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# Louisiana EMPLOYMENT Law Letter

*A monthly newsletter designed exclusively for Louisiana employers*

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**Jones Walker**

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EMPLOYEE BENEFITS

## What you need to know about short- and long-term disability benefits

by Jennifer A. Faroldi and Jennifer L. Anderson

*Our faithful readers have asked us four questions about employees who are taking short-term disability (STD) or long-term disability (LTD). These questions arise often, so we think it's about time we answer them for you!*

*Many legal considerations arise when making employment decisions concerning employees requesting or receiving STD or LTD benefits. When making these decisions, you should ensure that you're complying with the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and, if the employee is injured at work, Louisiana's workers' compensation laws. Of course, you may also have company-provided paid medical leave that comes into play.*

### *Firing employee while on LTD benefits*

**Q:** We don't have a policy on when and if we can fire an employee who's out on LTD benefits. We have an employee who has been out on disability for eight months. We don't meet FMLA criteria. We will need to hire someone at this point to fill her position because she's still unable to do her job. When and if she's ready to return, we may not have a position for her. Can we fire her now without risking a lawsuit? This is a first for me.

**A:** First, let's face the awful truth — employers are always at risk of being sued when making employment decisions. Therefore, we will discuss whether your decision to terminate this employee is in compliance with applicable law. The answer — maybe.

Disability insurance is a benefit offered by many employers. Like workers' comp policies, disability insurance policies usually don't regulate how much leave from work an employee is entitled to take, how long you need to hold a job for the employee, or whether you need to put the employee back into her job if and when she returns to work. You must look to the FMLA, the ADA, similar state laws, and your policies and practices to answer those questions.

You told us that your employee isn't eligible for FMLA leave, but let's make sure. To be eligible for FMLA leave, an employee must have been employed for at least 12 months (consecutive or nonconsecutive) and must have worked for you for at least 1,250 hours in the last 12 months. Also, you must have 50 or more employees within a 75-mile radius of the facility at issue. If your employee and your facility meet those criteria, you may be required to provide her with up to 12 weeks of unpaid FMLA leave if she has a "serious health condition." Further, she would have reinstatement rights to her job, or a substantially similar job, after the 12 weeks of unpaid FMLA leave. If you're still sure that you aren't covered by the FMLA, we'll move on.

## *In this issue*



**Jones Walker is a member of the *National Employers Counsel Network***

Your decision also requires consideration of the ADA. If your employee is a qualified individual with a disability as defined by the ADA, you may be obligated to engage in an "interactive process" with her to determine whether there's a reasonable accommodation that could help her do her job, such as additional time off from work or a job modification. We don't know enough about your employee's medical condition to determine whether she's "disabled" under the ADA. If she's unable to do the essential functions of her job with or without a reasonable accommodation, you don't have to hold her job any longer under the Act. Just be sure that you have enough information about her abilities and whether there's anything that could help her perform her essential job functions to support your decision.

You told us you don't have a "policy" on how long you keep a position open for someone on disability leave. But what has been your company's "practice"? Have you allowed someone else to remain on leave for a longer period? Doing so may have created an expectation for this employee that her job will be held for the same amount of time.

After you review your past practices, you may want to consider drafting a neutral policy setting forth how long your company will hold a position for any employee who's on any type of leave, sick or otherwise. Keep in mind that the ADA may apply, so you must still take a look at each individual situation.

## Web Alert NLRB's ruling no hoax

Our website, HRhero.com, gives you the latest national news in employment law. Go to www.HRhero.com/news to read:

- **"Anthrax threat justified firing" —** The NLRB upholds an employer's dismissal of an employee who sent e-mails to her co-workers about anthrax in the workplace.
- **"New regulations aim to increase unions' financial accountability" —** New rules from the DOL will require more detailed financial reporting from 5,000 of the nation's largest labor unions.
- **"Supreme Court denies social security payments to worker" —** The high court unanimously upheld the Social Security Administration's denial of benefits to a worker who had lost her job and was unable to find similar employment.
- **Agency Action —** The NLRB redesigns its website, and the EEOC's back at full strength. ❖

If you decide to terminate this employee, make sure you send out an appropriate COBRA notice regarding her health insurance benefits. Also, if the disability plan is a covered plan under the Employee Retirement Income Security Act (ERISA), your decisions may have ERISA implications, so you should consult with your labor attorney to learn more about potential ERISA issues. In fact, your editors suggest that you always consult your labor attorney about any employee medical issues that arise because resolving them usually depends on the specific facts of each case and the interrelation of the FMLA, the ADA, workers' comp, disability insurance, your policies and practices, and state laws can be complex.

### *Firing terminally ill worker who can't return to work*

**Q:** I have an employee who's currently out on STD and FMLA leave. Both are scheduled to expire this month. He has medical documentation that prevents him from returning to work in any capacity. He's terminally ill. He has qualified for LTD through the insurance company. I have advised him that we're going to let him go because he's unable to perform his current job duties and/or continue to work for the company in any capacity. I explained that upon his termination, a COBRA letter will be sent, and he will, according to the insurance company, begin receiving LTD benefits. Am I OK in letting him go?

**A:** Yes, but only after he exhausts all available leave under the FMLA and your policies and practices. If he's unable to perform the essential duties of his job, even with a reasonable accommodation, then terminating him doesn't violate the ADA or Louisiana's disability discrimination law.

As you read in the answer to the first question, you need to verify whether your company treated others more generously in the past. If the employee's FMLA leave has expired, then he has been out on leave for at least 12 weeks. You should verify that you didn't hold another employee's job open for a longer period of time. Notwithstanding this one issue, however, you can legally discharge the employee. As you correctly pointed out, you must follow the COBRA notice requirements when you terminate him.

### *Requiring medical exams*

**Q:** I have an employee who's out. According to her doctor, it will be two to three weeks. Our company pays STD when there's medical documentation. I have reason to doubt her illness. Can I make her submit to a medical exam by a doctor of my choosing (at my own cost)? Our policies say that I can — though I'm not sure that legally I can.

**A:** Yes. STD benefits are governed by the language of the benefit plan or, if you're self-insured, the language of your company's policies. So if your plan or policy allows you to request a medical examination by a doctor of your choice, you're permitted to do so to determine whether the employee is entitled to STD benefits.

If the employee is also eligible for FMLA leave, however, you should determine whether her condition is FMLA-qualifying. If it is, your right to request a medical certification and second or third medical opinions will be governed by the FMLA unless the plan imposes less burdensome requirements on the employee. In other words, you can't require the employee to provide more information or impose more burdensome requirements on her than are allowed under the FMLA to grant her leave if it qualifies, regardless of your STD plan's requirements. The best way to avoid confusing your rights and obligations under your STD plan and the FMLA is to keep the certification/examination processes separate and to make sure your STD plan's requirements are less burdensome to the employee than, or consistent with, those under the FMLA.

### *Trading sick leave for STD*

**Q:** Several years ago, when our benefits were set up, it was decided not to have STD but to be self-insured in a way by having a very generous sick leave accrual (10 days per year), including carryovers. We now have employees with 800 hours of accrued sick leave, which is the maximum. The problem is that new employees don't have those huge carryovers or STD, leaving them vulnerable. I would like to add STD coverage and decrease the sick leave to three days per year or something in that range. Can we just erase those carryovers since we're adding STD and making them unnecessary, or would that be a legal and/or employee relations problem?

**A:** Yes, but you may encounter a morale problem. Any time you take a benefit away from employees, even if for a good reason, it may not be well received. You may also allow current employees to retain some or all off their accrued sick leave (*i.e.*, a grandfather rule). You can then apply the new STD policy to all employees hired on or after the date the new STD plan goes into effect. Eventually, most if not all of the large accruals will be used and the transition should be smooth and without hard feelings.

*You can research STD and LTD benefits or any other employment law topic in the subscribers' area of www.HRhero.com, the website for Louisiana Employment Law Letter. Access to this online library is included in your newsletter subscription at no additional charge.* ❖

**Remain diligent in your efforts to prevent and correct age discrimination.**

AGE DISCRIMINATION

## Fifth Circuit says disparate impact claims not available under ADEA

by Antonio Robinson and Jennifer L. Anderson

*Just last month, the public's attention was drawn to the Age Discrimination in Employment Act of 1967 (ADEA) because the U.S. Supreme Court decided to entertain the novel question of whether an employee can sue for reverse age discrimination (i.e., discrimination against younger employees because of their age). Although the ADEA was enacted to protect older workers, if the Supreme Court decides otherwise, it could have a significant impact on your policies and practices*

*Without as much fanfare, the U.S. Fifth Circuit Court of Appeals in New Orleans recently rendered a decision of significant importance to Louisiana employers. At issue was whether employees can file an age discrimination claim under the ADEA by using the disparate impact theory, which doesn't require proof of intentional discrimination but rather permits a finding of age discrimination based on the statistical impact of certain employment decisions on older workers. After a thorough analysis, however, the Fifth Circuit found that the ADEA neither authorizes nor supports using the disparate impact theory to prove an age discrimination claim and affirmed the dismissal of the employees' lawsuit.*

### *Older workers cry foul*

In 1998, a municipality and its police department implemented a performance pay scale to bring starting salaries in line with the regional average, provide a more generous pay scale, and take tenure into account when setting pay rates. The plan created three categories of employees: (1) employees with less than five years' tenure, (2) employees with five or more years' tenure, and (3) employees under age 40 with more than five years' tenure. Approximately six months later, the city and police department amended the plan. Some employees, however, weren't pleased.

Those employees claimed that the plan discriminated against employees over 40 years of age. The employees, who were all over 40, specifically claimed that the city and the police department implemented the plan to facilitate the disbursement of larger salary increases to employees who were under 40. The city and police department asked the court to dismiss the employees' claims.

### *Trial court shows no sympathy*

The trial court noted that the employees raised both traditional intentional discrimination claims and disparate impact claims. It concluded, however, that while disparate

impact claims are available under Title VII of the Civil Rights Act of 1964, they aren't available under the ADEA. The court also dismissed the intentional discrimination claim for lack of evidence.

Dissatisfied with the trial court's decision, the employees appealed to the Fifth Circuit.

### *Neither does the Fifth Circuit*

On appeal, the employees raised two arguments: (1) the intentional discrimination claims shouldn't have been dismissed because additional evidence was needed from the city and police department through the litigation, and (2) the ADEA allows claims based on the disparate impact theory of liability. The court agreed that the intentional discrimination claim was prematurely dismissed and should be reinstated for further consideration. The court's analysis regarding the disparate impact issue was more involved because of its novelty. Although most of the other federal appeals courts have weighed in on this issue, the Fifth Circuit hadn't yet done so.

The court began by comparing the text of the ADEA to that of Title VII, which, as noted above, permits claims based on the disparate impact theory of liability. The court observed that both statutes contain prohibitory language, *e.g.*, Title VII prevents discrimination based on race, sex, and national origin (among others) and the ADEA prohibits discrimination based on age.

Because of the similarities that exist in the text of the statutes, the court noted that some federal appeals courts have concluded that disparate impact claims are available under the ADEA. Other federal appeals courts, however, have concluded otherwise. The Fifth Circuit studied the differences between the ADEA and Title VII. Most notably, it found that the ADEA contained an exception to liability not found in Title VII. The ADEA contains language that gives an employer a defense to liability if the challenged employment action was "based on reasonable factors other than age." The "reasonable factors other than age" defense negates an employee's showing of age discrimination. Thus, the ADEA doesn't prohibit employers from taking employment actions based on non-age factors, except when those non-age factors are so correlated to age that they're mere proxies.

The Fifth Circuit found further support for its position by reviewing and analyzing similar statutory language in the Equal Pay Act. The Act states that an employer can pay different wages as long as the inequity is based on a "factor other than sex." The Supreme Court previously determined that that language is inconsistent with and precludes the disparate impact theory of liability for Equal Pay Act claims. Using the Supreme Court's analysis of that language, the Fifth Circuit concluded that the "reasonable factors other than age" defense in the ADEA precluded the use of the disparate impact theory of liability to prove age discrimination.

As another basis for its decision, the Fifth Circuit cited the legislative history and purpose of the ADEA. While the employees attempted to draw analogies between Title VII and the ADEA, the court noted that Congress stated that "age prejudice is unique and differs from the concept of race prejudice" addressed in Title VII. Moreover, the court recognized that disparate impact claims are justified in the Title VII context to address historical and societal concerns, which were noticeably absent in Congress' reasons for passing the ADEA.

### *What does this mean for you?*

As mentioned, many employers have workforces with increasing numbers of individuals over age 40. And as many employees continue to work in lieu of retirement, many employers will likely see the average age of their workers continue to rise. Coupled with jobless economic recovery, those circumstances could result in more age discrimination lawsuits for employers like you. While the Fifth Circuit weighed in with other federal appeals courts declining to expand the ADEA to include disparate impact claims, that could all change because of the split of opinion about this issue in the federal appeals courts. While no one can predict what cases the Supreme Court will review, it isn't outside the realm of possibility that it will address this one. In fact, as we previously reported, the Supreme Court agreed to hear this issue in the recent past only to change its mind at the last minute.

In the meantime, you should remain diligent in your efforts to prevent and correct age discrimination. Training and educating managers and supervisors on maintaining a discrimination-free workplace is key because a slip of the tongue or pen during an interview, evaluation, or other conversation could provide the evidence an employee needs to pursue an age discrimination claim. We can't stress enough the importance of an annual audit of your human resources policies and practices, and with the new year upon us, now's the time to revisit the subject. ❖

UNFAIR LABOR PRACTICES

## Distribution of caustic newsletter held to be protected conduct

*A federal appellate court has held that an employee was unlawfully disciplined for distributing a newsletter critical of his employer. According to the court, the National Labor Relations Board (NLRB) properly found that the worker's statements constituted "protected concerted activity" under federal law. As a result, the employer was ordered to compensate the worker for any lost wages and benefits and directed not to engage in future unlawful conduct.*

### *Newsletter disrupts workplace*

Donald Alan DeWald, Jr., was employed by Honda of America Manufacturing, Inc., in its East Liberty, Ohio, plant. On October 20, 1998, he distributed a newsletter to fellow employees expressing his belief that a Honda benefits booklet was misleading. He also detailed his meetings with management, during which Honda provided him with a written statement denying that the booklet contained any inaccuracies.

One week later, Honda ordered DeWald to attend a manager-level counseling session and thereafter suspended him for three days to discipline him for his comments. Under the company's "Associate Standards of Conduct," an employee is prohibited from using "abusive or threatening language to or about fellow associates or creating an intimidating, hostile or offensive working environment."

DeWald then filed an unfair labor practice charge with the NLRB. The Board found that Honda had violated the National Labor Relations Act (NLRA) by disciplining DeWald for the comments he made while engaged in protected concerted activity. Based on that finding, the NLRB issued a "cease-and-desist order" and required Honda to compensate him for any lost wages or benefits he experienced as a result of the suspension.

### *Court upholds NLRB ruling*

Section 7 of the NLRA guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." To determine whether DeWald's newsletter constituted protected activity, the NLRB applied its "opprobrious, profane, defamatory, or malicious language" test. "[O]therwise protected activity may become unprotected," the NLRB wrote, "if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language."

The NLRB held that "although DeWald no doubt questioned the truthfulness of the individuals he named, the publication of the newsletter nevertheless remained protected activity under the Act." According to the Board, DeWald "was expressing his belief that the individuals responsible for addressing his concerns about the employee booklet did not have the experience, knowledge, or capability to understand the complexity of the benefits described in the booklet."

While the NLRB didn't engage in the analysis preferred by Honda, the Sixth Circuit held, the Board did consider the circumstances surrounding DeWald's statements. Because its findings were supported by substantial evidence, the court concluded that they shouldn't be disturbed. *NLRB v. Honda of America Manufacturing, Inc.*, No. 01-2350, Sixth U.S. Circuit Court of Appeals (2003).

### *Bottom line*

Section 7 of the NLRA offers both union and nonunion workers a broad spectrum of rights, including the right to engage in concerted activity. Courts will balance an employee's right to engage in concerted activity against the employer's right to maintain order and respect in the workplace. Because such balancing generally tips in favor of the employee, it's important that you exercise caution before disciplining employees for conduct that arguably could be classified as "protected concerted activity." ❖

EMPLOYEE BENEFITS

## Are stock options becoming a benefit of the past?

If Microsoft Corporation's decision to stop issuing stock options to employees is any indication, the answer to the above question is yes. The software giant said it would instead begin giving its 50,000 employees restricted stock. In addition, the company will begin to count all stock-related compensation as an expense on its income statements.

Stock options traditionally have provided employees the right to buy shares at a fixed price during a specified period. Restricted stock, on the other hand, are actual shares that can be sold only in future years and may be forfeited if the employee leaves the company. Although stock options have provided enormous windfalls in the past for employees when the stock has gone up, the downturn in the stock market has made options much less desirable. For example, most of the options that Microsoft granted during the past few years are worthless at the company's current share price.

Microsoft isn't the only company retreating from the use of stock options as an employee benefit, according to a recent survey conducted by Mercer Human Resource Consulting. When asked how they had altered their equity-compensation programs, 63 percent of the companies surveyed said they had reduced the number of options granted (or intended to be granted) in 2003. Nearly half of the companies responded that they had reduced the number of individuals who receive options. A mere eight percent reduced options and substituted cash for a portion of the lost value.

Companies are optimistic about the changes in their equity-compensation programs. According to Microsoft Chief Executive Steve Ballmer, the change "will help the company continue to attract and retain the best employees, and better align their interests with those of our shareholders." While Microsoft reportedly hasn't had difficulty of late attracting new employees, only time will tell the long-term effect of the company's decision. ❖

AMERICANS WITH DISABILITIES ACT

## EEOC unveils new fact sheet

The U.S. Equal Employment Opportunity Commission (EEOC) has released a fact sheet designed to educate job applicants about their rights under Title I of the ADA. The fact sheet, which addresses issues in a question-and-answer format, is part of the EEOC's efforts to advance the employment of individuals with disabilities under President George W. Bush's "New Freedom Initiative."

The new publication explains employers' reasonable accommodation obligations under the ADA during the hiring process, including examples of reasonable accommodations and accommodations that are too difficult or expensive. For example, in response to the question of whether you must give employees a specifically requested reasonable accommodation, the fact sheet states that when more than one accommodation meets the employee's needs, you may choose which one to provide.

The fact sheet also outlines the types of questions you're prohibited from asking on applications, during interviews, and after making an offer. According to the fact sheet, you may not ask an applicant how many days she was sick last year. In addition, the fact sheet notes that except under specific circumstances, you may not ask an obviously disabled applicant medical questions during an interview.

**You can rely on the DOL requirement without the risk of liability.**

On the other hand, the fact sheet clarifies the circumstances under which you may seek medical information from applicants. For instance, questions such as "Do you have a disability that would interfere with your ability to perform the job?" and "What prescription drugs are you currently taking?" may be asked after extending a job offer so long as you ask the same questions of other applicants offered the same type of job.

The fact sheet also provides resources on how to file a discrimination charge and how to obtain further information about the ADA. To obtain a copy, visit the agency's website at www.eeoc.gov/facts/jobapplicant.html. ❖

FAMILY AND MEDICAL LEAVE

## Court upholds 'three consecutive days' requirement

*A federal appellate court has dismissed a lawsuit filed by an employee who claimed that she was terminated in violation of the FMLA. The court rejected the worker's argument that partial days of incapacity may be used to establish a "serious health condition." According to the court, the U.S. Department of Labor's (DOL) regulations interpreting the statute require three full days of incapacity.*

### *Facts*

Margaret Russell was employed as a patient accounts adjustment representative by North Broward Hospital in Florida. During her employment, she was disciplined on numerous occasions for unscheduled absences. For instance, she received a verbal reprimand on June 24, 1999, a written corrective action report on July 6, 1999, and a written final corrective action report on January 17, 2000. Under the hospital's progressive discipline policy, as a result of the final report, she was suspended for three days without pay and warned that any further infractions may result in her termination.

On May 31, 2000, Russell slipped and fell at work. The same day, she was referred to the Medwork clinic, a hospital-approved workers' compensation health care provider. She was diagnosed with a fractured right elbow and a sprained ankle. The treating physician gave her a sling for her arm and prescribed medication for the pain. The physician also told her that she could return to work but restricted the use of her right arm. After leaving the Medwork clinic, she didn't return to work.

The next day, Russell reported to work at 8:00 a.m. but left two hours later, complaining that she was experiencing "severe pain." She went back to the Medwork clinic, where she was told that she needed to consult an orthopedist about her injuries. She then called her supervisor and told her that she wouldn't be returning to work that day. She also asked for the following day off, but her supervisor refused.

On June 2, Russell again reported to work at 8:00 a.m. but soon began to feel ill and started vomiting (allegedly because she took her pain medication on an empty stomach). She went home at 9:05 a.m. The same day, the hospital authorized her to see an orthopedist and scheduled an appointment for June 5.

Over the next week, Russell was absent from work intermittently to attend doctor appointments. On two occasions, she didn't report to work and didn't call in to explain her absence. The hospital ultimately terminated her employment because of her excessive absenteeism.

Russell sued her former employer, alleging that she was terminated in violation of the FMLA. According to the suit, she was entitled to protected leave from work for the period of May 31 through June 9 because she suffered from a serious health condition. A jury ruled in favor of the hospital, and Russell appealed to the Eleventh Circuit.

## *Court's analysis*

The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a *serious health condition* that makes the employee unable to perform the functions of the position of such employee." The statute defines *serious health condition* as "an illness, injury, impairment, or physical or mental condition that involves — (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." Because Russell's absences didn't involve inpatient care, the Eleventh Circuit focused on the second part of the definition.

The FMLA doesn't define "continuing treatment by a health care provider," but the DOL has issued regulations interpreting the phrase. The regulations state that a serious health condition stemming from continuing treatment by a health care provider must include "a period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of *more than three consecutive calendar days*" and certain subsequent treatment or periods of incapacity relating to the same condition.

Russell argued that she established seven consecutive partial days of incapacity; thus, her absences should have been considered protected under the FMLA. She didn't argue, however, that she suffered from an incapacity that lasted three or more full days. Relying on the regulations' plain language, the Eleventh Circuit held that Russell's FMLA claim must fail. The term "calendar day," the court found, refers to a "whole day, not to part of a day, and it takes some fraction more than three whole calendar days in a row to constitute the period of incapacity required." Because Russell failed to satisfy that requirement, the court upheld the dismissal of her suit. *Russell v. North Broward Hospital,* No. 02-13343, Eleventh Circuit (2003).

## *Practical impact*

This is a very positive ruling for employers. In this case, the Eleventh Circuit deferred to Congress' decision to delegate to the DOL the task of interpreting the FMLA. The court wrote: "Even though the FMLA does not explicitly say that three consecutive calendar days of incapacity are needed for a medical condition to qualify as a serious health condition, Congress entrusted the task of drawing the fine lines to the [DOL]."

The court further noted that "if we interpret [the DOL regulations] as requiring full days of incapacity, as we do, the requirement will ensure that serious health conditions are in fact serious, and are ones that result in an extended period of incapacity." Thus, you can rely on the DOL regulations' three-day period of incapacity requirement without the risk of liability.

*You can catch up on the latest court cases involving the FMLA in the subscribers' area of HRhero.com. Simply log in and use the HR Answer Engine to search for articles from 51 Employment Law Letters. If you need help or lost your password, call customer service at (800) 274-6774.* ❖

# HR Trends

***Minor ailments, major costs.*** Headaches, back pain, and arthritis cost U.S. employers nearly $62 billion in lost productivity each year, according to a survey published in the *Journal of the American Medical Association* (*JAMA*). The survey, which focused on the most common types of pain suffered by working adults in various occupations and industries, found that nearly 13 percent of the workers polled lost productive time over a two-week period because of a common pain condition. According to the *JAMA* researchers, "Overall, lost productive time due to health-related reduced performance on days at work accounted for four times more lost time than absenteeism."

***Outsourcing HR? Say it isn't so.*** A report from Robert W. Baird & Co., a Milwaukee-based financial services firm, predicts that a surge in human resource outsourcing by both small and large companies could occur in the near future. The report found that the timing is right for HR outsourcing as more employers seek to reduce overhead costs, improve service to their employees, and free up their HR departments to focus on more strategic issues. The report also listed "the existence of a large diverse group of highly specialized companies offering tailored HR outsourcing capabilities" as yet another factor. Data compiled by the Saratoga Institute in San Jose, California, found that the amount of HR functions performed by outside entities increased from 1.7 percent in 2000 to 4.5 percent in 2001.

***Study supports drug testing.*** The 2002 National Survey on Drug Use and Health, which was recently released by the Substance Abuse and Mental Health Services Administration, found that the vast majority of drug users hold full- or part-time jobs. Among the more than 50 million adults who were classified as "binge drinkers," approximately 41 million (or 80%) were employed. Of the 16.6 million illicit drug users surveyed by the organization in 2002, more than 12 million (or 75%) were employed. The DOL has established a website, www.dol.gov/dol/workingpartners.htm, that provides resources to help employers maintain an alcohol- and drug-free workplace. ❖

U.S. SUPREME COURT

# Key benefits issue back on the docket

Over the last several U.S. Supreme Court terms, the justices have agreed to hear a number of key cases arising under the ERISA. The common issue has been whether claims filed by plan participants or state laws creating new patient rights are "preempted" (or superseded) under ERISA. In early November, the high court continued that trend by agreeing to consider whether plan participants may sue their health maintenance organization (HMO) for negligence.

The case before the justices is a consolidation of several lawsuits involving individuals who claim that the HMOs through which they received health benefits acted negligently. All the claims were pursued under a state statute — the Texas Health Care Liability Act. While the suits were originally filed in state court, the HMOs successfully removed them to federal court in light of the ERISA issues involved.

In one case, for example, Juan Davila contends that he was prescribed the drug Vioxx by his doctor to treat arthritis pain. Under his coverage provided by Aetna U.S. Healthcare, however, he was required to try a less expensive drug first. After three weeks of taking the alternative drug, Davila was rushed to the hospital with a bleeding ulcer.

The Fifth Circuit refused to dismiss the cases, finding that the HMOs weren't acting as plan fiduciaries when they became involved in medical treatment decisions. The appellate court also noted that the plan participants weren't seeking to enforce benefits under the applicable plan and are empowered by ERISA to seek "appropriate relief" for a plan's breach of its fiduciary obligations.

This decision is significant to insurers fighting to control health care costs (which have increased by double-digit percentages each of the last several years). The ruling will also affect employers because the cost drivers facing insurers will have a direct impact on your health insurance premiums. ❖

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