union if the union presents the signatures of 50% plus one of the members of an appropriate bargaining unit. There would be no campaign period. There would be no secret ballot elections. In other words, the union can work in secret to obtain signatures and can use whatever tactics it wants, while employees have no opportunity to hear the employer's education campaign.

Second, the Labor Board will be given broad new powers to impose penalties on employers. Under the law, the Labor Board acts as investigator, prosecutor and judge. There is little pretense of impartiality. The Labor Board pays the salary of its investigators, its regional attorney, its regional director and the administrative law judges who hear the cases. Any appeal is taken directly to the Labor Board. The process is slow and cumbersome. Under the proposed legislation, the Labor Board will have far more power to impose very large monetary penalties when it finds an employer violates the law.

Third, and maybe most importantly, the law gives power to the federal government to dictate the terms of the first contract. As noted above, under current law, if the union wins the election the employer has an obligation to bargain in good faith. There is no obligation to agree to anything the employer believes would hurt its competitive position. Under the proposed legislation, if the parties cannot reach an agreement, then an arbitrator will be selected by the federal government to decide what the terms of the first contract will be and that decision will be binding for two years. This has never happened in the private sector in this

country. The union, in such a situation, would be encouraged to make all sorts of demands that it knows no employer would ever agree upon. In fact, the union would have every reason not to want to reach a first contract, because the union would have good reasons to believe the arbitrator would be more generous, especially with items important to the union, like dues check off and union security provisions.

Is "1984" in Our Future?

Right now most private sector employees really don't know much about unions. Only about 7% of the private sector workforce is represented by unions. So when union organizers come along with promises, telling employees how great unions are and how they will get more pay and better benefits automatically, employees tend to believe them. Many private sector employers do not talk about unions at all. They tend to think there is not any serious risk that employees will support a union.

If EFCA becomes law, all that will change. Employers will have to completely rethink how they deal with the possibility of union organizing. Of course, what probably will happen is that most employers will not do anything because they think their employees are happy, or because they don't want to spend any money on training, or because they just aren't paying attention. Then a few high profile employer targets will find themselves with a union and a contract imposed by a government arbitrator. This will not be good.

If employers don't pay attention, EFCA will become law, and the ability of a labor union to organize the workforce and impose terms and conditions of employment decided by a government arbitrator will suddenly be dramatically different.

Now you know. What are you prepared to do?

Zan Blue (Nashville, TN) practices in the areas of labor relations, and employment litigation prevention and defense.

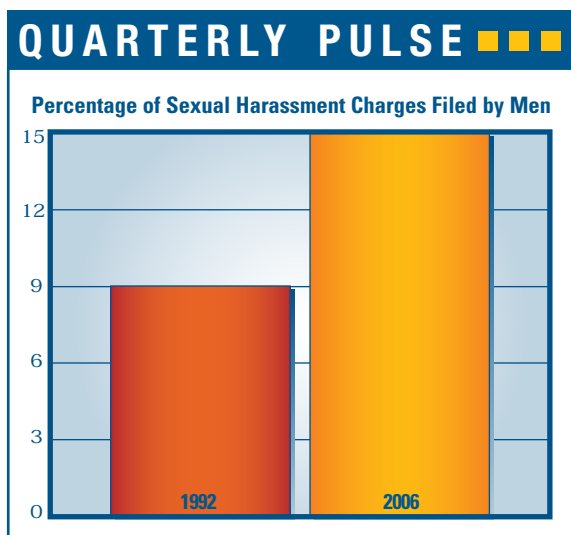
EPLI (continued from page 1)

company’s approved list of “panel” counsel; and (2) when the insurance company allows someone not on the panel to represent the employer as “accommodation” counsel (that is, the insurance company accommodates the employer’s request for a specific law firm or lawyer). Needless to say, the issue of counsel selection is best addressed when negotiating a new EPLI policy, not afterward. And whether an employer can easily get its choice of counsel depends on the insurance company’s practices, the amount of the deductible, and the law firm being requested.

Constangy is already on the panel counsel list for most of the major EPLI carriers and is regularly allowed as accommodation counsel with other carriers.

Even so, it will help if you mention our firm to your broker or insurance company when exploring employment practices liability insurance, or when notifying your existing EPLI carrier about a demand letter, charge or lawsuit. That will give you the best of both worlds: insurance to protect you from the worst risks, coupled with the level of legal representation you expect and deserve.

Ken Carlson (Winston-Salem, NC) practices in the area of employment litigation prevention and defense, and wage and hour, and is a certified mediator.



SOURCE: U.S. Equal Employment Opportunity Commission

MEDICAL EXAM (continued from page 3)

rejected the plaintiff based on an ADA-compliant post-offer medical examination.

In *Buchanan v. City of San Antonio*, the plaintiff was repeatedly rejected for employment as a police officer. At the close of his evidence, the plaintiff moved for judgment as a matter of law based on, among other things, the fact that the city had violated the ADA by requiring him to submit to a medical examination before a conditional offer of employment had been made. The trial court granted the plaintiff’s motion, and he was awarded \$300,000.

On appeal, the Fifth Circuit agreed with the plaintiff that the city’s medical examination was not “post-offer” because it was coupled with a physical fitness test, a background check, an assessment board, and a polygraph test. However, the court said that the city should have been given the opportunity to present evidence that the plaintiff would not have been hired notwithstanding the premature medical examination.

In summary, although the results vary, all of these circuits agree that the EEOC’s guidelines are reasonable and that the medical examination normally should not be administered until all other criteria have been evaluated.

There is one exception in the EEOC guidelines: If an employer needs to have a large, fungible pool of labor available for a given job, it is permissible to conduct the medical examination (including drug test) before an actual offer of employment is made. To qualify for this exception, the employer must treat everyone in the pool as equally “qualified” for employment when a vacancy occurs and must make job offers based on vacancies in some cut-and-dried order such as date of application or alphabetical order. In other words, the employer cannot compare qualifications once the applicants have made it into the pool. This exception is most frequently applied where the employer has unskilled jobs with a high level of turnover.

Apart from this one exception, when it comes to post-offer medical examinations, keep in mind this simple rule: last is best.

Kelli Hill (Macon, GA) practices in the areas of employment litigation prevention and defense, and workers’ compensation.

WHAT ABOUT DRUG TESTS?

Is a drug test a “medical examination” within the meaning of the ADA? Well, no . . . and yes.

Technically, a drug test is excluded from the ADA’s definition of “medical examination.” However, any good drug test has two phases: (1) an interview in which the individual being tested discloses any lawful medications he or she is taking that might affect the drug test result; and (2) the actual test itself, including any legally required re-testing. The test itself is not a “medical examination” within the meaning of the ADA, but the interview is.

Remember that a “medical examination” is any inquiry that would be expected to elicit information about an individual’s disability. Questions about medications are “medical examinations” because they frequently result in disclosure of medical conditions. For example, an employee who reveals that he or she is taking Thorazine would thereby disclose a possible mental illness.

For this reason, we normally recommend that employers postpone drug tests of applicants (as well as other medical examinations) until the post-offer stage. To qualify as “post-offer,” the medical examination/drug test must be the very last step in the hiring process.

With current employees, for which medical examinations may not be undertaken unless job-related and consistent with business necessity, we recommend delaying the “interview” phase until after a confirmed positive drug test result is received. The confirmed positive result is generally considered sufficient “business necessity” for further medical follow-up.

KELLI HILL

REASON PREVAILS...

We're not going there. We're just not. In a decision that should make us all breathe easier, the Ninth Circuit has held that it is not discriminatory to refer to a woman with children as a "mom." The plaintiff had applied unsuccessfully for several promotions and contended that the employer's bias was shown by his referring to her as a "mom." The court found that the employer had sufficiently demonstrated legitimate reasons for rejecting the plaintiff, and said that another negative term would have to be paired with "mom" to show bias.

Porn dogg. The U.S. Court of Appeals for the Second Circuit (Connecticut, New York, Vermont) is allowing a plaintiff to take sexual harassment and retaliation claims to trial. The plaintiff alleged that her boss, a professor at Fordham University, watched pornographic videos for hours at a time and required her to handle the videos. He also allegedly accessed pornographic websites on her computer. When she complained to the university, she contends, no action was taken . . . except against her.

Well, at least now we know why yours truly is such a slob. A federal court in Pennsylvania dismissed a race harassment case in which the plaintiff, an African-American account executive, and his fellow account executives, were given copies of the book "New Dress for Success." The book contained

some ethnic references, including that African-Americans selling to whites should avoid wearing Afro-centric clothing or styles, that Hispanics should avoid pencil mustaches and hair products that look "greasy or shiny," and that Irish-Americans consider excessively neat, "sharp" dress to be a sign of dishonesty. After receiving a copy of the book, the plaintiff returned to the office only once – to gather his belongings and submit a letter of resignation.

AND REASON FLAILS...

Imagine the stridulous sound of fingernails scraping a blackboard. While waiting for Congress to enact ENDA (the Employment Non-Discrimination Act, which prohibits sexual orientation and related forms of discrimination) or something similarly dramatic, the EEOC seems to be struggling for a *raison d'etre*. Several months ago, it launched a campaign against "family-status discrimination," which seemed to be nothing more than an attempt to put a fresh face on the old sex and pregnancy discrimination laws, and the FMLA. Now the agency is putting out anti-discrimination public service announcements featuring jazz artist Wynton Marsalis. Our admiration for Mr. Marsalis's musical gifts, as well as our opposition to employment discrimination, are unequalled, but his script (which he surely didn't write) actually requires him to say, "Some people play a cacophonous tune called discrimination." Couldn't the EEOC have used our tax dollars to hire a scriptwriter? Woops— they're on strike. Never mind.

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