Bender's Labor & Employment Bulletin

October 2017
VOLUME 17 • ISSUE NO. 10

Inside This Issue

LexisNexis™
Matthew Bender®

Court Sends ADA/GINA Wellness Regs Back to EEOC

By Jonathan R. Mook

Introduction

Regulations issued by the U.S. Equal Employment Opportunity Commission ("EEOC") governing the application of the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act to employer-sponsored wellness programs have been dealt a significant setback by the U.S. District Court for the District of Columbia, which has ordered the Commission to reevaluate the rules that it had issued in May 2016. The court did not vacate the rules, but left them in place for the time being, thus creating new uncertainty for employers in determining how they should design their wellness programs to be in conformity with the law.

This article reviews the statutory and regulatory framework and the EEOC's regulations governing wellness programs and discusses in detail the reasoning of the district court in rendering its decision. It also addresses the implications for employers as they develop and promulgate wellness plans for their workers in the future.

Regulation of Wellness Plans Under HIPAA

In the last several years, many employers have implemented employee wellness programs and activities to promote healthier lifestyles or to prevent disease with the expectation that such programs will reduce healthcare costs.[1] The design of such programs is regulated, in part, by the Health Insurance Portability and Accountability Act ("HIPAA"), as amended by the Affordable Care Act ("ACA"), as well as by HIPAA's implementing regulations. HIPAA prevents health plans and insurers from discriminating

[1] See Kristin Madison, *Reconciling Policy Objectives*, 51 Willamette L. Rev. 407, 412-13 (2015); Katherine Baiker, et al., *Workplace Wellness Programs Can Generate Savings,* HEALTH AFFAIRS, January 14, 2010, available at http://content.healthaffaairs.org/content/29/2/304.full; Soeren Mattke, et al., *Workplace Wellness Programs Study,* Rand Corporation (2013) available at http://rand.org/pubs/research_reports/RR254.html (participants in wellness programs benefitted from "statistically significant and clinically meaningful improvements in exercise frequency, smoking behavior, and weight control.").

continued on page 275

CONTENTS:

ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to:

N. Peter Lareau
61113 Manhae Lp.
Bend, Oregon 97702
E-mail: nplareau@gmail.com

or

Mary Anne Lenihan
Legal Editor
Bender's Labor & Employment Bulletin
LexisNexis Matthew Bender
230 Park Avenue, 7th Floor
New York, NY 10169
E-mail: maryanne.lenihan@lexisnexis.com

If you are interested in writing for the BULLETIN, please contact N. Peter Lareau via e-mail at nplareau@gmail.com or Mary Anne Lenihan via e-mail at maryanne.lenihan@lexisnexis.com.

A NOTE ON CITATION:

The correct citation form for this publication is:
17 Bender's Lab. & Empl. Bull. 273 (October 2017)

ISBN 978-0-8205-5039-8, EBOOK ISBN 978-1-4224-8015-1

(Pub. 1239)

Court Sends ADA/GINA Wellness Regs Back to EEOC
By Jonathan R. Mook

(text continued from page 273)

based on "any health status related factor."[2] HIPAA, however, also allows covered entities to offer "premium discounts or rebates" on a plan participant's copayments or deductibles in return for that individual's compliance with a wellness program.[3] An incentive may include a discount on insurance costs or a penalty that increases the plan participant's costs because of non-participation in the wellness program.[4]

Generally speaking, there are two types of wellness programs for which rewards may be given: health-contingent and participatory. A health contingent wellness program is one in which the reward is based on an individual's satisfaction of a particular health factor.[5] A participatory program does not condition receipt of an incentive on satisfaction of a health factor, but rather simply requires an employee to participate in the program, no matter what the outcome to the employee's health may be.[6] The ACA's amendments to HIPAA, and the accompanying implementing regulations, allow plans and insurers to offer incentives of up to 30 percent of the total cost of coverage in exchange for an employee's participation in a health-contingent wellness program. Neither the ACA nor the HIPAA regulations impose a cap on incentives that may be offered to induce enrollment in a participatory wellness program, however.

Impact of ADA and GINA on Wellness Plans

Employer-sponsored wellness programs implicate both the ADA and GINA because the programs often involve the collection of sensitive medical information from employees, including information about disabilities or genetic information. The ADA generally prohibits employers from requiring medical examinations or inquiring whether an individual has a disability unless the inquiry is both job-related and "consistent with business necessity."[7] The prohibition is not absolute, however. The statute makes some allowances for wellness programs by allowing an employer to conduct medical examinations and collect employee medical history as part of an "employee health program," if the employee's participation in the program is "voluntary."[8] Significantly, the term "voluntary" is not defined in the statute.

GINA prohibits employers from requesting, requiring, or purchasing "genetic information" from employees or their family members.[9] GINA defines genetic information broadly as including an individual's genetic tests, the genetic tests of family members such as children and spouses, and the manifestation of a disease or disorder of a family member.[10] Like the ADA, GINA contains an exception that permits employers to collect this information as part of a wellness program, as long as the employee's provision of the information is voluntary.[11] As with the ADA, the meaning of "voluntary" is not defined in the statute.

EEOC's ADA and GINA Regulations

The EEOC initially adopted the position that for a wellness program to be "voluntary," employers could not condition the receipt of incentives on the employee's disclosure of ADA- or GINA-protected information.[12] The EEOC's position changed in May 2016, when the

[2] See Titles I and IV of the Health Insurance Portability and Accounting Act of 1996, Pub. L. 104-191, adding Section 9802 of the Internal Revenue Code and Section 2702 the Employee Retirement Income Security Act, and Section 2705 of the Public Health Service Act ("PHS Act"). The nondiscrimination provisions originally enacted in HIPAA set forth eight health status related factors, which the HIPAA final regulations refer to as "health factors." 71 Fed. Reg. 75014 (Dec. 13, 2006). These eight health factors are: health status, medical condition including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), and disability.

[3] See 29 U.S.C. § 1182(b)(2)(B); 26 U.S.C. § 9802(b); 42 U.S.C. § 300gg-4(b).

[4] See 26 C.F.R. § 54.9802-1(f)(1)(i).

[5] See Incentives for Nondiscriminatory Wellness Programs in Group Health Plans ("2013 HIPAA rule"), 78 Fed. Reg. 33,158, 33,180 (2013).

[6] See Incentives for Nondiscriminatory Wellness Programs in Group Health Plans ("2013 HIPAA rule"), 78 Fed. Reg. at 33,167.

[7] 42 U.S.C. § 12112(d)(4)(A).

[8] 42 U.S.C. § 12112(d)(4)(B).

[9] 42 U.S.C. § 2000ff-1(b).

[10] See 42 U.S.C. § 2000ff(4)(A).

[11] 42 U.S.C. §§ 2000ff-1(b)(2)(A)–(B).

[12] See EEOC, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, No. 915.002 (July 27, 2000); EEOC, Regulations Under the Genetic Information Nondiscrimination Act of 2008 ("the 2010 GINA rule"), 75 Fed. Reg. 68,912, 68,935 (Nov. 9, 2010), codified at 29 C.F.R. § 1635.

Commission promulgated specific rules on the application of the ADA and GINA to employer wellness programs.[13]

Those rules provide guidance on how wellness programs should be fashioned to comply with the requirements of both ADA and GINA and still be consistent with the provisions governing wellness programs under the HIPAA, as amended by the ACA. The EEOC's rules reaffirm that medical inquiries or medical examinations as part of an employee health or wellness program are allowed under the ADA and GINA if the inquiries and examinations truly are voluntary and used only for purposes of the program. However, the EEOC took the new position that incentives, whether in the form of a reward or penalty, may be used to encourage employee participation in a program.

Thus, the EEOC's ADA rule provides that the use of a penalty or incentive of up to 30 percent of the cost of self-only coverage will not render "involuntary" a wellness program that seeks the disclosure of ADA-protected information.[14] The GINA rule similarly permits employers to offer similar incentives of up to 30 percent of the cost of self-only coverage for disclosure of information, pursuant to a wellness program, about a spouse's manifestation of disease or disorder. Such information falls within the definition of the employee's "genetic information" under GINA.[15] Unlike the HIPAA regulations, which place caps on incentives in health-contingent wellness programs only, the incentive limits in the EEOC's GINA and ADA rules apply not only to health-contingent wellness programs, but to participatory programs as well. The EEOC's final regulations took effect in July 2016 and became applicable to employer sponsored wellness plans on January 1, 2017.[16]

In general, the EEOC's rules have been welcomed by employers because they provide needed clarity in fashioning wellness programs to comply with the requirements of both the ADA and GINA on wellness plans.[17] Additionally, the EEOC's limitation of incentives to 30 percent of self only coverage, has been a very workable one. Even before the EEOC rules were promulgated, the vast majority of employers with wellness programs limited incentives to less than 30 percent of the cost of an employer's self only coverage.[18]

The reaction to the EEOC rules was not as positive in the disability rights community. Many questioned whether an incentive of 30 percent of self-only coverage to participate in a wellness plan, particularly if the 30 percent was in the form of a penalty, rendered that plan truly "voluntary" or whether participation was, in fact, coerced.

The District Court Litigation

Given the divergence in views, it was not entirely unexpected that in early October 2017, the American Association of Retired Persons ("AARP") filed suit against the EEOC in U.S. District Court for the District of Columbia challenging the EEOC's final ADA and GINA regulations as violating the Administrative Procedure Act ("APA").[19] In its lawsuit, AARP argued principally that the EEOC's final rules permitting incentives or penalties of up to 30 percent of an employee's self only coverage for participatory wellness programs, in particular, were inconsistent with the requirements of both the ADA and GINA because those statutes allow an employer to obtain medical information from an employee as part of an employee health program only on a voluntary basis. According to AARP, employees who cannot afford to pay a possible 30 percent increase in premiums would be forced to disclose their protected information when they otherwise would choose not to do so.

Initially, AARP sought to obtain a preliminary injunction to prevent the EEOC's regulations from taking effect, a request that was denied. Although the court found that AARP had standing to pursue its lawsuit, the court ruled that AARP failed to show at the preliminary stage of the proceedings that it would suffer either irreparable harm or have a substantial likelihood of success on the merits to warrant injunctive relief.[20]

When the court decided AARP's motion for a preliminary injunction, the administrative record of the EEOC's

---

[13] EEOC, Final Rule, "Regulations Under the Americans with Disabilities Act," 81 Fed. Reg. 31126 (May 17, 2016) ("ADA Rule"); EEOC, Final Rule, "Genetic Information Nondiscrimination Act," 81 Fed. Reg. 31143 (May 17, 2016) ("GINA Rule").

[14] See ADA Rule, 81 Fed. Reg. at 31,133–34.

[15] See GINA Rule, 81 Fed. Reg. at 31,144. The rule does not permit employers to collect this information from the employee or the employee's children, only from the employee's spouse.

[16] See ADA Rule, 81 Fed. Reg. at 31, 129; GINA Rule, 81 Fed. Reg. at 31,147. When an ACA Exchange Plan is used as a reference for the limitation, the plan year is the calendar year. 81 Fed. Reg. at 31, 129; GINA Rule, 81 Fed. Reg. at 31,147.

[17] *See, e.g.*, J. Mook, "EEOC Issues Final Rules on Wellness Programs," 16 Bender's Lab. & Empl. Bull. 203 (July 2016).

[18] 81 Fed. Reg. at 31137.

[19] See Complaint, *AARP v. U.S. Equal Employment Opportunity Commission,* C.A. No. 1:16-cv-02113-JDB (D.D.C., filed, Oct. 24, 2016).

[20] *AARP v. EEOC,* 226 F. Supp. 3d 7 (D.D.C. 2006).

rulemaking was not available for the court's review. Subsequently, that record was made available to the district court, and the parties engaged in further briefing pertaining to whether the EEOC's regulations should be invalidated under the APA because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[21] Using this standard, a court will uphold an agency's action where the court finds that the agency "has examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[22] Where a court concludes that the agency's action is not the product of reasoned decision-making, however, the court will overturn the action as being arbitrary and capricious.[23]

In the proceedings before the district court, both AARP and the EEOC agreed that both the ADA and GINA are ambiguous about the meaning of the term "voluntary." They parted company as to whether the Commission had sufficiently supported its interpretation of the term "voluntary" as permitting a 30 percent incentive level. The issue before the district court, therefore, was whether the EEOC had offered a reasoned and adequate explanation for its interpretation to pass muster under the APA.

Arguments of AARP and EEOC

In its arguments before the district court, AARP did not dispute that some level of incentive may be permissible under the statutes. Instead, AARP contended that the incentive level the EEOC adopted constituted an unreasonable interpretation of the term "voluntary." According to AARP, the 30 percent level chosen by the EEOC is inconsistent with the "ordinary meaning" of "voluntary" because the incentive is too high to give employees a meaningful choice as to whether to participate in wellness programs that require the disclosure of protected medical information. AARP also argued that "the EEOC had failed to adequately justify the reversal of its prior position that prohibited the use of incentives" and adequately explain how the Commission determined that a 30 percent incentive level was an appropriate measure of whether the disclosure of protected medical information is "voluntary."[24]

In response, the EEOC set forth three reasons why it reversed its prior interpretation that "voluntary" precluded the use of incentives and why it determined that the term permits incentives of up to 30 percent of the cost of self-only coverage. The Commission argued principally that its new interpretation was adopted to harmonize its regulations with the HIPAA regulations governing wellness programs and to induce more individuals to participate in wellness programs – a goal that Congress encouraged in enacting the ACA. The EEOC also explained that the 30 percent incentive level constituted a reasonable interpretation of "voluntary" considering current insurance rates, as well as a comment letter submitted by the American Heart Association which endorsed the 30 percent level.[25]

District Court Decision

On August 22, 2017, after full briefing on the issue and oral argument, U.S. District Court Judge John Bates issued his ruling, which agreed with AARP's argument that the EEOC had failed to adequately explain the reasoning behind its wellness plan regulations.[26] In particular, Judge Bates found that the Commission had failed to offer a reasoned explanation for its view that allowing wellness plans to offer incentives of up to 30 percent of the cost of self-coverage in exchange for the disclosure of medial information as part of an employee's participation in a wellness program meant that the disclosure still was "voluntary."

In addressing the arguments of both parties, the district court first emphasized that the determination of what is "voluntary" is the type of agency judgment to which the courts should give some deference. As the district court acknowledged, "voluntariness" is a matter of degree, and the EEOC is "far better suited than the courts to determine what incentive level adequately balances the goals of the ADA, yet helps to achieve some consistency across federal regulations."[27]

Nonetheless, the district court pointed out that to be upheld, the EEOC's chosen interpretation still must be reasonable and must be supported by the administrative record. After examining that record, Judge Bates concluded there was nothing in the administrative record to explain the EEOC's conclusion that incentives greater than 30 percent of the cost of self only coverage would render the disclosure of protected medical information

[21] 5 U.S.C. § 706.

[22] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[23] 463 U.S. at 52.

[24] See Memorandum in Support of Cross Motion for Summary Judgment and Opposition to Motion to Dismiss filed by AARP, *AARP v. U.S. Equal Employment Opportunity Commission,* No. 1:16-cv-02113 (D.D.C., filed Apr. 28, 2017) at 25-30.

[25] Memorandum in Opposition to Cross Motion for Summary Judgment and Opposition to Motion to Dismiss filed by U.S. Equal Employment Opportunity Commission, *AARP v. U.S. Equal Employment Opportunity Commission,* No. 1:16-cv-02113 (D.D.C., filed May 30, 2017) at 18-21.

[26] *AARP v. EEOC,* 2017 U.S. Dist. LEXIS 133650 (D.D.C. Aug. 22, 2017).

[27] 2017 U.S. Dist. LEXIS 133650, at *27.

"involuntary" but an incentive of 30 percent or less would not. In reaching this conclusion, Judge Bates considered the EEOC's professed reliance on (1) the HIPAA regulations allowing a 30 percent incentive for health-contingent wellness programs; (2) current insurance rates; and (3) the comments the EEOC received during the rulemaking proceeding.[28]

No Harmonization with HIPAA

The district court rejected the EEOC's argument that adopting the 30 percent incentive level in its ADA and GINA wellness regulations was in harmony with the HIPAA rules. The district court acknowledged that "in the abstract," harmonization might be a "reasonable goal." Nonetheless, the district court identified three problems with the EEOC's underlying reasoning on the point.[29]

First, Judge Bates noted that Congress had chosen the 30 percent number for HIPAA in a different context from either the goals of the ADA or GINA. That is because HIPAA was enacted to prevent insurance discrimination and prohibit health plans and insurers from denying individuals coverage or benefits or imposing increased costs, based on a health factor.[30] HIPAA's allowance of a 30 percent incentive in health-contingent wellness programs, which require a participant to satisfy a particular health standard, is an exception to this general rule because the incentive allows insurers and health plans to discriminate based on a health factor in certain limited circumstances.[31]

Accordingly, the district court reasoned there had been no need to limit incentives in participatory wellness programs in HIPAA because those programs do not require participants to achieve a particular health standard nor do they encourage discrimination based on a health factor, which is HIPAA's chief concern. The voluntary nature of an individual's participation in a wellness program is not an issue under that statute. Thus, as the district court explained, the 30 percent incentive cap in HIPAA is not intended to serve as a proxy for, or interpretation of, the term "voluntary."[32]

Unlike HIPAA, permitting the use of incentives in wellness programs, the district court pointed out, does not create an exception to the anti-discrimination provisions of the ADA. Rather, it constitutes an interpretation of the explicit statutory requirement that an employee's decision to disclose ADA-protected information to an employer be "voluntary."[33] Notwithstanding this critical distinction, Judge Bates found that, in promulgating its ADA regulations, the EEOC did not appear to have considered the purpose of the ADA vis-à-vis that of HIPAA. The EEOC also failed to explain why the wholesale adoption of the 30 percent level in HIPAA, which comes from a different statute based on different considerations and reasons, constitutes a permissible interpretation of the term "voluntary," beyond stating that this interpretation "harmonizes" the regulations.[34]

Second, Judge Bates found that there was no such harmonization. That is because the EEOC's 30 percent incentive level is *not* consistent with HIPAA because only health-contingent wellness programs are subject to the HIPAA 30 percent cap. By contrast, the ADA rule extends the 30 percent cap to both participatory and health-contingent wellness programs. Additionally, the district court noted that the HIPAA regulations calculate the 30 percent incentive level differently from that in the EEOC's ADA regulations. The HIPAA level is based on the *total* cost of coverage, which includes the cost of family coverage, rather than the cost of *self-only* coverage that the ADA rule adopts. Accordingly, the district court concluded that the EEOC's proffered reason of "harmonization" with HIPAA for the Commission interpreting permitting wellness program incentives of up to 30 percent was "deeply flawed."[35]

No Analysis of Current Insurance Rates

The district court also rejected the EEOC's argument that the 30 percent incentive level was reasonable based on "current insurance rates." As Judge Bates noted, the Commission's final rule failed to elaborate on this point. In fact, at oral argument, the EEOC conceded that the Commission had performed no study or analysis of "current insurance rates" nor of how such rates may have related to the voluntary disclosure of information in wellness programs. Thus, like the Commission's harmonization argument, the district court opined that the EEOC's justification of its regulations based upon current insurance rates was "utterly lacking" in substance.[36]

Lack of Support in Comment Letters

Finally, Judge Bates gave short shrift to the EEOC's assertion that the Commission had relied on comment letters submitted during the rule-making proceedings in reasonably determining that the 30 percent incentive

---

[28] 2017 U.S. Dist. LEXIS 133650, at *28.
[29] 2017 U.S. Dist. LEXIS 133650, at *29.
[30] 2017 U.S. Dist. LEXIS 133650, at *29 (citing 2013 HIPAA Rule, 78 Fed. Reg. at 33,158–59).
[31] 2017 U.S. Dist. LEXIS 133650, at *29.
[32] 2017 U.S. Dist. LEXIS 133650, at *29.
[33] 2017 U.S. Dist. LEXIS 133650, at *30.
[34] 2017 U.S. Dist. LEXIS 133650, at *30.
[35] 2017 U.S. Dist. LEXIS 133650, at *33.
[36] 2017 U.S. Dist. LEXIS 133650, at *35.

level was an appropriate interpretation of "voluntary." The only specific comment letter identified by the EEOC was a letter submitted by the American Heart Association, which stated that it made sense to have the incentive level consistent across all types of programs, whether participatory or health-contingent, but failed to explain why. Moreover, as Judge Bates pointed out, the letter, itself, acknowledged that it was not "intuitive" that a program is "completely voluntary with an incentive attached that can significantly increase the cost of health insurance."[37]

Failure to Consider Relevant Factors

Most significantly, Judge Bates emphasized there was no indication in the administrative record that the EEOC had considered any factors relevant to the financial and economic impact the rule likely would have on those persons who would be affected most. In submissions to the EEOC during the rule-making proceedings, many commenters had pointed out that, based on the average annual cost of premiums in 2014, a 30 percent penalty for refusing to provide protected information would double the cost of health insurance for most employees. According to Judge Bates, "at around $1800 a year, this is the equivalent of several months' worth of food for the average family, two months of child care in most states, and roughly two months' rent."[38]

Moreover, Judge Bates found that the EEOC had failed to consider the distributional impacts of its ADA rule and whether an incentive as a given percentage of premium costs would be coercive for an employee. As Judge Bates noted, many comments had expressed concern that the 30 percent incentive level was likely to be far more coercive for employees with lower incomes and to disproportionately affect people with disabilities who on average have lower incomes than those without disabilities. "The possibility that the ADA rule could disproportionately harm the group the ADA is designed to protect," Judge Bates said, "would appear to pose a significant problem" for the Commission and "demonstrates the EEOC's failure to engage meaningfully with the text and purpose of the ADA."[39]

Shortcomings of the GINA Rule

Finally, the district court found that the EEOC's GINA rule suffered from the same shortcomings as the Commission's ADA rule. In other words, like the Commission's efforts in promulgating its ADA rule, in promulgating its GINA wellness program regulations, the EEOC had failed to consider factors relevant to "voluntariness" or otherwise support its decision to impose the 30 percent incentive level for GINA.[40] As the district court found, the "EEOC's explanation for its chosen interpretation of voluntary in the GINA rule fares no better than its explanation in the ADA rule—principally because EEOC relies primarily on its decision in the ADA rule as the basis for its decision here."[41]

Court's Remand to EEOC

In sum, the district court concluded that the EEOC had failed to justify its decision to interpret "voluntary" in both the ADA and GINA as permitting incentives of up to 30 percent of an employee's self-only coverage because the Commission had not adequately explained how it determined that the 30 percent incentive level is an adequate measure of "voluntariness." Instead, the district court said that the EEOC had "co-opted the 30 percent incentive level from the HIPAA regulations without giving sufficient thought to whether or how it should apply" in the context of either the ADA or GINA.[42] Accordingly, the court ruled that both the Commission's ADA rule and the GINA rule are arbitrary and capricious.[43] It declined, however, to vacate the ADA and GINA rules for fear of wide-spread disruption of existing employer-sponsored wellness programs. As the court noted, the EEOC's rules have been in effect for over a year. Therefore, said the court, "employer health plans ... were undoubtedly designed in reliance on these rules."[44] Accordingly, Judge Bates expressed concern that if the rules were vacated, "it may well end up punishing those firms—and employees—who acted in reliance on the rules." Thus, "[e]mployees who received incentives from their employers would presumably be obligated to pay these back, which may not be feasible for many; employers who imposed a penalty rather than an incentive would likewise be obligated to repay to employees the cost of the penalty, which again, may or may not be feasible."[45] Thus, because "vacatur appears likely to cause potentially widespread disruption and confusion," the district court declined to nullify the rules. Instead, "assuming that the agency can address the rules' failings in a timely manner," Judge Bates determined that "for the present," he would remand the rules to the EEOC for "reconsideration without vacatur."[46]

---

[37] 2017 U.S. Dist. LEXIS 133650, at *36.

[38] 2017 U.S. Dist. LEXIS 133650, at *38, citing Administrative Record at 3778 (Bazelon Ctr. for Mental Health Law); 3833 (Disability Rights Educ. & Def. Fund).

[39] 2017 U.S. Dist. LEXIS 133650, at *39.

[40] 2017 U.S. Dist. LEXIS 133650, at *43.

[41] 2017 U.S. Dist. LEXIS 133650, at *49.

[42] 2017 U.S. Dist. LEXIS 133650, at *42.

[43] 2017 U.S. Dist. LEXIS 133650, at *50.

[44] 2017 U.S. Dist. LEXIS 133650, at *52.

[45] 2017 U.S. Dist. LEXIS 133650, at *53.

[46] 2017 U.S. Dist. LEXIS 133650, at *54.

Impact of Court Decision

In the wake of the district court's ruling, AARP hailed the decision as being "a tremendous victory for workers" and emphasized that "no one should be coerced into revealing personal health information in the workplace under a wellness program."[47] Acting EEOC Chair Victoria A. Lipnic issued a statement saying that the agency is "assessing the impact of the court's decision and order, and options with respect to these regulations going forward."[48] In a subsequent filing with the district court, the EEOC has stated that the agency has "not yet determined what proceedings it intends to conduct on remand, or how long those proceedings will take." However, the EEOC has opined that "under any scenario, it is not feasible for the EEOC to complete remand proceedings before 2018."[49]

For now, the EEOC's ADA and GINA wellness program regulations remain in effect. But, that may well change as the EEOC moves forward with its further consideration of the latest iteration of its ADA and GINA wellness program rules. For now, employers are left in a state of limbo in determining how they should design their wellness programs in conformity not only with the HIPAA rules regulating incentives for health contingent programs, but with the ADA and GINA requirements that extend to participatory programs as well.

While there are no sure answers, the best approach probably is to continue to design wellness programs so that they comply not only with the HIPAA regulations, but also the EEOC's existing ADA and GINA rules. Certainly, until the EEOC promulgates new rules, neither the Commission nor any other federal agency will challenge this approach. And, if and when the EEOC issues new regulations, there should be a designated lead-time to allow employers that have been following the old rules to adopt their wellness plans to the new ones.

Adhering to the existing EEOC regulations may not entirely be a safe-harbor, however. There remains the possibility that private plaintiffs will follow the line of analysis of AARP and Judge Bates and question whether an "incentive" of 30 percent of an employee's self-only coverage to sign up for a participatory wellness program is, in practical effect, not "voluntary," but coercive. The argument certainly may have some appeal, especially for lower paid employees, for whom 30 percent of self-only coverage may be equivalent to two months of an employee's rent or mortgage payment. This particularly would seem to be the case if the incentive were cast in the form of a penalty for an employee's failure to participate.

All this means is that it will be to the benefit of both employers and employees alike for the EEOC to act expeditiously to address the issues raised by Judge Bates in his decision. Definitive guidance in this complex area of the law involving the intersection of HIPAA, the ADA and GINA is sorely needed.

Editor's Note:

For additional information on the EEOC's ADA and GINA rules, see J. Mook, "EEOC Issues Proposed Rule on Wellness Programs," 15 Bender's Lab. & Empl. Bull. 213 (July 2015); J. Mook, "EEOC Proposes Amending GINA Regs for Wellness Plans." 16 Bender's Lab. & Emp. Bull, 1 (January 2016); J. Mook, "EEOC Issues Final ADA and GINA Rules on Wellness Programs," 16 Bender's Lab. & Empl. Bull. 203 (July 2016).

Jonathan R. Mook is a partner in the Alexandria, Virginia firm of DiMuro Ginsberg, P.C., where his practice includes general litigation and counseling employers in all aspects of employment law. Mr. Mook is the author of two legal treatises on the Americans with Disabilities Act: "ADA: Employee Rights and Employer Obligations" (1992) and "ADA: Public Accommodations and Commercial Facilities" (1994), both published by Matthew Bender. Mr. Mook can be contacted at jmook@dimuro.com.

---

[47] "AARP Scores Federal Court Victory for Workers in Challenge to Workplace Wellness Rules," available at https://press.aarp.org/2017-08-24-AARP-Scores-Federal-Court-Victory-Workers-Challenge-Workplace-Wellness-Rules.

[48] V. Gurrieri, "AARP Gets Wellness Regs Kicked Back to EEOC, Employment Law 360 (August 22, 2017) available at https://www.law360.com/articles/956611.

[49] See Defendant's Memorandum in Opposition to Plaintiff's Rule 59(E) Motion to Alter or Amend Order, *AARP v. U.S. Equal Employment Opportunity Commission,* No. 16-cv-02113-JBD (D.D.C., filed Sept. 11, 2017) at 1 n. 1.

Board Faulted for Determination that LPNs Are Not Supervisors

By N. Peter Lareau

Introduction

In *NLRB v. New Vista Nursing & Rehabilitation*,[1] the Third Circuit refused to enforce a Board order requiring New Vista to bargain with a union that had prevailed in an election conducted by the Board to determine whether New Vista's employees wished to be represented for purposes of bargaining. The Third Circuit's decision was grounded in the Board's determination that LPNs employed by New Vista were *not* supervisors under within the meaning of the National Labor Relations Act ("Act") and, therefore, were to be included in the bargaining unit and entitled to vote on the question of union representation. The Third Circuit held that in making its non-supervisory determination, the Board had applied criteria "squarely at odds with . . . controlling [Third Circuit] precedent.[2]

The issue of determining supervisory status under the Act has long plagued the Board and the courts, particularly in the health care industry. This article, after reviewing the history of the issue, focuses on the Third Circuit's decision.

Statutory Background

When the Wagner Act came into law in 1935, supervisors were not excluded from the statutory definition of "employee" and the Board vacillated on whether they were entitled to union representation. It had held that a unit consisting entirely of supervisors could be represented by a union that was independent of the union representing rank-and-file employees;[3] or even by a union affiliated with the labor organization that represented the rank-and-file employees.[4] One year later, it reversed that position, finding that units of supervisory personnel were not appropriate.[5] Two years after that, in the case of *Packard Motor Car Co.*,[6] it again reversed its position, finding that units of supervisory personnel were entirely appropriate. The Board's decision in that case was approved by the Supreme Court,[7] but overturned almost immediately with the enactment of the Labor Management Relations Act of 1947 (Taft-Hartley Act),[8] which amended the Wagner Act by expressly excluding supervisors from the definition of employee.

Today supervisors are excluded from the definition of employee under Section 2(3) of the Act and may not be included in a bargaining unit certified by the Board. Although they are free to join and remain a member of a labor organization, no employer is required to bargain with a labor organization as the representative of supervisory employees.[9]

Indicia of Supervisory Status

Section 2(11) of the Act defines, in some detail, the group of individuals who are deemed supervisory. The definition does not relate to the individual's job title or wage rate;[10] instead it focuses on job duties. A supervisor is any individual "having authority, in the interest of the employer," to take any of the following actions with respect to other employees provided that the exercise of any such authority requires the use of independent judgment:

---

[1] 2017 U.S. App. LEXIS 16498 (3d Cir. Aug. 29, 2017).

[2] 2017 U.S. App. LEXIS 16498, at *2.

[3] *Union Collieries Coal Co.*, 41 N.L.R.B. 961 (1942).

[4] *Louisville Refining Co.*, 4 N.L.R.B. 844 (1938) In this case, the Board also noted that, in industries in which such had been an established practice, it had previously approved units that included supervisors as well as rank-and-file employees.

[5] *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

[6] 61 N.L.R.B. 4 (1945).

[7] *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947).

[8] See discussion at § 1.01[2] and § 1.02[5][c], *supra.*

[9] Section 14(a) of the Act, 29 U.S.C. § 164(a). Section 14(a) provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[10] *Dole Fresh Vegetables, Inc.*, 339 N.L.R.B. 785 (2003); *Capital Transit Co.*, 114 N.L.R.B. 617 (1955), *enforced,* 1956 U.S. App. LEXIS 4617 (D.C. Cir. Sep. 18, 1956).

(1) hire;
(2) transfer;
(3) suspend;
(4) lay off;
(5) recall;
(6) promote;
(7) discharge;
(8) assign;
(9) reward;
(9) discipline;
(10) responsibly direct; or
(11) adjust grievances.[11]

The listed supervisory functions are commonly referred to as the *primary criteria*[12] and they encompass individuals who possess the authority to effectively recommend any of the foregoing actions, although, as a practical matter, an individual who fails to actually exercise any of the indicia of statutory authority will rarely be found to be a supervisor. The list of supervisory functions is disjunctive and an individual with authority to undertake any one of these functions is a supervisor.[13] The party seeking to exclude an individual from the coverage of the Act, on the basis that the individual is a supervisor, has the burden of proving that supervisory status.[14]

For supervisory status to exist, therefore, three criteria must be met:

- the individual must have the authority to engage in one of the 12 functions set forth in Section 2(11) of the Act;
- the exercise of such authority must require the use of independent judgment; and
- the individual must hold and exercise the authority in the interest of the employer.[15]

The Issues

The problems that have been encountered by the Board and the courts in applying these three criteria have largely revolved around four issues: (1) determining whether the authority to exercise any of the 12 enumerated functions is held in the interest of the employer; (2) defining what is meant by the authority to "assign" other employees; (3) defining what is meant by the authority to "responsibly direct" other employees; and (4) determining whether an individual uses independent judgment in the exercise of any such authority. Because the Third Circuit's decision turned on the last of these issues—whether New Vista's LPNs used independent judgment in the exercise of their authority to discipline other employees—this article is limited to that issue.

[11] The definition of the term "supervisor," as set forth in Section 2(11) of the Act, 29 U.S.C. § 152, includes "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[12] In addition to the primary criteria, the Board has developed a series of *secondary criteria* that it sometimes employs and that include: the ratio of supervisors to rank-and-file employees; whether individuals attend management meetings; the disparity between wages and benefits of alleged supervisors and wages and benefits of rank-and-file employees; and whether the individual is perceived to be a supervisor by other employees. *See Children's Habilitation Center v. N.L.R.B.,* 887 F.2d 130 (7th Cir. 1989) (supervisory ratio); *Market Place, Inc*., 304 N.L.R.B. 995 (1991) (attending management meetings); *J.L.M., Inc*., 312 N.L.R.B. 304 (1993) (wage/benefit disparity); *NLRB v. Chicago Metallic Corp*., 794 F.2d 527 (9th Cir. 1986) (perception as supervisor). *But see N.L.R.B. v. Attleboro Assocs., LTD,* 176 F.3d 154 (3rd Cir. 1999) (rejecting supervisory ratio criterion). The secondary criteria will not be discussed further in this article.

[13] *Arlington Masonry Supply, Inc*., 339 N.L.R.B. 817 (2003); *Rest Haven Living Ctr., Inc*., 322 N.L.R.B. 210 (1996).

[14] *Arlington Masonry Supply, Inc*., 339 N.L.R.B. 817 (2003); *Dean & Deluca N.Y., Inc*., 338 N.L.R.B. 1046 (2003); *NLRB v. Ky. River Cmty. Care, Inc*., 532 U.S. 706 (2001); *Illinois Veterans Home*, 323 N.L.R.B. 890 (1997); *North Jersey Newspapers Co*., 322 N.L.R.B. 394 (1996); *S.S. Joachim & Anne Residence*, 314 N.L.R.B. 1191 (1994); *St. Alphonsus Hosp*., 261 N.L.R.B. 620 (1982), *enforced without op.*703 F.2d 577 (9th Cir. 1983); *contra* Grancare, Inc. *v. NLRB*, 137 F.3d 372 (6th Cir. 1998); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987); *but see Northcrest Nursing Home*, 313 N.L.R.B. 491 (1994) (Board acknowledges its difference with the Sixth Circuit respecting burden of proof and sets forth reasons for its position).

[15] *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571 (1994).

Whether Action Taken Entailed the Use of Independent Judgment

Generally

An individual's authority to exercise any of the twelve functions indicative of supervisory status does not confer such status unless such exercise entails the use of independent judgment. An individual will not be deemed a supervisor if he merely effects decisions made by others,[16] or if the manner and method by which the authority is exercised is circumscribed and limited by employer-promulgated rules, such that no discretion is involved in the individual's conduct.[17]

Determining whether an individual is exercising independent judgment may prove difficult. Although not limited to the health care industry, the issue has been litigated in that industry, where professional employees, such as nurses, interact with other members of staff (both professional and non-professional) daily. As the Board has stated:

> Supervisory issues are, of course, highly fact bound. Deciding whether an individual possesses any . . . indicia of supervisory authority often calls for making delicate, difficult, and even fine distinctions, and there are frequently gray areas. In almost any employment situation employees are given direction by other employees, including more experienced, straw boss, technical, and professional employees. Whether that direction is routine or responsible or requires independent judgment is the focus of the litigation of these issues whether in the health care industry or not.[18]

NLRB v. Health Care & Retirement Corp. (1994)

The starting point for an examination of what constitutes "independent judgment" is the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp ("Health Care")*.[19] As noted above, supervisory status requires a finding not only that an employee possesses authority with respect to one of the twelve functions specified in Section 2(11) but also that the authority is exercised "in the interest of the employer". Prior to this decision, the Board had consistently held that professional employees (such as nurses) did not exercise authority in the interest of the employer if the decision to exercise or the manner of exercise entailed the use of professional judgment. In *Health Care*, the Supreme Court rejected the Board's position as "inconsistent with both the statutory language and this Court's precedents."[20] The Court pointed out that the interpretation of the term "supervisor," when applied to professional employees should be the same as when applied to any other individual:

> The Act does not distinguish professional employees from other employees for purposes of the definition of supervisor in § 2(11). The supervisor exclusion applies to "any individual" meeting the statutory requirements, not to "any non-professional employee."[21]

Providence Hospital (1995)

After the Supreme Court's decision *Health Care*, the Board was required to apply to professional employees in the health care industry the same tests for determining supervisory status as it applied to any other individual, whether in the health care industry or not. Nonetheless, in the first health care industry case presenting such issues after the Supreme Court's decision, *Providence Hospital*,[22] the Board examined the exercise of independent judgment in the context of registered nurses assigning work to, and directing the work of, other employees. It held that the assignment and direction of work does not involve the exercise of independent judgment when it occurs in the context of professional employees utilizing the training, skills and experience of their profession.[23]

After its decision in *Providence Hospital*, the Board's decisions consistently applied the standard that the assignment and direction of work does not involve the exercise of independent judgment when it occurs in the context of professional employees utilizing the training, skills and experience of their profession. The application of this standard on a case-by-case basis produced varying results on

---

[16] *Dole Fresh Vegetables, Inc*., 339 N.L.R.B. 785 (2003).

[17] *Quinnipiac College*, 330 N.L.R.B. No. 63, 2000 N.L.R.B. LEXIS 8 (Jan. 7, 2000), *enforcement denied*, *NLRB v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001).

[18] *Northcrest Nursing Home*, 313 N.L.R.B. 491 (1994).

[19] 511 U.S. 571 (1994).

[20] 511 U.S. at 580.

[21] 511 U.S. at 581.

[22] 320 N.L.R.B. 717 (1996), *enforced sub nom. Providence Alaska Med. Ctr. v NLRB*, 121 F.3d 548 (9th Cir. 1997).

[23] 320 N.L.R.B. 729.

the ultimate issue of supervisory status and, where supervisory status was not found, the circuit courts frequently disagreed.[24]

Kentucky River Community Care, Inc. v. NLRB (2001)

In *Kentucky River Community Care, Inc. v. NLRB*,[25] the Supreme Court concluded that the Board's position respecting the use of independent judgment by professional employees was flawed. In doing so, the Court agreed with the Board that the term "independent judgment" is ambiguous as to the degree of discretion required for supervisory status and that it was within the Board's authority, exercised reasonably, to determine the degree of discretion required. Where the Board went awry, the Court found, was in categorically precluding a finding of independent judgment with respect to the direction of employees if that direction entailed the skills, training and experience of a profession. This, the Court found, did not involve the exercise of administrative discretion properly within the realm of the Board, but relied on factors unrelated to the degree of discretion exercised by the employee.

Oakwood Healthcare, Inc. (2006)

In *Oakwood Healthcare, Inc.*[26] a case raising issues under *Kentucky River,* the Board reexamined the independent judgment issue in light of *Kentucky River,* and "refine[d] the analysis to be applied in assessing supervisory status."[27] The Board commenced its discussion by repeating the admonition noted in its decision in *Providence Hospital,*—that the legislative history of the Act required it to "distinguish two classes of workers: true supervisors vested with 'genuine management prerogatives,' and employees such as 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'"[28] It then proceeded to adopt definitions of the terms "assign," "responsibly to direct," and "independent judgment," emphasizing that it was not "blindly adopting 'dictionary-driven' definitions[]"[29] but adhering to the "principle of statutory interpretation that 'in all cases involving statutory construction, our starting point must be the language employed in Congress ... and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.' "[30]

In defining the phrase "independent judgment," the Board started with the recognition that the Supreme Court, in *Kentucky River*, had disapproved its prior interpretation of that term, which excluded the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services."[31] Instead, the Court had held that "it is the *degree* of discretion involved in making

---

[24] *Compare Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2nd Cir. 2000) (court reverses Board and finds charge nurses are supervisors); *Extendicare Health Facilities, Inc.,* 330 N.L.R.B. 1377 (2000) (LPNs are supervisors); *Integrated Health Servs. v. NLRB*, 191 F.3d 703 (6th Cir. 1999) (court reverses Board and finds that staff nurses are supervisors); *Passavant Retirement Center v. NLRB*, 149 F.3d 243 (3rd Cir. 1998) (court reverses Board and finds LPNs are supervisors); *Beverly Enters., Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (LPNs are supervisors; Board's treatment of supervisory issue has "manifested irrational inconsistency"); *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998) (LPNs are supervisors); *Mid-America Care Found. v. NLRB*, 148 F.3d 638 (6th Cir. 1998) (court reverses Board and concludes LPNs are supervisors); *NLRB v. GranCare, Inc*., 158 F.3d 407 (7th Cir. 1998) (LPNs are supervisors); *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997) (court reverses Board and concludes LPNs are supervisors, criticizing Board for using "razor-thin factual distinctions" to find otherwise) *with Harborside Healthcare, Inc*., 330 N.L.R.B. 1334 (2000); *Elmhurst Extended Care Facilities, Inc*., 329 N.L.R.B. 535 (1999); *Vencor Hosp*., 328 N.L.R.B. 1136 (1999) (RN team leaders are not supervisors); *NLRB v. Hilliard Development Corp*., 187 F.3d 133 (1st Cir. 1999); *N. Montana Health Care Ctr. v. NLRB*, 178 F.3d 1089, (9th Cir. 1999) (charge nurses are not supervisors); *GranCare, Inc*., 323 NLRB No. 85, 1997 NLRB LEXIS 312 (Apr. 25, 1997), *enforced*, 170 F.3d 662 (7th Cir. 1999) (charge nurses are supervisors); *Beverly Enters. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998) (LPNs are not supervisors); *Beverly Enters. v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997) (LPNs are not supervisors); *Beverly Enters. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999) (charge nurses are not supervisors); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548 (9th Cir. 1997) (charge nurses not supervisors).

[25] 532 U.S. 706 (2001).

[26] 348 N.L.R.B. 686 (2006).

[27] 348 N.L.R.B. at 686.

[28] *Oakwood Healthcare*, 348 N.L.R.B. at 688 (citing *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 280–281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947))).

[29] The dissent accused it of doing so. 348 N.L.R.B. at 701.

[30] 348 N.L.R.B. at 688 (citing *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)).

[31] 348 N.L.R.B. at 692.

the decision, not the *kind* of discretion exercised . . . that determines the existence of "independent judgment" under Section 2(11).[32] Accordingly, the Board adopted "an interpretation of the term 'independent judgment' that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise."[33]

Under the approach enunciated by the Board in *Oakwood Healthcare*, the starting point for establishing that an employee has exercised independent judgment is a showing that the employee acted, or effectively recommended action, "free of the control of others and [after forming] an opinion or evaluation by discerning and comparing data."[34] That alone, however, will not necessarily suffice. The decision maintains that an employee may exercise a supervisory function free of the control of others, and after forming an opinion or evaluation by discerning and comparing data, that does not give rise to supervisory status. The party asserting supervisory status must make an additional showing—that the exercise of judgment was not merely routine or clerical in nature.

Determining where, on the spectrum, an exercise of judgment falls—between a true exercise of independent judgment and one that is merely clerical or routine in nature—requires an assessment of the *degree* of discretion exercised. The requisite discretion does not exist, maintains the Board, if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."[35] Examples of actions that do not possess the requisite degree of discretion would include the decision to staff a shift with a particular number of nurses where law or employer policy requires a fixed nurse-to-patient ratio (even assuming that the decision requires the employee to ascertain the number of patients and to arithmetically calculate the number of nurses required to satisfy the requirement). Similarly, assigning a nurse to a task does not involve the requisite degree of discretion if a controlling collective bargaining agreement specified that the assignment be made strictly by seniority. On the other hand, merely because the employer has issued general instructions or policies applicable to a supervisory function does not mean that the authority to act in that area does not entail independent judgment that rises above the merely routine or technical, if the instructions or policies recognize the exercise of discretion in their implementation.

NLRB v. New Vista Nursing and Rehabilitation

Facts and Procedural Background

In January 2011, 1199 SEIU United Healthcare Workers East ("Union") filed a petition to represent the Licensed Practical Nurses employed by New Vista. New Vista's staffing structure for its nurses is tri-level and overseen by a director of nursing. Immediately under the director of nursing is a nursing supervisor (evening shift) or unit manager (morning shift) to whom report licenses practical nurses ("LPNs"). The third, and lowest, level of nurses staffing is comprised of certified nurse aides ("CNAs"). When the Union filed the petition, it already represented the CNAs.[36]

New Vista argued to the Board that a unit consisting of LPNs was inappropriate because they were supervisors within the meaning of the Act and had the authority to discipline, or effectively recommend the discipline of the CNAs. In making the argument, New Vista relied primarily on the fact that the LPNs submitted a disciplinary form known as a "Notice of Corrective Action" or "Employee Warning Notice."[37]

The facts surrounding these forms were fiercely contested. Some testimony suggested LPNs did not use the forms to effectively recommend discipline. One of the nurses had never seen the Employee Warning Notice until just prior to her testimony. Similarly, testimony by another nurse was that LPNs rarely (if ever) recommended a specific kind of discipline. There was, however, countervailing evidence that supported New Vista's position. Most notably, Director of Nursing Victoria Alfeche testified that LPNs, in the exercise of their own discretion, frequently filled out the forms, could recommend a specific type of discipline and that she acted on the forms as a matter of course.[38]

The Board's Regional Director, J. Michael Lightner, rejected New Vista's argument, applying a four-part test:

[32] 348 N.L.R.B. at 692 (citing Kentucky River, 532 U.S. at 714).
[33] 348 N.L.R.B. at 692.
[34] 348 N.L.R.B. at 692.
[35] 348 N.L.R.B. at 693.
[36] 2017 U.S. App. LEXIS 16498, at *3.
[37] 2017 U.S. App. LEXIS 16498, at *4-5.
[38] 2017 U.S. App. LEXIS 16498, at *5.

> To prevail, the Employer must prove that: (a) LPNs submit actual recommendations, and not merely anecdotal reports, (b) their recommendations are followed on a regular basis, (c) the triggering disciplinary incidents are not independently investigated by superiors, and (d) the recommendations result from the LPNs' own independent judgment.[39]

His conclusion rested heavily on his finding that LPNs "simply report[ed] factual findings to their superiors without any specific recommendation for disciplinary action" and that the "higher authorities" at New Vista proceeded with independent investigations upon receiving the forms.[40] In the election subsequently conducted by the Board, a majority of LPNs voted to be represented by the Union and the Board denied New Vista's request for review of Director Lightner's order directing the election.[41] To test the Board's certification of the Union as the LPNs exclusive representative, New Vista refused to bargain. In a decision and order dated August 26, 2011, the Board granted summary judgment in favor of the Union and against New Vista.[42]

Third Circuit's Decision on the Merits[43]

In an earlier case involving the independent judgment issue, *NLRB v. Attleboro Assocs., Ltd.*,[44] the Third Circuit had "rejected the Board's position that an employee does not have authority to effectively recommend discipline if the employee's supervisors independently investigate the employee's recommendation."[45] The Board, in *Attleboro*, had argued that "[T]o be supervisory, the actions taken 'must not only initiate, or be considered in determining future disciplinary action, but also . . . must be the basis for later personnel action without independent investigation or review by superiors.'"[46] The Third Circuit rejected that argument, holding in *Attleboro* that the LPNs in that case had the power to effectively supervise CNAs and that "the NLRA does not preclude a charge nurse from having supervisory status merely because her recommendation is subject to a superior's investigation."[47]

Continuing with its analysis of *Attleboro,* the court observed that it "recognize[d] three facts that together may show an employee is a statutory supervisor: (1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action; (2) the employee's actions "initiate" the disciplinary process; and (3) the employee's action functions like discipline because it increases severity of the consequences of a future rule violation[.]"[48] Further, *Attleboro* teaches that there are "two facts that do not disprove supervisory status: (1) [that] a nurse's supervisor undertakes an independent investigation; and (2) [that] the employees exercise their supervisory authority only a few times (or even just one time)[.]"[49]

Because the test enunciated by the Board's Regional Director and adopted by the Board conflicts with the teaching of *Attleboro*, controlling precedent in the Third Circuit, the court refused to enforce the Board's order and remanded for further consideration.

Comment

The Board's decision in *New Vista* purports to apply the definition of independent judgment formulated in *Oakwood*:

> the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data."

Under *Oakwood*, a determination of whether authority has been exercised with "independent judgment" entails a determination of the "degree of discretion" involved in the judgment: "Whether [a] registered nurse is a 2(11) supervisor will depend on whether his or her responsible direction is performed with the degree of discretion required to reflect independent judgment."[50] The *Oakwood* Board continued:

---

[39] 2017 U.S. App. LEXIS 16498, at *5-6.

[40] 2017 U.S. App. LEXIS 16498, at *6.

[41] 2017 U.S. App. LEXIS 16498, at *6-7.

[42] 2017 U.S. App. LEXIS 16498, at *7.

[43] A substantial part of the Board's decision is devoted to a discussion of New Vista's challenges to procedural aspects of the Board's decision. See 2017 U.S. App. LEXIS 16498, at *7-35. Ultimately, the court rejected these challenges and issued a decision on the merits. This article is limited to the decision on the merits.

[44] 176 F.3d 154 (3d Cir. 1999).

[45] 2017 U.S. App. LEXIS 16498, at *36-37.

[46] 2017 U.S. App. LEXIS 16498, at *37 (quoting Br. for the NLRB in *Attleboro).*

[47] 2017 U.S. App. LEXIS 16498, at *37 (quoting *Attleboro*, Attleboro, 176 F.3d at 164.

[48] 2017 U.S. App. LEXIS 16498, at *39-40 (citations omitted).

[49] 2017 U.S. App. LEXIS 16498, at *40-41 (citations omitted).

[50] *Oakwood,* 348 N.L.R.B. at 692.

> actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as "independent" under the Act lies somewhere in between these extremes. . . . In determining the meaning of the term "independent judgment" under Section 2(11), the Board must assess the degree of discretion exercised by the putative supervisor.

Although citing and relying upon *Oakwood*, the *New Vista* Board made no attempt to undertake such an assessment. Instead it relied on a formulation previously rejected by the Third Circuit. Given the highly subjective nature of the assessment articulated in *Oakwood*, perhaps the Board cannot be faulted for not even giving it a try. It can be faulted, however, for relying on a formulation previously rejected by the courts and for not attempting to formulate new standards.

The case will now return to the Board pursuant to the court's remand instruction, presenting a perfect opportunity for reconsideration of the issue and, perhaps, a reformulation of the analytic framework.

Pete Lareau is the author of "NLRA: Law and Practice" and numerous other books and articles in the field of labor and employment law and is the Editor-in-Chief of Bender's Labor & Employment Bulletin.

Laws at Odds: The Medical Peer Review Privilege from Disclosure and the National Labor Relations Act

By Elizabeth Torphy-Donzella and Jeremy Himmelstein

Introduction

Section 7 of the National Labor Relations Act ("NLRA") provides employees with the right "to bargain collectively though representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."[1] Additionally, the NLRA prohibits employers from "interfere[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their Section 7 rights.[2] However, hospitals always, and employment agreements often, contain confidentiality provisions to ensure that sensitive information is not inadvertently placed in the wrong hands. At times, maintaining confidentiality may conflict with an employee's rights under the NLRA.

To maintain accreditation, most hospitals and medical providers are required to utilize peer review committees for physicians.[3] Many states also require hospitals to administer peer review committees for nurses so that nurses remain qualified to provide quality care to patients.[4] Peer review is the process that licensed medical personnel take to evaluate physicians, nurses, and other employees to ensure that they are competent and do not engage in unprofessional conduct. When a peer review committee finds that an employee acted below the hospital's standard of care, the committee usually informs an oversight board and reports the findings to state licensing agencies. Because legislators believe that free exchange of opinions is crucial to the effectiveness of peer review, all fifty states and the District of Columbia have peer review statutes that include documentary privileges.[5] Generally, these statutes prohibit all records, recommendations, evaluations, or any other information from being admitted into discovery even when compelled by a subpoena.[6] Despite the existence of these provisions, some courts have found that the privileges do not provide such protections when unions are involved.

This article will review the U.S. Court of Appeals for the D.C. Circuit's decision in *Midwest Division – MMC, LLC, d/b/a Menorah Medical Center v. NLRB*[7] ("*Midwest Division*") – one of the most recent court cases addressing whether the peer review privilege extends to a union's request for disciplinary records.

Background

It is settled law that employees have the right to bring union representation to any meeting they are required to attend if they reasonably believe that the meeting will result in disciplinary action.[8] The U.S. Supreme Court explained this right in *NLRB v. J. Weingarten, Inc.*,[9] ("*Weingarten*"), holding that an employer committed an unfair labor practice when a manager denied a sales employee's request to have a union steward accompany her to an investigatory meeting. Because the employee was required to attend a meeting that might have led to her termination, the Court held that the employee's rights to representation, or *Weingarten* rights, were violated. However, the Court made an important distinction.

> [T]he employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one.[10]

Thus, an employee's *Weingarten* rights are not implicated when the employer provides the employee with the option to attend or not to attend.

---

[1] 29 U.S.C. § 157.

[2] 29 U.S.C. § 158(a)(1).

[3] Dinesh Vyas & Ahmed E. Hozain, *Clinical peer review in the United States: History, legal development and subsequent abuse.* World J. Gastroenterol. 2014; 20(21):6357–6363 (June 7, 2014).

[4] *See e.g.*, Tex. Occupations Code Ann., §§ 303.001(5); 303.0015 (Vernon, 2017).

[5] *See* Anita Modak-Truran, *A Fifty-State Survey of the Medical Peer Review Privilege* (Oct. 1, 2008).

[6] *See e.g.*, D.C. Code § 44-805; Conn. Gen. Stat. § 19a-17b.

[7] 2017 U.S. App. LEXIS 15637 (D.C. Cir. Aug. 18, 2017).

[8] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975).

[9] *Weingarten*, 420 U.S. at 256.

[10] *Weingarten*, 420 U.S. at 258.

Following the Supreme Court's ruling in *Weingarten*, the U.S. Court of Appeals for the Ninth Circuit analyzed whether an employee's right to representation extends to meetings that are conducted in compliance with a state statute. In *Mt. Vernon Tanker Co. v. NLRB*,[11] the Ninth Circuit assessed an employee-seaman's claim that his rights were breached when he was required to attend an investigation without union support, after being charged with "willful disobedience of a lawful order."[12] Even though this meeting could have led to disciplinary action, the court held that the seaman was not entitled to union representation because the meeting was "mandated by law"[13] and "the [NLRB] has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other equally important congressional objectives."[14]

The Ninth Circuit's interpretation of *Weingarten* is also important when considering union information requests and whether an employer's refusal to disclose information is a violation of Section 8 of the NLRA. The Supreme Court has held that employers have a statutory obligation to "provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."[15] However, does a union's interest in protecting an employee from discharge or other discipline supersede an employer's duty to comply with state or federal statutes? The National Labor Relations Board ("NLRB" or "Board") examined a similar issue in *Borgess Medical Center*, where a registered nurse was discharged for giving a patient the wrong medications.[16] In preparation for arbitration, the union requested the hospital's "incident reports concerning other medication errors."[17] The hospital refused to furnish the records because the information was confidential and protected from disclosure under Michigan state law. While the Board agreed that the hospital had a legitimate confidentiality interest in complying with state law, the Board ruled in favor of the union, holding that the hospital "made no effort" to offer an alternative solution that did not violate state law.[18]

The NLRB made clear that employers must at least try to accommodate a union's disclosure request. Taking a union-friendly approach in *Midwest Division*, the D.C. Circuit expanded this rule even further.

The Midwest Division Decision

Summary of the NLRB's Decision

Menorah Medical Center ("Menorah") is a full service, acute care hospital that employs physicians, nurses, support staff, and administrative employees.[19] To comply with Kansas law, Menorah utilizes a "Nursing Peer Review Committee" which "addresses issues of reportable incidents involving nurses" and, if necessary, refers such incidents to the Kansas State Board of Nursing.[20] "Kansas law attaches a confidentiality privilege to certain aspects of peer-review proceedings."[21] Specifically, "reports, statements, [and] findings" from internal deliberations may not be subject to any "means of legal compulsion."[22]

In May 2012, Sherry Centye and Brenda Smith, two Menorah nurses, were provided with letters from Menorah's risk manager, which alleged that they had "exhibited unprofessional conduct . . . determined to be a Standard of Care Level 4: *grounds for disciplinary action*."[23] The letters stated that "an in-person exchange would take place only if you choose."[24] Furthermore, Centye and Smith were permitted to "submit a written response to the Committee . . . in lieu of an appearance."[25] The nurses requested that Menorah allow a union representative to attend the committee hearing, which Menorah's risk manager denied. After the hearing, a union representative contacted Menorah's staff and requested information pertaining to the structure of the committee, all prior allegations made against nurses, and any discipline that the committee had issued in the past. Menorah denied all the requests, stating that the information was privileged and confidential under Kansas law. The Union filed unfair labor practice charges with the NLRB alleging that Menorah violated the NLRA in its refusal to accommodate the Union's requests.

---

[11] *Mt. Vernon Tanker Co.*, 549 F.2d at 571.

[12] 549 F.2d at 574-75.

[13] 549 F.2d at 575.

[14] 549 F.2d at 576 (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

[15] *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979).

[16] *Borgess Medical Center*, 342 NLRB 1105, 1105 (2004).

[17] 342 NLRB at 1105.

[18] 342 NLRB at 1106.

[19] *Menorah Medical Center*, 362 NLRB No. 193, 2015 NLRB LEXIS 670, at *56 (NLRB Aug. 27, 2015).

[20] 2015 NLRB LEXIS 670, at *61-62.

[21] *Midwest Division,* 2017 U.S. App. LEXIS 15637, at *5.

[22] Kan. Stat. Ann. § 65-4915(b).

[23] *Menorah*, 2015 NLRB LEXIS 670, at *67.

[24] *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *7.

[25] 2017 U.S. App. LEXIS 15637, at *7.

The NLRB ruled in favor of the Union, holding that Menorah violated the nurses' *Weingarten* rights when it refused to allow the nurses to have union representation at the committee hearings. Furthermore, the Board held that Menorah wrongfully withheld information that the Union requested because the Union needed the information to effectively represent its members.

Menorah's Arguments on Appeal

On appeal to the U.S. Court of Appeals for the D.C. Circuit, Menorah challenged the Board's determination that the hospital committed unfair labor practices when it denied the nurses the right to bring union representatives to the committee hearing and when the hospital withheld information about the committee and results of prior committee hearings.[26] First, Menorah argued that the Board wrongly asserted jurisdiction over the dispute because the hospital's peer review committee functioned as a "State or political subdivision" and not a statutory employer subject to the NLRA.[27]

Next, Menorah argued that its denial of the nurses' requests for union representation did not infringe on their *Weingarten* rights because *Weingarten* is only implicated when bargaining-unit employees are compelled to attend disciplinary proceedings without union representation. Specifically, Menorah contended that it provided the nurses with the option to attend or not and thus, no rights were violated when it denied union representation.[28] Third, Menorah challenged the NLRB's ruling that it violated the NLRA when it withheld confidential information about the peer review program. In support, Menorah cited *Kaleida Health, Inc.*,[29] a recent NLRB decision holding that employers need only provide sensitive information when "the union's need for the information outweigh[s] the general policy regarding confidentiality." In this case, Menorah contended that Kansas law specifically enumerated a state-law privilege for peer review committees, and as such, no countervailing union interest could outweigh maintaining confidentiality.

The D.C. Circuit's Decision

The court first disposed of Menorah's lack of jurisdiction argument, holding that the hospital's peer review committee was not a "political subdivision" under Supreme Court precedent and thus, Menorah was not exempt from the NLRA. In *NLRB v. Nat. Gas. Util. Dist. of Hawkins County*,[30] the U.S. Supreme Court stated that to be a political subdivision exempt from the NLRA, an entity must be "(1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or the general electorate."[31] In this case, the D.C. Circuit summarily denied Menorah's argument because the Kansas statute "makes each hospital responsible for 'establishing and maintaining its own system of risk management,'" thus, "the very statutory scheme that requires the existence of peer-review committees[] specifies that they are created and administered by hospitals, not the state."[32] Furthermore, Menorah could not meet the second prong because the committee was not "appointed or removable by pubic officials."[33]

Following its determination that Menorah was an employer subject to the NLRA, the court analyzed the merits of the Board's unfair labor practice findings. First, the court unanimously reversed the Board's ruling that Menorah violated the nurses' *Weingarten* rights when it refused the nurses' request for union representation. Consistent with the Supreme Court's holding in *Weingarten*, the D.C. Circuit held that Menorah did not wrongfully refuse the nurses' request for representation because the charge letters provided the nurses the opportunity to appear before the peer review committee "if you choose." Additionally, the letter stated that the nurses were entitled to "submit a written response . . . in lieu of an appearance." The court agreed with the Board that because the charge letters did not contain any factual details, the nurses could incur severe drawbacks if they chose to forego attendance. However, the court noted that *Weingarten* "contains no suggestion that the NLRA requires an employer to *renew* advice to an employee that her attendance at a hearing is optional."[34] By contrast, *Weingarten* only required that Menorah offer the choice between attending or declining. Because the nurses were

[26] 2017 U.S. App. LEXIS 15637, at *10.

[27] 2017 U.S. App. LEXIS 15637, at *10 (citing 29 U.S.C. § 152(2)).

[28] *See* 2017 U.S. App. LEXIS 15637, at *15-20.

[29] 356 NLRB 1373, 1379 (2011).

[30] 402 U.S. 600, 604-05 (1971).

[31] 402 U.S. at 604-05.

[32] *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *12 (quoting Kan. Stat. Ann. § 65-4922(a)).

[33] 2017 U.S. App. LEXIS 15637, at *14.

[34] 2017 U.S. App. LEXIS 15637, at *18 (emphasis in original).

provided with these options, the court held that their *Weingarten* right to representation was not violated.[35]

The court also found that Menorah's confidentiality rule barring employees from discussing reportable incidents violated the NLRA because employees have the "right to discuss the terms and conditions of [their] employment with other employees."[36] Ruling that Menorah did not present a "legitimate and substantial business justification" that "outweigh[ed] the adverse effect on the interests of the employees," the court held that Menorah's confidentiality rule was "unduly broad in violation" of the NLRA.[37]

The court split on the remaining unfair labor practice findings. The standard for assessing requests for information was agreed upon by all members of the panel. Employers have "a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."[38] When a union successfully demonstrates that information is relevant, the "employer must furnish the requested information if 'the union's need for the information outweigh[s] the general policy regarding confidentiality.'"[39] That is where the agreement ended, however. The panel majority affirmed the Board's determination that that the requested information was "relevant to the Union's ability to enforce the collective-bargaining agreement" because "the Committee's work can lead to [Menorah's] suspension or discharge of an employee."[40] This was evidenced, said the panel majority, by Menorah's risk management plan, which states that "[w]hen the investigation of a reported incident [i.e., by the Peer Review Committee] results in an adverse finding, the event will be considered at the time of . . . employee performance evaluations."[41] As for the second prong of the analysis, the majority held that Menorah could not demonstrate any legitimate need to maintain confidentiality other than to remain compliant with state law.[42] Although the majority recognized that Kansas law attaches a privilege to "the reports, statements, memoranda, proceedings, findings and other records submitted to or generated by peer review committees[,]" it observed that, notwithstanding Kansas' interest in creating a statutory peer review privilege, the Supreme Court of Kansas has held that the privilege does not attach broadly to "any document that may incidentally come into the committees' possession."[43] Instead, the privilege applies only to documents and "forms found to be 'part of the peer review process as envisioned by the legislature.'"[44] The majority narrowly interpreted the privilege and, in doing so, found the union's interest in the information prevailed over the hospital's interest in confidentiality. Thus, the court agreed with the NLRB that the hospital violated the NLRA by rebuffing the union's information requests, including the request for copies of the investigatory information and disciplinary records relied upon by the committee in reaching its determinations.[45]

Dissenting from this holding, Judge Kavanaugh found the balance of interests to be decidedly in favor of the hospital. The hospital's interest in preserving the statutory privilege and the underlying purpose of the privilege – ensuring "the frank participation of medical professionals in peer review committee deliberations"[46] – was weighty in the dissent's estimation. By contrast, the union's need for the information was "minimal at best . . . because the peer review committee does not itself threaten direct adverse action against the Union's members."[47] As such, the dissenting judge would have vacated the Board's order and remanded the case to the Board to "properly rebalance the hospital's confidentiality interest against the Union's asserted need for the information[.]"[48]

Conclusion

The peer review privilege is based on the widely recognized principle that the robust and open discussion of

[35] 2017 U.S. App. LEXIS 15637, at *15-20. Judge Kavanaugh, who dissented in part, agreed with the majority's rejection of the Board's finding that the hospital violated the employee's *Weingarten* rights. However, he would have reached the threshold issue of whether such rights are implicated at all in the peer review process. "Because the peer review committee at issue here is not part of the hospital's disciplinary process and is instead part of the state licensing process, employees do not have *Weingarten* rights in interviews conducted by the peer review committee." *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *33.

[36] 2017 U.S. App. LEXIS 15637, at *27 (quoting *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007)).

[37] 2017 U.S. App. LEXIS 15637, at *28-29.

[38] 2017 U.S. App. LEXIS 15637, at *21 (quoting *Detroit Edison Co.*, 440 U.S. at 303)).

[39] 2017 U.S. App. LEXIS 15637, at *21 (quoting *Kaleida Health, Inc.*, 356 NLRB at 1379)).

[40] 2017 U.S. App. LEXIS 15637, at *22.

[41] 2017 U.S. App. LEXIS 15637, at *23.

[42] 2017 U.S. App. LEXIS 15637, at *24.

[43] 2017 U.S. App. LEXIS 15637, at *24 (*citing Adams v. St. Francis Reg'l Med. Ctr.,* 264 Kan. 144, 144 (1998)).

[44] *Midwest Division,* 2017 U.S. App. LEXIS 15637, at * 24 (citing *Adams,* 264 Kan. at 158)

[45] 2017 U.S. App. LEXIS 15637, at *26-27.

[46] 2017 U.S. App. LEXIS 15637, at *34.

[47] 2017 U.S. App. LEXIS 15637, at *34 (citations and internal quotations omitted).

[48] 2017 U.S. App. LEXIS 15637, at *35.

medical errors within the peer review committee setting is sufficiently critical that its deliberations should remain confidential. Indeed, the privilege (like many privileges) recognizes that although the evidence may be inarguably *relevant* to a proceeding, it nonetheless should be shielded from disclosure to effectuate an important purpose. As the American Hospital Association noted in an amicus brief filed in support of the hospital, "[w]ithout strict confidentiality, peer review's effectiveness would collapse."[49]

Given the importance of the D.C. Circuit in interpretation of federal labor law, the panel majority's decision threatens to have a chilling effect on peer review panel proceedings in hospitals with union-represented medical professionals. The determination that hospital peer review panels may be compelled to disclose the names of nurses under investigation, all investigatory information relied upon by the committee, and all documents consulted by the committee in reaching its decision could well undermine the ability of committees to investigate conduct giving rise to breaches of patient care. Once disclosed to the Union, the privilege is lost and, by logical extension, parties to litigation arising from such medical errors will be able to secure information that otherwise would be unavailable to them. It is submitted that this undermines the intent of State legislators and poses a serious threat to patient care. The D.C. Circuit panel decision represents misplaced deference.

Elizabeth Torphy-Donzella is a partner with Shawe Rosenthal, LLP, a labor and employment law firm that represents employers. Jeremy Himmelstein is a law clerk at the firm and a third-year law student at the University of Maryland School of law.

RECENT DEVELOPMENTS

ADA

NRC Regulations Doom ADA Claim

McNelis v. Pennsylvania Power & Light Co., 2017 U.S. App. LEXIS 15207 (3d Cir. Aug. 15, 2017)

Daryle McNelis ("McNelis") worked as an armed security officer at a nuclear power plant owned by Pennsylvania Power & Light Co. ("PPL"). After McNelis began experiencing mental health problems, including paranoia and problems with alcohol, his wife insisted that he undergo a three-day stay at a psychiatric facility. When McNelis was discharged, he was instructed to discontinue or reduce his use of alcohol.

Having learned of McNelis' emotional erratic behavior from a coworker, PPL required McNelis to undergo a medical clearance before returning to work. McNelis was examined by a psychologist who performed testing required by PPL's policies and the regulations of the Nuclear Regulatory Commission ("NRC"). The psychologist's report concluded that pending receipt of a report from a facility where McNelis would receive an alcohol assessment and possible treatment, McNelis was not fit for duty. Given the psychologist's conclusion, PPL revoked McNelis' authorization to access the nuclear facility and terminated his employment.

Subsequently, McNelis filed suit against PPL in federal district court for the Middle District of Pennsylvania for disability discrimination in violation of the Americans with Disabilities Act ("ADA"), as well as the 1973 Rehabilitation Act and the Pennsylvania Human Relations Act whose provisions are interpreted consistently with those of the ADA. McNelis claimed that the company had erroneously regarded him as having a disability in the form of alcoholism, mental illness and/or illegal drug use and that this misperception was a motivating factor for his termination. The district court granted summary judgment to PPL on all of McNelis' claims, and McNelis appealed to the Third Circuit Court of Appeals.

In considering McNelis' appeal, the Third Circuit explained that to establish a *prima facie* case of disability discrimination, McNelis had to establish not only that he had been regarded as disabled, but, additionally, that he was qualified to perform the essential functions of his armed security officer position with or without reasonable accommodation. After reviewing the evidence, the court of appeals concluded that McNelis could not make this showing because the NRC requires security officers, like McNelis, to be fit for duty and to maintain an unescorted security clearance. In McNelis' case, he could satisfy neither requirement at the time he was terminated, and hence, he was not qualified under the ADA.

The Third Circuit rejected McNelis' contention that the court should not rely upon the psychologist's report that McNelis was not fit for duty because he was denied the opportunity to address the erroneous perceptions of the psychologist. The appeals court noted that McNelis was given a chance to challenge the psychologist's conclusions through PPL's review procedures, and McNelis was not entitled to more process than had been delineated by the NRC in its regulations.

[49] *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *34 (Kavanaugh, J. dissenting in part).

The Third Circuit also rejected McNelis' argument that, in his case, PPL failed to follow its practice of giving employees a chance to regain security access. The circuit court pointed out that merely because accommodations may have been offered to some employees in the past did not mean that PPL had to offer the same accommodations to McNelis. Moreover, in addressing an ADA claim, the court said that a court should not second guess a physician's determination that an employee fails to satisfy the requirements of the job. Accordingly, the Third Circuit affirmed the judgment of the district court dismissing McNelis' ADA claims.

No ADA Claim for Injured Employee

Boyle v. City of Pell City, 678 Fed. Appx. 403 (11th Cir. Aug. 10, 2017)

Paul Boyle ("Boyle") worked for the City of Pell City, Alabama ("City") as a heavy equipment operator. After suffering an on the job injury that caused him to develop spinal stenosis, chronic nerve pain, and other related conditions, Boyle no longer could perform his old job duties. The City initially accommodated Boyle by letting him perform office work. Subsequently, Boyle was allowed to perform a foreman's job at the rate of pay of a heavy equipment operator, which was lower than the foreman rate. This arrangement was memorialized in a written agreement, which provided that after two years it would be renegotiated. That did not occur, however, and Boyle continued to perform the duties of a foreman for approximately seven years, while being paid at the lower heavy equipment operator rate.

After hearing a rumor that the City intended to fire him, Boyle decided to apply for disability retirement. In support of his application, Boyle's physician opined that he was totally incapacitated for further performance of his duties and that the City could not make any reasonable accommodations that would allow Boyle to continue his employment. Notwithstanding this information, Boyle's application for disability retirement was denied.

Following this denial, the City transferred Boyle from his foreman position to a job in inventory. Boyle informed the City that conducting inventory involved physical activities that were hard for him to perform given his medical condition, and he sought to be returned to his foreman position. The City refused and Boyle filed a second application for disability retirement, which was substantially similar to his first application. That second application was granted, and Boyle retired. Boyle also applied for Social Security disability, which, likewise was approved.

Approximately two years later, Boyle filed a lawsuit in federal district court for the Northern District of Alabama, claiming, among other things, that the City had violated the Rehabilitation Act of 1973, whose provisions are like those of the Americans with Disabilities Act. Boyle contended that the City had unlawfully denied him the reasonable accommodation of returning him to the foreman position from his job in inventory and that he had been constructively discharged.

The district court granted summary judgment in favor of the City because Boyle failed to offer a sufficient explanation for the inconsistencies between his Rehabilitation Act claims and his representations in his disability retirement applications that he was totally incapacitated from performing his job duties and that no reasonable accommodations would enable him to continue his employment. Alternatively, the district court found that Boyle could not establish his failure to accommodate claim because he had not identified any reasonable accommodation that would have allowed him to perform the essential functions of his original heavy equipment operator position, nor could he show that his claimed constructive discharge occurred solely because of his disability.

Boyle appealed the dismissal of his case to the Eleventh Circuit Court of Appeals. On appeal, the court found that even if Boyle could explain away the inconsistencies between his disability retirement applications and his Rehabilitation Act claim, Boyle had failed to meet his burden of identifying a reasonable accommodation that would have allowed him to perform his heavy equipment operator job. Although the City had allowed Boyle to perform foreman duties for several years, the court noted there was no evidence that a foreman position was ever vacant. As the circuit court explained, the City was not legally obligated to create a foreman position or to allow Boyle to bump an incumbent employee from a foreman job.

Additionally, the court noted that a foreman position was a higher-level position than that of a heavy equipment operator and that the law does not require an employer to promote a disabled employee as an accommodation. Thus, although the City had accommodated Boyle for years by allowing him to perform foreman duties, the City was not legally required to continue to do so. Further, the City did not violate the Rehabilitation Act by removing an accommodation it was not legally required to provide in the first place. Accordingly, the Eleventh Circuit affirmed the district court's dismissal of Boyle's case.

Court Holds No Second Right-to-Sue Notice

Stamper v. Duvall County School Board, 863 F.3d 1336 (11th Cir. July 18, 2017)

Tyquisha Stamper ("Stamper") worked for the Duvall County School Board ("Board"). In 2007, Stamper filed

with the U.S. Equal Employment Opportunity Commission ("EEOC") a charge of disability and race discrimination against the Board. In February 2009, the EEOC notified Stamper that it was dismissing her charge because the Commission could not conclude that the information obtained during its investigation established violations of the applicable statutes.

Stamper had 90 days upon receipt of the Commission's notice to file a lawsuit against the Board, but she did not do so. Instead, more than two years later, in July 2011, Stamper filed a request for reconsideration with the EEOC. Subsequently, the Commission sent Stamper a Notice of Revocation, which vacated the dismissal of her charge and revoked the letter terminating the Commission's processing of that charge. Stamper then filed a second charge against the Board based upon the same allegations as in her initial charge. She also requested another notice of her right to sue. Pursuant to regulations requiring the Attorney General to issue a right to sue notice when a party files a charge against a government, governmental agency or political subdivision, the Department of Justice, instead of the EEOC, issued Stamper the second notice of her right to sue.

In January 2013, within 90 days of her receipt of her second notice of the right to sue, Stamper filed a pro se complaint in federal district court for the Middle District of Florida against the Board. Stamper's lawsuit alleged that the Board had discriminated against her based on her disability, in violation of the Americans with Disabilities Act ("ADA"), and her race, in violation of Title VII of the Civil Rights Act of 1964. Stamper's lawsuit contended that the discriminatory acts against her had caused her to develop catatonic schizophrenia. The district court dismissed Stamper's complaint on the basis that she had failed to sue within 90 days of receiving the first notice of her right to sue and there was no basis upon which to equitably toll the time limitation for more than three years.

Stamper appealed the dismissal of her lawsuit to the Eleventh Circuit Court of Appeals. In considering Stamper's appeal, the court first addressed the district court's determination that her complaint was untimely. The court of appeals explained that even though the EEOC may reconsider a decision to dismiss a discrimination charge, the effect of that decision on the timing for filing a civil action depends on when the Commission issues its notice of intent to reconsider. Where the notice of intent to reconsider occurs within the 90-day period for an employee to file a lawsuit, the issuance of the notice revokes the charging party's right to file suit. If, as occurred in Stamper's case, the 90-day suit period has expired, the EEOC's notice of intent to reconsider the charging parties' right to sue does not extend the 90-day period. Hence, the court of appeals concluded that the Commission lacked the authority to revive Stamper's claim of discrimination or to issue Stamper a second notice of her right to sue.

Additionally, the Eleventh Circuit affirmed the district court's conclusion that Stamper's catatonic schizophrenia did not equitably toll the period for the filing of her lawsuit because Stamper failed to establish a causal connection between her schizophrenia and her delay in filing suit. The court noted that during the 90-day period that she had to file suit, Stamper kept appointments with her psychiatrist, whose medical records noted that Stamper was "oriented," "happy," "alert," and spoke at a "normal rate." Additionally, the court noted that Stamper had collected disability benefits and cashed her disability checks. Based upon this information, the Eleventh Circuit concluded there was insufficient evidence that Stamper's medical condition prevented her from filing suit, and therefore, the 90-day period from her receipt of her first right-to-sue letter would not be equitably tolled. Accordingly, because Stamper's lawsuit was untimely, the Eleventh Circuit affirmed the district court's dismissal of Stamper's case

---

Fifth Circuit Affirms Dismissal of ADA Harassment Suit

Patton v. Jacobs Engineering Group, Inc., 863 F.3d 419 (5th Cir. July 17, 2017)

Timothy Patton ("Patton") worked for Talascend, a staffing agency that furnishes contract employees to its clients. Patton has an obvious stutter, and at the time he was hired, he informed Talascend that he had stuttering and anxiety problems. In October 2012, Patton was assigned to work at Jacobs Engineering Group, Inc.("Jacobs") as an electrical instrumentation systems designer.

While working at Jacobs, Patton complained that his coworkers were harassing him because of his stutter. Patton said that he left a message with Talascend's human resources department, but it never was returned. Patton also made complaints to Talascend about the noisy work environment at Jacobs. Talascend raised the issue with Jacobs and offered to reassign Patton to another client. However, Patton continued working at Jacobs and performed his job well. According to Patton, the harassment and excessive noise at Jacobs caused him to experience severe anxiety. After suffering a panic attack while driving, which resulted in a car accident, Patton did not return to work at Jacobs.

Patton filed a formal charge of discrimination with the Louisiana Commission on Human Rights and the U.S. Equal Employment Opportunity Commission ("EEOC") asserting harassment because of his disability. After receiving a right-to-sue letter from the EEOC, Patton filed suit against Jacobs and Talascend in Louisiana state

court alleging violations of the Americans with Disabilities Act ("ADA") and state law for failure to accommodate and disability harassment.

Jacobs and Talascend removed the lawsuit to federal district court which granted summary judgment in favor of both defendants on all of Patton's claims. The district court found that Patton had failed to exhaust his administrative remedies as to his failure-to-accommodate claim. Additionally, the court ruled that Patton had failed to introduce sufficient evidence of a hostile work environment and, in any event, had failed to take advantage of the internal complaint procedures in either Jacobs' or Talascend's anti-harassment policy.

Patton appealed to the Fifth Circuit Court of Appeals. On appeal, the court first addressed whether Patton had exhausted his administrative remedies as to his failure-to-accommodate claim since this claim was not included in Patton's EEOC charge. In addressing this issue, the court noted that Patton's intake questionnaire to the EEOC stated that he had requested changes or assistance because of his disability, but that his employer had not made any actual changes in response to his requests. Patton argued that his intake questionnaire should be considered a charge, but the appeals court rejected Patton's argument because the intake questionnaire had not been verified as required by the EEOC's regulations.

The Fifth Circuit found, however, that Patton's intake questionnaire should be construed as part of his formal EEOC charge because he filed both at the same time and the EEOC's investigation encompassed Patton's failure-to-accommodate claim. The court held that Patton's failure-to-accommodate claim, therefore, could reasonably be expected to grow out of his charge of discrimination, and accordingly, Patton properly exhausted his administrative remedies for that claim.

Nevertheless, the Fifth Circuit determined that Patton's failure to accommodate claim still must fail because he had not put forth sufficient evidence that either Jacobs or Talascend had knowledge of his disability. The court acknowledged that Patton's stutter was obvious and that he had complained about noise, but there was a lack of evidence showing that either Jacobs or Talascend had attributed Patton's sensitivity to noise to his stuttering or any other physical or mental impairment. Although Patton said that he told Talascend that his stuttering and anxiety problems went together, the Fifth Circuit found that Patton's statements were too vague to show that he identified his sensitivity to noise as a limitation resulting from a disability.

The same held true with respect to Jacobs. Although the Fifth Circuit acknowledged that Patton had requested that Jacobs move him to a quieter area to decrease his anxiety and stuttering, the court said that this information was not sufficient for a jury to infer that Jacobs knew that Patton had a disability. As the court explained, Patton did not tell Jacobs that his disability caused his noise sensitivity, nor was a causal relationship obvious. Thus, the circuit court concluded that the district court had not erred in granting summary judgment against Patton on his failure-to-accommodate claim.

Turning to Patton's hostile work environment claim, the Fifth Circuit found that viewing the record in a light most favorable to Patton, a jury could find that the harassment Patton experienced at Jacobs' was sufficiently severe or pervasive to alter the terms and conditions of his employment such that an ADA violation arose. In this regard, the court noted that Patton had testified there were many employees who called him names over an extended period of time.

Nonetheless, the appeals court reasoned that Patton's disability harassment claim ultimately failed because Patton had not shown that either Jacobs or Talascend had failed to take prompt, remedial action addressing the harassment. The court noted that the employee handbooks of both Talascend and Jacobs directed employees who experienced harassment to contact the human resources department. Although Patton said he had left a message with Talascend's human resources department, Patton could not remember the contents of his message and he never followed up. Thus, the Fifth Circuit held that Patton had unreasonably failed to take advantage of the corrective opportunities provided by Talascend and Jacobs. Such failure spelled the demise of his hostile work environment claim.

Accordingly, the court of appeals affirmed the district court's grant of summary judgment against Patton on both his failure to accommodate and hostile work environment claims.

Seventh Circuit Upholds ADA Jury Verdict

Stragapede v. City of Evanston, Illinois, 865 F.3d 861 (7th Cir. July 31, 2017)

Biagio Stragapede ("Stragapede") worked in the water services department of the City of Evanston, Illinois ("City"). After suffering a traumatic brain injury at home, the City placed Stragapede on a temporary leave of absence during his recovery and rehabilitation. After being medically cleared to return to work, Stragapede resumed full-time employment.

Soon thereafter, the City noticed some worrisome developments. These included Stragapede's request for assistance to change out a water meter, his being observed

driving through an intersection while looking down at his lap, and his mistakenly going to the wrong location to complete a job task. Based upon these incidents, the City again placed Stragapede on administrative leave and relayed its concerns to the neurologist who previously had performed a neurological assessment. The neurologist concluded that the incidents identified by the City rendered Stragapede unable to perform the essential functions of his job. After receiving this assessment, the City terminated Stragapede's employment.

Stragapede filed suit against the City in federal district court for the Northern District of Illinois claiming that his firing constituted disability discrimination in violation of the Americans with Disabilities Act ("ADA"). The case went to trial and the jury returned a verdict for Stragapede, awarding him $225,000 in damages. The trial court also awarded him back pay in the amount of approximately $354,000. The court denied the City's post-trial motions and entered judgment for Stragapede.

The City appealed to the Seventh Circuit Court of Appeals, which first considered whether the trial court had erred in failing to grant the City judgment as a matter of law. On appeal, the City argued that the evidence presented at trial established that Stragapede was not able to do his job and, additionally, would have posed a direct threat. In support of its argument, the City pointed to the assessment of its neurologist that Stragapede was unable to perform the essential functions of his job, as well as the testimony of one of Stragapede's supervisors that he was unable to complete his work.

In rejecting the City's arguments, the Seventh Circuit pointed out that the neurologist had examined Stragrapede only once prior to his return to work, and based upon that examination, the neurologist advised the City that Stragapede should be able to resume work. The neurologist's subsequent evaluations were based not on his examination, but rather on information the neurologist had received from the City. Given this difference, the appeals court opined that a jury may have given the neurologist's opinion following his examination more weight than the views he expressed based on information supplied by the City. Additionally, the court pointed out that the supervisor who had testified that Stragapede had not completed his work never observed him working in the field installing meters, and Stragapede's direct supervisor testified that he was capable of doing his job.

Finally, the Seventh Circuit rejected the City's contention that Stragapede posed a direct threat to his own health and safety or that of others. The court explained that to prevail on the direct threat defense, the City had to establish that its determination was based solely on medical and other objective evidence. In Stragapede's case, the circuit court found that the jury could have concluded that the neurologist's opinion was based on the City's mischaracterization of Stragapede's performance. Accordingly, the Seventh Circuit upheld the judgment against the City for violating the ADA.

Arbitration

Exotic Dancer Not Required to Arbitrate Statutory Wage Claims

Moon v. Breathless Inc., 2017 U.S. App. LEXIS 15501 (3rd. Cir. August 1, 2017)

Alissa Moon ("Moon"), an exotic dancer, signed a contract with Breathless Men's Club ("Club") in Rahway, New Jersey to rent performance space. The agreement declared that Moon was an independent contractor, not an employee and contained an arbitration clause:

> In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration. THIS MEANS THAT NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL — DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION. ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. THIS MEANS NEITHER YOU NOR WE MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS.

In August of 2015, Moon sued the Club in federal district court, alleging violations of the Fair Labor Standards Act ("FLSA"), the New Jersey Wage Payment Law ("NJWPL"), and the New Jersey Wage and Hour Law. The Club moved to compel arbitration arguing that the dispute was covered by the parties' agreement. The district court agreed. On appeal, the Third Circuit reversed.

The appellate court addressed two issues: (1) Whether the arbitrability of the dispute should be decided by the court or an arbitrator; and (2) whether the arbitration clause in question covered Moon's claims. Addressing the first issue, the Third Circuit quoted the Supreme Court's decision in *First Options of Chicago, Inc. v. Kapl*an, 514 U.S. 938, 944 (1995): "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." Under New Jersey Law, there is a

presumption that issues of arbitrability are to be decided by a court, a presumption that may be overcome only by a clear and unmistakable showing that the parties agreed to arbitrate arbitrability; "[s]ilence or ambiguity in an agreement does not overcome the presumption that a court decides arbitrability." The appellate court concluded that the arbitration clause in question did not clearly and unmistakably require the issue to be settled by an arbitrator: "the arbitration clause fails to mention arbitrability, let alone the venue for deciding it[.]"

Having determined that it should decide the issue, the court concluded that the arbitration clause did not cover Moon's statutory claims. Under New Jersey Law, statutory claims are subject to arbitration only if the clause: (1) identifies the general substantive area that the arbitration clause covers; (2) references the types of claims waived by the provision; and (3) explains the difference between arbitration and litigation. The court found that the clause before it failed to satisfy either of the first two requirements: "the arbitration clause at issue here . . . references contract disputes—not statutory rights."

ERISA

Eighteen-Month Extension of Transition Period for Fiduciary Rule Exemptions Proposed by DOL

On August 31, the US Department of Labor proposed an 18-month extension of the special transition period for the Fiduciary Rule's Best Interest Contract (BIC) Exemption and the Principal Transactions Exemption. According to the announcement, the proposal is consistent with a Request for Information the DOL published in July asking for public input that could form the basis of new exemptions or changes to the rule and exemptions.

As adopted, both the BIC and Principal Transactions Exemptions are unavailable if the financial institution's contract with a retirement investor includes a waiver or qualification of the retirement investor's right to bring or participate in a class action or other representative action in court. In tangential litigation relating to the validity of similar arbitration provisions, the Solicitor General announced that the U.S. Government was no longer arguing that such clauses were unenforceable. Therefore, at the time of announcing the 18-month extension, the DOL also announced that it was adopting "an enforcement policy consistent with [the Solicitor General's] position."

ERISA Does Not Supersede a Plan's Forum-Selection Clause

In re Mathias, 2017 U.S. App. LEXIS 14803 (7th Cir. August 10, 2017)

ERISA's venue provision, 29 U.S.C.S. § 1132(e)(2), provides in relevant part:

> Where an action under this subchapter is brought in a district court of the United States, it *may* be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

In this case, the issue presented, one of first impression for the Seventh Circuit, was whether ERISA's venue provision supersedes the venue in which a plaintiff files suit, i.e., whether the provisions of a plan may override a beneficiary's selection of another venue permitted by the statute. The Seventh Circuit, agreeing with the Sixth Circuit—the only other circuit to consider the issue—held that, "because the statute is phrased in permissive terms—it states that a suit 'may be brought' in one of several federal judicial districts—it does not preclude the parties from contractually channeling venue to a particular federal district." Explaining further, the court stated:

> Although ERISA plans are a special kind of contract and courts are attentive to the statutory goal of protecting beneficiaries, an ERISA plan is nonetheless a contract. And the Supreme Court held long ago . . . that contractual forum-selection clauses are presumptively valid even in the absence of arm's-length bargaining. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).
>
> What all this means for the present dispute is that the forum-selection clause in the . . . plan is controlling unless ERISA invalidates it. The relevant part of ERISA's venue provision states:
>
> > Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.
>
> § 1132(e)(2) (emphasis added). Nothing in this text expressly invalidates forum-selection clauses in employee-benefits plans.

FLSA

Federal Court Enjoins Implementation of DOL's New Overtime Rule; DOJ Moves to Dismiss Appeal of

Nevada v. United States Department of Labor, No. 4:16-CV-731 (E.D. Tex. Aug. 31, 2017)

In 2004, the U.S. Department of Labor (Department) modified the pre-existing standards for determining whether employees were exempt from overtime premium pay requirements of the Fair Labor Standards Act (FLSA) as administrative, executive or professional employees. Prior to the modification, the Department employed a "long" test and a "short" test for assessing whether an employee was exempt. The long test combined a low minimum salary level with a rigorous duties test, which restricted the amount of nonexempt work an employee could do to remain exempt. The short test combined a high minimum salary level with an easier duties test that did not restrict amounts of nonexempt work. After the Department implemented the long and short tests, Congress amended 29 U.S.C. § 213(a)(1) in 1961. This amendment permitted the Department to define and delimit the exemption "from time to time."

The Department's 2004 modified regulations, which are the ones currently in effect, eliminated the long and short tests, replacing them with a "standard" duties test that did not restrict the amount of nonexempt work an exempt employee could perform, but set the salary level equivalent to the minimum salary level previously used for the long test. They require an employee to meet the following three criteria to be exempt from overtime pay. First, the employee must be paid on a salary basis (the "salary-basis test"). Second, an employee must be paid at least the minimum salary level established by regulations (the "salary-level test"). The current minimum salary level is $455 per week ($23,660 annually). Third, an employee must perform executive, administrative, or professional capacity duties as established by regulations (the "duties test").

On March 23, 2014, President Obama issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees" observing that the 2004 "[R]egulations regarding . . . overtime requirements . . . for executive, administrative, and professional employees . . . have not kept up with our modern economy." After publishing a Notice of Proposed Rulemaking and considering more than 293,000 comments on the proposed rule, the Department published the final version of the rule (the "Final Rule") on May 23, 2016.

Under the Final Rule, the minimum salary level for exempt employees increased from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The Department bases the new salary level on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, which is currently the South. The Final Rule also creates an automatic updating mechanism that adjusts the minimum salary level every three years. The first automatic increase is scheduled to occur on January 1, 2020.

The State of Nevada and twenty other states, filed suit in the United States District Court for the Eastern District of Texas challenging the validity of the Final Rule and requested emergency injunctive relief. A separate suit challenging the Final Rule was filed by business interests and eventually consolidated by the court with the states' suit. On November 22, 2016, the court issued a preliminary injunction that prevented the Final Rule from going into effect on December 1, 2016. On August 31, 2017, ruling on motions for summary judgment, the court concluded that the Final Rule was invalid.

It reasoned that the Final Rule exceeded the Department's authority and was not entitled to deference because, contrary to the intent of Congress, the Final Rule essentially eliminated consideration of an employee's duties in determining whether the employee qualified for the exemption. The court states:

> the Department's authority is limited by the plain meaning of the words in the statute and Congress's intent. Specifically, the Department's authority is limited to determining the essential qualities of, precise signification of, or marking the limits of those "bona fide executive, administrative, or professional capacity" employees who perform exempt duties and should be exempt from overtime pay. With this said, the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test[.] Nor does the Department have the authority to categorically exclude those who perform "bona fide executive, administrative, or professional capacity" duties based on salary level alone. In fact, the Department admits, "[T]he Secretary does not have the authority under the FLSA to adopt a 'salary only' test for exemption."
>
> (Citations omitted).

On September 5, the Department of Justice moved to dismiss its appeal of November 22 ruling.

Immigration

Revised I-9 Form Mandatory as of September 18

On July 17, 2017, USCIS issued a Revised Form I-9, use of which became mandatory as of September 18. The new form revised the list of acceptable documents, List C, to include Consular Report of Birth Abroad (Form FS-240).

Title VII

September 2016 Revisions to EEO-1 Form Stayed by OMB

In an August 29, 2017 memorandum from the Office of Management and Budget ("OMB") to the Chair of the EEOC, OMB directed the EEOC to immediately stay "the effectiveness of those aspects of the EEO-1 form that were revised on September 29, 2016." The memorandum notes that, since the revised form was approved, the EEOC has released data file specifications for employers to use in submitting EEO-1 data that: (1) were not contained in the Federal Register notices as part of the public comment process; (2) were not outlined in the supporting statement for the collection of information; and (3) were not considered by the EEOC in compiling the burden estimates for compliance. OMB expressed concern that certain aspects of the revised form "lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

The memorandum goes on the direct the EEOC to submit for review by OMB a new information collection package for the EEO-1 form and to publish a notice in the Federal Register announcing the immediate stay of effectiveness of the wages and hours worked reporting requirements contained in the EEO-1.

Employers will still be required to comply with the reporting requirements for FY 2017, but will do so on the EEO-1 as its existed prior to the 2016 revisions. The reporting deadline for that fiscal year is March 31, 2018.

For a summary of the changes made by the 2016 revisions, see "Title VII; New EEOC Pay Reporting Requirements Begin Next Year", 16 Bender's Labor & Employ. Bull. 15 (November 2016).

CALENDAR OF EVENTS

2017

Oct. 5-6	ALI-ABA: Employee Benefit Plans of Tax-Exempt and Governmental Employers	Washington, DC
Oct. 11	NELI: Affirmative Action Workshop	Chicago, IL
Oct. 12-13	NELI: Affirmative Action Briefing	Chicago, IL
Oct. 18	NELI: Affirmative Action Workshop	Washington, DC
Oct. 19-20	NELI: Affirmative Action Briefing	Washington, DC
Oct. 25	NELI: Affirmative Action Workshop	San Francisco, CA
Oct. 26-27	NELI: Affirmative Action Briefing	San Francisco, CA
November 9-10	NELI: Employment Law Conference	Chicago, IL
November 16-17	NELI: Employment Law Conference	Washington, D.C.
November 30-December 1	NELI: Employment Law Conference	San Francisco, CA
December 7-8	NELI: Employment Law Conference	New Orleans, LA

2018

Mar 4-7	NELI Employment Law Briefing	Vail, CO
Mar 11-14	NELI Employment Law Briefing	Miami Beach, FL
Mar 25-28	NELI Employment Law Briefing	Palm Springs, CA
Apr 12-13	NELI ADA & FMLA Compliance Update	San Francisco, CA
Apr 19-20	NELI ADA & FMLA Compliance Update	Washington, DC
Apr 26-27	NELI: ADA & FMLA Compliance Update	Chicago, IL
May 10-11	NELI: Employment Law Conference	Chicago, IL
May 17-18	NELI: Employment Law Conference	Washington, D.C.
May 24-25	NELI: Employment Law Conference	Las Vegas, NV
July 11	NELI: California Employment Law Update	San Diego, CA

(Pub. 1239)

July 12-13	NELI: Employment Law Update	San Diego, CA
July 26-27	NELI: Employment Law Update	Washington, D.C.
Aug. 16-17	NELI: Public Sector EEO and Employment Law Update	San Francisco, CA
Aug 23-24	NELI: Public Sector EEO and Employment Law Update	Washington, DC

SUBSCRIPTION QUESTIONS?

If you have any questions about the status of your subscription, please call your Matthew Bender representative, or call our Customer Service line at 1-800-833-9844.

ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to N. Peter Lareau, 61113 Manhae Lp., Bend, Oregon 97702, e-mail: nplareau@gmail.com, or Mary Anne Lenihan, Legal Editor, Labor & Employment, LexisNexis Matthew Bender, 230 Park Avenue, 7th Floor, New York, NY 10169, maryanne.lenihan@lexisnexis.com.

If you are interested in writing for the BULLETIN, please contact N. Peter Lareau via e-mail at: nplareau@gmail.com or Mary Anne Lenihan via e-mail at: maryanne.lenihan@lexisnexis.com.

(Pub. 1239)

(Pub. 1239)

Lexis Advance® Labor & Employment Practice Page

Find top labor and employment sources as soon as you sign in. The **Lexis Advance® Labor & Employment Practice Page** brings your trusted, go-to employment sources to the first screen you see—comprehensive primary sources (cases, codes and regulations); authoritative analysis, practical guidance and expert commentary; plus relevant and trusted news you can't find elsewhere. Designed specifically for labor and employment practitioners, you can see the sources you count on and discover what else can help you, even tools beyond Lexis Advance, before your first click. Add your own favorite or often-used sources to the page for even faster access. Lexis Advance Labor & Employment Practice Page … **Cut right to the chase.**

EXCEPTIONAL CONTENT

Get the best information to work from—authoritative LexisNexis® resources, coupled with expertise from veteran authors and legal editors who specialize in labor and employment law.

- **Powerhouse treatises**—Rely with confidence on more than 75 authoritative treatises covering nearly every niche topic within labor and employment law, including **Matthew Bender®** titles such as *Larson on Employment Discrimination*, *Labor and Employment Law*, *ADA: Employee Rights and Employer Obligations*, and *Wages and Hours: Law and Practice*. Take advantage of expertise from Littler Mendelson and Xpert HR with sources written by top attorneys and designed to make the law accessible and practical.
- **Monitor the current state of labor and employment law** with immediate access to a vast catalog of primary-law content including cases, full-text labor arbitration decisions and agency materials, as well as the high-quality analysis provided with *Shepard's*® Citations Service. Spend less time finding, and more time analyzing, with immediate access to federal and state statutes and regulations and 50-state surveys.
- **Better news, better insights** from an **exclusive combination of top daily news sources** including *The Wall Street Journal*®, *The New York Times*® and Mealey's™ *Daily News: Labor and Employment*, plus timely analysis and commentary on breaking labor and employment news from Law360®, *Bender's Labor & Employment Bulletin* and *Employment Law: Mealey's™ Litigation Report*.

EXPERT ORGANIZATION

Start working faster with better direction. LexisNexis editors review the deep resources across LexisNexis and ensure the most relevant labor and employment sources are at the top of the page. **You uncover the best labor and employment resources—the ones most likely to help you—in the least time.**

- **Top titles stay within reach**. Most-used and best-regarded labor and employment sources—primary law, treatises, daily industry news and more—are in your sightline. Click once and go.
- **Uncover the unexpected.** What you don't know *can* hurt you. The Labor & Employment Practice Page brings you the best possibilities, including resources you didn't know existed.
- **Need a bigger picture? You've got it—A to Z.** Select **View all sources** and get a full, alphabetical listing of LexisNexis labor and employment resources. *You can be confident you don't miss a thing*.
- **Research a legal topic—no search needed.** No extra steps either. **Key legal topics** for labor and employment practitioners are right on your page. Select and review results.
- **Make it your page.** Add other most-used sources or your source combinations to the easy-to-access **Favorites pod**.

EXCLUSIVE TOOLS

Leverage the differentiators, i.e., Lexis Advance tools that help you dig deeper faster, tools no other online publisher offers.

- **Get more of what you need for transactional work.** **Lexis Practice Advisor® Labor & Employment module*** provides step-by-step practical guidance on labor and employment related transactional matters and issues, plus with model forms drafted by leading practitioners, you can quickly customize documents for specific client situations.
- **Get built-in research help.** The **red search box** offers legal phrase suggestions and points you to popular labor and employment cases and statutes as you enter your search. Plus your search is automatically filtered to your practice area.
- **Select a case passage—and uncover connections.** No search or cite is needed with **Legal Issue Trail™**, exclusive to Lexis Advance. Pinpoint cases that reference a passage you select, revealing connections you may not see otherwise.
- **Work anytime, anywhere on practically any device.** Screens for Lexis Advance Practice Pages **adapt automatically** to fit the size of your device. (And you can print easily with a Safari® plug-in.) No apps needed.

**Requires additional subscription.*