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EMPLOYMENT LAW UPDATE:

President Bush Signs “Americans with Disabilities Act Amendments Act of 2008” Into Law

By W. Ryan Neumyer, Esquire

On September 25, 2008, President Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 (the “Act”). The Act, which becomes effective January 1, 2009, demonstrates Congress’ disagreement with a number of decisions issued by the U.S. Supreme

Court and other federal courts that have narrowed the application of the ADA.

The Act does not change the basic definition of “disability” under the ADA (an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment). The 2008 Act does, however, make the following important changes and clarifications:

- 1) the definition of *major life activities* is expanded by including two *non-exhaustive* lists:
 - (a) the first list includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working;
 - (b) the second list includes the operation of major bodily functions which include functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions;
- 2) mitigating measures other than “ordinary eyeglasses or contact lenses” are not to be considered in determining whether an individual is disabled;
- 3) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- 4) an individual subjected to an action prohibited by the ADA, such as a failure to hire, because of an actual or perceived impairment will meet the “regarded as” definition of a disability unless the impairment is transitory and minor;
- 5) individuals covered only under the “regarded as” prong of the definition of a “disability” are not entitled to reasonable accommodations; and



- 6) the definition of “disability” should be interpreted broadly.

The EEOC has indicated that it will be evaluating the impact of these changes in its enforcement guidances and other publications addressing the ADA. More details will be forthcoming regarding the practical impact the Act will have on employers.

It is clear, however, that the new law will significantly increase the number of individuals who are protected as “disabled.” Employers must begin to review hiring policies and procedures to ensure heightened scrutiny with regard to disability related matters, including requests for reasonable accommodations. Additionally, employers should train supervisors, managers and human resources staff on the changes brought about by the Act to ensure compliance. These proactive steps will help to minimize the costs associated with disability-related discrimination claims.

Third Circuit Invalidates FMLA Regulation that “Deems” Employee Eligible for FMLA if Employer Fails to Respond to Leave Request

By Amy G. Macinanti, Esquire

Patricia Sinacole became employed by iGate in 1998 as a full-time salaried employee. In 1999, Sinacole opted to change her employment with iGate to a part-time position. On November 28, 2000, Sinacole submitted a written request for FMLA leave to allow for childbirth and care for her newborn child. Sinacole requested that the leave begin on or about April 4, 2001. iGate did not respond to Sinacole’s FMLA request. Nevertheless, Sinacole took leave from her work beginning April 6, 2001. On May 23, 2001, Sinacole gave notice of her intent to return to work on July 2, 2001. Prior to and during the time that Sinacole had been on leave, iGate was experiencing a significant financial downturn and had eliminated several positions, including two positions identical to Sinacole’s position. On June 22, 2001, iGate sent Sinacole a letter informing

her that her employment with iGate was being terminated immediately as part of an overall reduction in force.

Sinacole filed a lawsuit in the U.S. District Court for the Western District of Pennsylvania alleging, among other things, that iGate unlawfully interfered with her right to take FMLA leave. iGate sought to dismiss the suit since Sinacole had not worked the required 1,250 hours in the twelve months immediately preceding her leave date and, therefore, was not eligible for FMLA leave. Alternatively, iGate argued that Sinacole was terminated for a legitimate reason unrelated to her FMLA leave, i.e., the reduction in force.

Despite the fact that she did not meet the 1,250 hour eligibility requirement, Sinacole argued that the FMLA regulation 29 C.F.R. § 825.110(d) entitled her to FMLA leave. The regulation relied upon by Sinacole states:

“If the employee notifies the employer of the need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee’s eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met.**If the employer fails to advise the employee whether the employee is eligible prior to the date requested leave is to commence, the employee will be deemed eligible. The employer may not then deny the leave.**”

29 C.F.R. § 811.110(d). The District Court rejected this argument, and, on appeal, the Third Circuit agreed.

The Third Circuit reasoned that it is a “sole” province of Congress to determine the category of employees who have a right under a given law. In the FMLA, Congress made clear that an employee



must work at least 1,250 hours in the twelve-month period preceding the date of leave in order to be eligible for leave. The Department of Labor, by its regulation, expanded this category and thus co-opted the authority of Congress. Thus, the court held, “[T]his regulation is invalid to the extent that it giv[es] otherwise non-eligible employees a cause of action for an employer’s failure to respond to a [request] for FMLA leave.”

The Sinacole decision is important because it invalidated a portion of an FMLA regulation. However, the decision is very fact specific, as are most FMLA cases. Accordingly, while employers will benefit from the ruling in the Sinacole case, employers must continue to carefully review each employee request for FMLA leave and respond appropriately.

New Guidance Issued on Common Wage & Hour Questions

By Eric N. Athey, Esquire

Over the past several months, federal courts and the U.S. Department of Labor have issued opinions on a number of common wage and hour issues. Below is a summary of some of the more significant rulings.

Employees Must Be Paid for Time Obtaining Treatment Under OSHA's Bloodborne Pathogens Standard. Under OSHA regulations governing bloodborne pathogens (e.g. Hepatitis B, HIV), employers are required to make treatment available "at no cost to employees" whenever an employee experiences occupational exposure to a bloodborne pathogen. In Sec'y of Labor v. Beverly Healthcare-Hillview, the U.S. Court of Appeals for the Third Circuit considered whether this regulatory language requires that employees be paid for their time receiving such treatment - or merely requires that the treatment be made available at no charge to the employee. The Secretary of Labor had previously concluded that the regulation required that employees be paid for their time and reimbursed for travel expenses. On appeal, the Third Circuit agreed. In a decision issued on June 4, 2008, the Court

reasoned that the term "cost" has many meanings and that employees who obtain treatment during non-work hours incur a cost of time for which they must be compensated. The Court did not answer the related issue of whether time spent by employees obtaining treatment must be counted as "hours worked" for purposes of calculating overtime hours.

Employer May Lawfully Implement Single Three-Week Pay Period to Avoid 27th Payday in a Year. Some employers pay their non-exempt employees annual salaries which are equal to a pre-determined hourly rate multiplied by 40 hours and then multiplied by 52 weeks. These employees, like their exempt counterparts, are then paid the same bi-weekly amount of pay (plus any overtime worked) on each of the 26 paydays during the year. This payroll model is simple to administer. However, every several years, employers who follow this pay schedule experience a 27th payday in a single calendar year. In order to prevent employees from receiving more than their agreed-upon annual salaries in these situations, such employers often implement an extended three-week pay period at the end of these years for which non-exempt employees receive the same total pay as any other two-week pay period. This practice has often been questioned but, until recently, there was no formal enforcement guidance on point.

In an Opinion Letter dated May 30, 2008, the Wage & Hour Division of the U.S. Department of Labor ("DOL") concluded that this practice was permissible, provided 1) the salary paid during the three-week period divided by the number of hours worked during the period amounts to at least the minimum wage; and 2) employees are paid the appropriate premium for any overtime hours worked. The Division also observed that the employer noted the payroll adjustment on payroll records and pay stubs at the start of each fiscal year in which the adjustment was made; thus, employees knew well in advance that the adjustment would be made. Such advance notice would be advisable for employers who utilize this pay practice.



Employer May Permit Employees to Pay for Work Shoes Via Payroll Deduction. In an Opinion Letter dated March 17, 2008, the Wage & Hour Division considered whether an employer may permit employees to pay for work shoes via payroll deduction. The employer, a restaurant, required employees to wear "dark colored" shoes at work. However, employees were permitted to wear shoes they already owned, they could purchase a pair on their own, or they could purchase a pair through a vendor with whom the employer had a purchase arrangement. With respect to this latter option, the employee could pay the vendor directly or the employer could purchase the shoes through the vendor and recoup the cost from employees (at no profit to the employer) via payroll deductions - which could take an employee's gross earnings below the minimum wage rate during some pay periods. The employer sought an Opinion Letter as to whether this arrangement was lawful.

The DOL has long taken the position that employer payroll deductions for "uniform" purchases may not reduce an employee's earnings below the minimum wage rate. However, since the shoes at issue were merely a "general type of ordinary foot wear," the DOL concluded that they were not "uniforms" and did not fall under this restriction. The DOL then considered whether the deduction was permitted under Section 3(m) of the Act. Section 3(m) allows employers to include as part of "wages" the "reasonable cost" to the employer of furnishing any employee with board, lodging "or other facilities." Actual costs incurred by employers for these items are lawfully credited toward minimum wage compliance. Citing their own Field Operations Handbook, the Division concluded that the shoes may be considered "other facilities" by the employer and, therefore, the payroll deduction was permissible even though it reduced certain employee paychecks below minimum wage levels. The Division further noted that this conclusion applied regardless of whether the deduction applied to an hourly employee or a tipped employee.

Exempt vs. Non-Exempt - Job Analyses. The DOL's recent Opinion Letters included several which considered the exempt status of certain jobs. The exempt/non-exempt determination requires a detailed analysis of the actual functions of the position - the job title of a position is of limited relevance. For this reason, employers should not merely assume that all employees holding a particular job title are exempt merely because the Division found one position with the same title to be exempt. Nevertheless, the following Opinion Letters may be helpful starting points for employers who are researching the exempt status of certain positions:

Service Coordinators (assisting individuals to gain access to community services) - Not exempt under learned professional exemption;

Sellers of Novelty Items at Promotional Events - Exempt under outside sales exemption;

Plant Manager - Exempt under executive employee exemption;

Jailers - Subject to partial overtime exemption under Section 7(k);

Product Technology Application and Marketing Analyst (Mining Technology Firm) - Exempt under administrative employee exemption;

Purchasing Agents (Mobile Home Manufacturer) - Exempt under administrative employee exemption.

If you would like to review any particular Opinion Letter, you may access them at www.dol.gov/esa/whd or contact us for a copy.

**From Work Release to Early Retirement:
Courts Tackle Important UC Issues**
By Denise E. Elliott, Esquire

Incarcerated Employees

In its April 2008 decision in Weems v. UCBR, the Commonwealth Court of Pennsylvania made two rulings favorable to employers who discharge incarcerated employees. First, the Court confirmed that an inability to report to work due to incarceration can constitute willful misconduct



for excessive absenteeism. Second, the Court ruled that an employer has no obligation to participate in a work release program if participation would change an employee's terms of employment.

In Weems, the employee last worked on June 23, 2006, was incarcerated on June 26, 2006, was subsequently discharged by Harley Davidson and was released from prison on April 11, 2007, at which time she filed an application for benefits. Affirming the Referee's denial of benefits, the Court noted that excessive absences and lack of good cause for the absence can support a finding of willful misconduct for absenteeism. The Court noted that imprisonment is not good or adequate cause for the absence because "an employee who engages in criminal activity punishable by incarceration should realize that his ability to work may be jeopardized."

The Weems claimant tried to argue that because she was eligible for work release, she was ready and able to work and it was Harley Davidson's refusal to participate in the work release program that prevented her from working. Again, the Court disagreed. The claimant could not produce a court order for work release to support her claim of eligibility. Additionally, the Court noted that there was no precedent requiring employers to participate in work release, and that an employer cannot be expected to change the conditions of employment to accommodate an incarcerated employee.

Voluntary Early Retirement Participation

In an Opinion dated September 4, 2008, the Commonwealth Court addressed the effect of participation in a Deferred Retirement Option Plan (DROP) on a claimant's eligibility for unemployment benefits. In Port Authority of Allegheny County v. UCBR, four claimants were granted unemployment benefits when they were discharged prior to the expiration of their elected DROP period. The employer argued that the claimants were ineligible for benefits because they voluntarily quit on the effective date of their

retirement (the date on which they elected to participate in the DROP program), the claimants did not have a necessitous or compelling reason to retire, there was no evidence to support a finding that the claimants' DROP periods were irrevocable, and claimants' unemployment was not the type of joblessness that the law ever intended to address. The Commonwealth Court disagreed with the employer on all four points.

All four claimants elected to participate in the DROP program and gave an effective retirement date of February 1, 2003. Claimants subsequently executed an "Irrevocable Election and Agreement to Participate in the Deferred Retirement Option Plan," in which they selected the length of their DROP periods (the period during which they intended to remain employed), which could not exceed five years. During the claimants' participation in the DROP program, monthly pension credits were deposited in an interest bearing account for payment to the claimants at the termination of their elected DROP period. The claimants also continued to receive a salary during this period.

Following the claimants' enrollment in the DROP program, the employer changed the length of time that a DROP participant could remain an active employee and provided a cut-off date of July 1, 2007. Accordingly, claimants were terminated by the Port Authority on July 1, 2007, in advance of the expiration of their elected DROP periods. Benefits were granted to the claimants for the period between July 1, 2007 and the date of the expiration of their individual elected DROP periods.

The Commonwealth Court held that despite the claimants' participation in the DROP program, their separation from employment on July 1, 2007 could not be considered a voluntary quit. The claimants were able and willing to continue working through the termination of their DROP periods, and would have continued working but for the employer's amendment to the DROP program. Additionally, the Commonwealth Court rejected the employer's argument that because the



claimants effectively resigned in February of 2003 when they entered the DROP program, they were not entitled to benefits. The Court noted that such an argument would amount to asking employees to waive their rights to UC Benefits, which is not permitted under the law. The argument also failed because after the effective resignation date, the employer offered each claimant an additional period of work and the claimant was permitted to keep working. The Court further rejected the employer's argument that the claimants received a monetary benefit and were not subject to economic hardship due to their unemployment. Although the claimants received a lump sum payment from their pension accounts at the time of discharge, had they been permitted to work through the end of their elected DROP periods, they would have continued to receive their salary and pension credits.

No Leniency for Late Appeals Due to Illiteracy

The Commonwealth Court recently upheld the heavy burden imposed upon claimants who file appeals from Referee decisions beyond the 15 day appeal period. For a late appeal to be considered, a claimant must show either (1) that the government agency engaged in fraudulent behavior or manifestly wrongful or negligent conduct; or (2) that non-negligent conduct beyond the claimant's control caused the delay. In Dull v. UCBR, the claimant could prove neither and her late appeal was rejected.

The claimant in Dull argued that her appeal, which was filed at least six and a half months late, should be considered because there was no evidence that the Referee's decision was mailed to her on the date of decision and because she was incompetent due to a low IQ and a first grade reading level, which rendered her illiterate. The Commonwealth Court rejected both arguments.

First, the Court held that when the record reflects that the decision was mailed on a certain date, the burden then shifts to the claimant to demonstrate that the decision was not delivered to her address. The claimant in Dull could not

advance such evidence. She simply testified that she did not know when she received the decision because she could not read, was not willing to ask someone to go through her mail, and thus would not have recognized the decision when it was received. Second, the Court held that leniency in filing a late appeal will only be granted in such cases when the incapacitated person makes some diligent effort to file the appeal. Again, the only excuse claimant provided for filing her appeal six and a half months late was that she could not read and did not seek help because she was embarrassed. The Court reasoned that claimant's failure to seek assistance amounted to negligence on her part, and therefore she had not satisfied her heavy burden to have her untimely appeal considered.

Pennsylvania Courts Address COBRA Compliance Issues

By W. Ryan Neumyer, Esquire

Two Pennsylvania courts have recently addressed an employer's obligation to provide notice of an employee's right to COBRA continuation coverage. Each case serves as a reminder of just how important and, at times, complicated it is for employers to ensure COBRA compliance.

Social Security Disability Benefits and COBRA: In Carstetter v. Adams County Transit Authority, the U.S. District Court for the Middle District of Pennsylvania held that an employee's receipt of Social Security disability benefits did not justify an employer's failure to offer COBRA coverage. Carstetter, a maintenance mechanic for a municipal transit authority, was required to obtain an annual medical clearance from the Pennsylvania Department of Transportation to operate commercial vehicles. He requested leave under the FMLA and applied for Social Security disability benefits when he was medically unable to renew his clearance. Although Carstetter was eventually awarded Social Security disability benefits, he was never afforded an FMLA leave.



Carstetter applied for unemployment compensation because his disability benefits provided him with only sixty percent of his regular income. The transit authority interpreted Carstetter's claim for unemployment as a voluntary resignation and informed Carstetter that his employment had ended. Carstetter filed suit and alleged (among other claims) that the transit authority had improperly failed to offer him COBRA coverage.

The transit authority did not dispute Carstetter's contention that no COBRA notice was issued; rather, the transit authority argued that receipt of Social Security disability benefits rendered Carstetter ineligible for COBRA. The court rejected this argument. The court noted that a qualified beneficiary who becomes eligible for Medicare under Title XVIII of the Social Security Act during the period of COBRA coverage may have COBRA coverage terminated in favor of Medicare coverage (although Medicare eligibility prior to receipt of COBRA has no impact on an individual's COBRA eligibility). The court held, however, that an employee's receipt of Social Security disability benefits does not, by itself, render the employee ineligible for COBRA; in fact, eligibility for Social Security disability benefits can extend COBRA eligibility for an additional eleven (11) months (on top of the eighteen (18) month period of continuation coverage for a qualifying event that is a termination of employment or a reduction in hours).

COBRA Rights of Workers' Compensation Claimants: In Aquilino v. Solid Waste Services, Inc., the U.S. District Court for the Eastern District of Pennsylvania awarded a former employee more than \$41,000 to cover medical expenses incurred after his employer failed to provide him with notice of his COBRA rights. Aquilino was employed by Solid Waste Services as a recycling driver. He sustained a work-related injury when a metal pole struck his head. After a period of absence and a return to light duty work, Aquilino required a second leave of absence as a result of the injury. After continuing Aquilino's health coverage for several months without any

request for Aquilino to make his monthly contributions toward the cost of coverage, the employer terminated his health coverage without notice. Aquilino only learned that his health insurance had been terminated after he was admitted to a hospital for a severe allergic reaction. During the hospital stay, Aquilino incurred medical bills in excess of \$41,000. He sued to recover this amount due to his employer's failure to provide a COBRA notice.

The employer argued that Aquilino's insurance coverage was terminated because he failed to remit his monthly premium contribution, not due to a COBRA qualifying event. The court disagreed with the employer and found that Aquilino's leave of absence was a reduction of hours resulting in a loss of coverage which triggered COBRA notice requirements:

When Aquilino went out on workers' compensation . . . [the employer] neither continued to deduct [his premium] contributions nor advised Aquilino of the method by which he was to make these required contributions. The Court finds that the method and means by which a plan participant is required to make contributions to a health plan is an implicit term and condition of the health plan. Accordingly, a change in the method or means by which an employee is required to make contributions to a health care plan that occurs as a result of a reduction in hours qualifies as a loss of coverage for the purposes of COBRA.

Since the employer failed to provide an appropriate COBRA notice, the court awarded Aquilino more than \$41,000 to cover the medical costs incurred during his hospital stay in addition to a statutory penalty of \$50 per day for the 415 day period beginning on the date Aquilino's



coverage was terminated and ending on the date Aquilino first learned he had no coverage.

These cases are a reminder to employers that COBRA matters must be taken seriously and demonstrate just how severe the penalties may be when a COBRA notice is not provided after a qualifying event.

WORKERS' COMPENSATION UPDATE:

Commonwealth Court Further Restricts Employers' Use of Impairment Rating Evaluations

By Denise E. Elliott, Esquire

Yet another hurdle has been placed before employers seeking to limit the length of time a workers' compensation claimant may receive wage loss benefits. The latest decision in a string of Pennsylvania Court cases discussing Impairment Rating Evaluations (IREs) held that a claimant must be found to be at Maximum Medical Improvement (MMI) before an impairment rating evaluation may be used to modify benefits from total disability to partial disability status. In Combine v. WCAB (National Fuel Gas Distribution Corporation), the Commonwealth Court held that there must be a finding of MMI before an impairment rating evaluation can be used to convert a claim from total to partial disability.

The claimant in Combine suffered a medical meniscus tear to his left knee on December 4, 2000, and the employer began paying total disability benefits. In July of 2006, the employer filed a Modification Petition seeking to change the claimant's status to partial disability based on an impairment rating of 20%. Under Act 57, a rating of less than 50% allows an employer to seek a modification or "conversion" from total to partial disability status. Claimant argued that the

modification was improper because he had not reached MMI. Both the WCJ and WCAB granted the modification and held that a finding of MMI was not necessary for the status change. The Commonwealth Court disagreed.

The Commonwealth Court first focused on Section 306(a.2)(1) of the Act, which provides that "[t]he degree of impairment *shall* be determined based upon an evaluation by a physician pursuant to the most recent edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*." Interpreting the word *shall* as meaning mandatory, the Court next turned to the AMA Guides. The Court noted that "only permanent impairment may be rated according to the Guides, and only after the status of MMI is determined." The Guides also explain that permanency and MMI are usually "synonymous and occur when all reasonable treatment expected to improve the [employee's] condition has been offered or provided." The final guidance of the AMA is that "impairment ratings are to be performed when an individual is at a state of permanency."

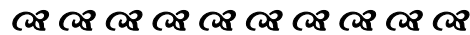
The Commonwealth Court thus held that a physician conducting an IRE must first determine that the claimant has reached MMI **prior** to determining the percentage of impairment. The Court did not go so far as to require that the physician use magic language to establish MMI, but did hold that the physician must at least address the issue. The physician in Combine, when asked whether the claimant had reached MMI, stated that he did not address the issue and that a different type of examination would be necessary to make this determination. Thus, the modification of benefits was reversed and the Court held that claimant's total disability status should continue.

In our last newsletter, we reported on the Commonwealth Court's decision in Diehl v. WCAB, which held that an employer seeking conversion following a late IRE request (i.e., a request made more than 60 days after the 104 week TTD anniversary), must establish an earning



capacity on the part of the employee through traditional job referrals, actual employment, or a labor market survey. Essentially, if an employer misses the 60 day window, it must then incur the additional cost and uncertainty of a litigated earning capacity proceeding to gain a conversion. The good news is that reargument on the Diehl case has been granted by the Commonwealth Court and is scheduled for November 2008.

In light of the Combine and Diehl decisions, it is likely that the Commonwealth Court will continue to interpret the portions of the Act relating to IREs liberally and for the benefit of claimants. The practical effect of the Combine decision, however, may be more than the Court intended. Given the importance the Court places on permanency in the IRE process, employers may now find it increasingly difficult to convert claims from total to partial disability status.



If you have any questions regarding any labor or employment law matter, including the issues discussed in this newsletter, please do not hesitate to contact us at (717) 392-1100, or e-mail us at the following addresses:

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