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Human Resources Newsletter

HR Focus

Retirement Math 101

by Anthony J. Kolenic, Jr. : **akolenic@wnj.com**

"If you don't know where you're going, any road will take you there" – Lewis Carroll

Participants in defined benefit plans often have trouble calculating the monthly benefit earned under the plan. Unfortunately, it is also the case that almost no 401(k) participant can calculate the monthly retirement benefit equivalent of his or her account balance.

More fundamentally, very few participants have even thought about what their account balance and the monthly retirement benefit equivalent should be, not to mention how much they have to save each year along the way in order to reach that goal. Rather, participants, quite naturally, think in terms of the amount they are able to save each year in their 401(k) plan, probably assuming that they will have to make do with whatever the total is when they get there.

It may be helpful for participants to do the basic math to determine their needs and their progress in accumulating funds for retirement. A prudent fiduciary can help participants avoid outliving their assets or having to significantly cut back their lifestyle in retirement.

A good starting point is to assume that you need to accumulate a pot of gold equal to 20 times your expected annual expenditure in retirement. And, experts often assume that the annual expenditure in retirement will be roughly 80 percent of your pre-retirement income.

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Pre-Employment Background Checks: The Cure Can Be As Bad As The Disease

by Robert A. Dubault: **rdubault@wnj.com**

Studies show that an overwhelming number of employers conduct some form of pre-employment background check on prospective employees. There are many good reasons to do so: hiring qualified, safe and productive employees, preventing theft or workplace violence, and maintaining employee morale, just to name a few. While no one doubts the need to properly screen an applicant's background and qualifications, *how* you go about doing so and what criteria you use can potentially expose your organization to significant liability.

Employers who use a third party to gather background information and verify references must be sure to comply with the federal Fair Credit Reporting Act (FCRA).

From its title, you may conclude that the FCRA only applies to traditional credit reports. It covers much more than that. The FCRA establishes detailed procedures that must be followed whenever a "consumer report" or an "investigative consumer report" is obtained for employment purposes. Consumer reports include such things as educational and employment histories, motor vehicle records, licenses and criminal background. Investigative consumer reports are consumer reports that are developed by interviewing people who may know the applicant or employee (such as checking references).

If you use a third-party vendor to do your background checks, the FCRA requires, in general, that you:

- Provide separate, advanced written notice to the applicant or employee
- Get the individual's authorization to obtain the information
- Certify to the third-party vendor conducting the background check that you have complied with the FCRA
- Provide a pre-adverse action notice and additional documentation to the individual before taking action based in whole or in part on the report
- Provide an adverse action notice containing specific information to the individual

Failure to comply with the FCRA can expose you to enforcement action by the Federal Trade Commission, legal action by your state attorney general's office for injunctive relief and damages, or a private cause of action by the applicant or employee. It was recently reported that an Ohio transportation company has agreed to pay $2.6 million to settle a class-action lawsuit (*Hall v. Vitran Express, Inc.*) alleging FCRA violations.

Leaving aside the FCRA, there are several other legal land mines you should also be aware of. For example, some employers automatically screen out potential employees if they have an arrest or felony conviction in their record. Michigan law prohibits employers from requesting, making or maintaining a record regarding non-felony arrests where a conviction does not result. Michigan employers may, however, request information relative to convictions or pending felony charges. Several other states have similar or more severe limitations on collecting such information.

In addition, the Equal Employment Opportunity Commission (EEOC) has taken the position that a policy or practice which automatically excludes individuals from employment solely because of a prior conviction will be presumed to violate Title VII of the 1964 Civil Rights Act because it may have a

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Tick Tock:

Whatever Happened to the Time Clock?

by Mary E. Tell: **mtell@wnj.com**

Remember the good old days when employees came to work, punched a time clock, worked until lunch, punched the time clock again, took a break and punched the time clock, then worked until the end of their shift and punched the time clock one more time?

I don't remember it either; I'm too young. But some of the old guys in the firm have told me stories about getting yelled at by supervisors for punching in and out in the wrong space on the time card. Besides messing up the time card, which required a supervisor to fix it, that's a bit of a hassle and a lot of punching. Most employers thought so, too. So fewer and fewer of them continue to use the time clock.

Instead, employees began using time sheets or their work computer to record time. That's OK. In fact, Fair Labor Standards Act (FLSA) regulations specifically state that a time clock is not required.

Still, some employers didn't think that was good enough, so they started to use what is commonly known as "exception timekeeping."

In exception timekeeping, meal periods and other non-working hours are subtracted automatically from an employee's compensable hours, except on those rare occasions when the employee does not work a preset schedule. There's nothing wrong with exception timekeeping either, as long as it accurately reflects the hours that the employee works. In fact, the Wage Hour Division issued an opinion letter in 2007 specifically stating that exception timekeeping is an acceptable method of timekeeping.

But as exception timekeeping becomes more and more popular, the Wage Hour Division and plaintiffs' lawyers are taking note. And what do plaintiffs' lawyers like more than anything else? Class action lawsuits. Exception timekeeping seems to be made for them.

In March, a New York District Court certified a class of current and former hospital employees whose hourly pay was subject to an automatic 30-minute deduction. Three named plaintiffs brought this class action against St. Joseph's Hospital and 18 other defendants (various inter-related entities and individuals). At the time of the decision, 72 current or former employees had opted in to the FLSA collective action.

The plaintiffs challenged the defendants' policy of automatically deducting 30 minutes each day from an employee's pay for a meal period, even though employees often missed their meal period due to patient care demands.

The court granted class certification for all current and former hourly employees of defendants, from the present to *the past 8 years*, whose pay was subject to an automatic 30 minute deduction but were not afforded a bona fide meal period of at least 30 minutes. Class certification is the initial and most onerous step for plaintiffs pursuing a class action – without certification of their proposed class, the collective action must be dropped and only individual suits may be brought.

Don't forget, meal periods must be counted as hours worked (and therefore compensated) unless *all* of the following three conditions are met:

- The meal period is generally at least 30 minutes
- The employee is *completely* relieved from all duties during the period
- The employee is free to leave the duty post

What has this got to do with exception timekeeping? When an employee skips or takes a shortened meal break, an FLSA violation occurs if automatic time deductions deprive an employee of earned compensation.

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Is Every Employee Now Disabled?

by Jon P. Kok : **jkok@wnj.com**

The Americans with Disabilities Amendments Act (ADAA) was created to expand coverage of the Americans with Disabilities Act (ADA) and overturn several U.S. Supreme Court decisions that Congress believed interpreted the concept of "disability" too narrowly. The question now is whether the Equal Employment Opportunity Commission (EEOC) has gone too far in the other direction, making nearly every employee in America "disabled" under the statute.

On May 24, 2011, the EEOC's final regulations implementing the ADAA will go into effect. Significant changes found in the new regulations include the following:

- The EEOC has listed various conditions that "in virtually all cases" meet the definition of disability. These conditions include autism, cancer, cerebral palsy, diabetes, HIV, muscular dystrophy, epilepsy, multiple sclerosis, missing limbs, major depression, bipolar disorder, obsessive compulsive disorder, post-traumatic stress disorder and schizophrenia. While all of these conditions certainly seem like disabilities, some of them can have dormant or mild symptoms when treated with medication. In the past, an employer could do an individualized analysis. Now, it would be wise to accept almost any employee with these conditions as "disabled."
- The EEOC has rejected the formerly well-accepted position that temporary impairments are not disabilities. Previously, many employers would not consider conditions to be disabilities if they lasted less than six months. Now, the EEOC has expressly stated that impairments expected to last fewer than six months can be disabilities, provided they are sufficiently severe.
- In order to have a disability, an employee must have an impairment that substantially limits a major life activity. Previously, employers would engage in significant analysis of what constitutes a "substantial limitation." The Supreme Court said an impairment needs to "prevent" or "severely restrict" a major life activity to be considered a disability. Now, the EEOC gives no standard as to what "substantial limitation" means and instead states that employers should not extensively analyze this requirement.

"The EEOC has listed various conditions that in virtually all cases meet the definition of disability."

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An Ounce of Prevention

By John H. McKendry, Jr.: **jmckendry@wnj.com**

Several major audit initiatives have been launched this year by government agencies involved with employee benefits. As a result, the agencies have identified areas of emphasis and common errors discovered during routine and random audits. What follows is a break down by agency of the targeted areas.

UNITED STATES DEPARTMENT OF LABOR

Thanks to electronic filing, the Department of Labor (DOL) now has the ability to search Forms 5500, in addition to non-governmental sources, for targeted concerns. The DOL's priorities are:

- Delinquent employee contributions (Criminal Project)
- Insolvent employers
- Employee stock ownership plans (employer securities valuations)
- Multiple employer welfare benefit plans
- Fees of consultants and service providers
- Review of low volume financial auditors

Non-project or random audits are largely triggered by participant or service provider complaints.

Of increased concern is the willingness of the DOL to seek criminal, rather than civil sanctions, for violations uncovered in project or routine audits. For criminal violations, ERISA has essentially only one misdemeanor provision, but three felony provisions. The DOL trumpets on its Web site: 281 criminal investigations, 97 guilty pleas and 96 individual indictments. If the business or profession of the plan sponsor involves required licensing, a felony conviction will often be a bar to continuing the business.

In a recent West Michigan case, the DOL initiated a felony prosecution for an employer who had been delinquent in transmitting less than $20,000 of employee contributions over a four-year period. The case was resolved with a misdemeanor plea, which preserved the employer's professional license.

PENSION BENEFIT GUARANTY CORPORATION

The Pension Benefit Guaranty Corporation (PBGC) is targeting defined benefit pension plan sponsors who cease operations at any facility with a resulting 20 percent decrease in participants. This can be the result of a closure by the employer or occur inadvertently in a merger or acquisition.

The event requires a notice to the PBGC under ERISA 4063(a) within 30 days and will trigger a request by the PBGC under ERISA 4062(e) for a prorata increase in funding as though the plan was terminating. The settlements with employers have been in the hundreds of millions of dollars.

INTERNAL REVENUE SERVICE

The Internal Revenue Service (IRS) is pursuing four major employee benefit audit initiatives:

- Full scope 401(k) plan review and questionnaire
- Independent contractor status
- Fringe benefits, employee reimbursements
- Executive compensation

In addition, the IRS has identified the following recurrent failures on audit and through its voluntary correction program:

- Failure to timely amend a retirement plan
- Utilization of a definition of compensation different than that in the plan document
- Failure to follow plan eligibility provisions
- Impermissible in-service distributions
- Distribution errors – incorrect forms, incorrect tax reporting and failure to timely make distributions
- Insufficient records retention or internal controls
- Erroneous 401(k) ADP and ACP nondiscrimination testing
- Improper 401(k) matching calculations
- Automatic enrollment failures

Often, the violations, if left uncorrected, have collateral consequences that are as large as the potential tax sanctions. For example, misclassification of independent contractors not only leads to increased employment tax liability but also can generate large claims for entitlements to retirement and health care benefits and claims by states for unpaid taxes and unemployment and workers' compensation payments and coverage.

PREVENTION AND CORRECTION

The best defense against an audit in these areas is a compliance review that surveys the areas of likely DOL, PBGC or IRS emphasis, followed by voluntary correction of any issues or failures.

An easy place to start is with a review of the plan's annual reporting Form 5500. From that form we can pinpoint areas of concern and often avoid triggering follow-up questions or compliance audits. In addition, we can advise you of the availability and terms of DOL and IRS correction programs that resolve compliance issues and avoid more severe audit sanctions.

Even if a review has not occurred before a notice of audit, there is often sufficient time to conduct a review and make necessary corrections before the auditor arrives. Such a review demonstrates a good-faith effort to comply and often mitigates or eliminates any audit sanctions.

Target-Date Funds: Some Pros And Cons

by Anthony J. Kolenic, Jr. : **akolenic@wnj.com**

Vanguard just reported that, at the end of 2010, 79 percent of defined contribution plans offered target-date funds and 48 percent of participants used them when offered. Target-date funds (or TDFs) offer a simple approach to investment decision making and portfolio construction and fit well with the growing use of automatic enrollment in defined contribution plans, particularly since the Department of Labor designated TDFs as a qualified default investment alternative (QDIA).

At the same time, a number of concerns have been expressed about TDFs. Those concerns should guide a prudent fiduciary's use of TDFs and the selection of a particular TDF family.

TDFs are well suited to be a default investment for participants who are automatically enrolled in a plan and who do not assume control over their account. All in all, the Department of Labor acted wisely in identifying TDFs as a QDIA for 401(k) plans. In some cases, however, plan fiduciaries have moved to TDFs as though they are the universal solution to all fiduciary investment questions. TDFs are certainly preferable to the pre-TDF world in which participants were simply offered a number of investment choices and asked to create their own portfolios. TDFs do create a one-stop shopping portfolio for participants that, used properly, can be very helpful to participants because of the simplicity of the system.

However, plan fiduciaries and participants should consider several factors when moving into TDFs. Some of them are explained in the following paragraphs.

THE "TO" VERSUS "THROUGH" GLIDE PATH ISSUE

Put most simply, some TDFs assume that participants will move money out of the TDF at retirement and, correspondingly, the equity holdings in the TDF closest to retirement are drastically reduced over time. Other TDFs assume that participants will leave funds in the plan and in the TDF through retirement, and therefore sustain a significantly higher level of equity exposure in the TDF to and through retirement. In addition, different TDFs operate under different philosophies – in some cases the goal is to insulate participants from losses and in other cases to capture gains into retirement years.

Neither glide path is wrong. The important point, however, is to understand the glide path used by the particular TDF and to educate participants about that glide path. Many participants learned this lesson the hard way in the 2008 market downturn, learning for the first time that the close-to-retirement TDF that they thought was very conservatively invested continued to have significant equity exposure.

Although this has tempered somewhat since the 2008 market downturn, the 2010 TDFs tested in one survey had equity holdings ranging from 2 percent to 65 percent. In 2008, for example, the 2010 TDFs surveyed lost between 9 percent and 41 percent of their value, depending on their level of equity exposure. In 2009, those same funds increased from 7 percent to 31 percent, again depending on the level of equity exposure.

Participants with the discipline to remain invested have probably recovered all of those losses, and perhaps more, but participants who did not have the discipline may have been hurt substantially by that lack of knowledge.

THE TDF'S NAME MIGHT BE MISLEADING

This point is closely related to the preceding point. While most TDF providers name the TDF to refer to the expected retirement date (e.g., the "2015 fund"), some instead refer to the date of the lowest equity exposure reached in the TDF lineup. If this is not identified and explained to participants, participants may allocate their funds into the wrong TDF.

TDFs PROVIDE ONLY A ROUGH RELATIONSHIP TO RISK TOLERANCE AND FINANCIAL GOALS

Clearly not everyone with a 10-year time frame to retirement has exactly the same risk tolerance and financial goals. Participants in that age range, for example, have spouses of different ages and assets outside of the retirement plan ranging from significant to non-existent. TDFs focus on one factor – expected age at retirement – as a proxy for risk tolerance, but it is possible with a bit more work to actually help participants identify their risk tolerance and place themselves in the target-date or other type of fund most closely matching that risk tolerance, whether or not it corresponds to a particular age. Once again, this should be explained to participants.

SOME TDFs USE OVERLY SIMPLIFIED MARKETING MATERIALS

In examining a TDF for your plan, be alert to implicit, if not explicit, representations of appropriateness. For example, materials often indicate that the particular TDF is "age appropriate." Studies show that participants perceive a promise in the marketing materials and a feeling that "it must be good, my employer picked it." So, review those materials with an eye toward avoiding over simplification and misleading statements.

"Because of the different approaches to creating TDFs and their different equity exposure, different TDFs perform differently over time, making it extremely difficult to compare one TDF lineup with another from a different provider."

PROPRIETARY TDFs MAY NOT BE "THE BEST OF THE BEST"

A TDF lineup consists of a number of composite portfolios designed to save participants the trouble of constructing their own portfolio. This is a good thing, since most participants are not well equipped to design their own portfolios. However, remember that the various TDFs (usually set up in five-year blocks) are themselves made up of mutual funds selected by the TDF provider.

Be alert to the fact that someone is deciding which mutual funds make up the particular target-date portfolios and that someone may have an interest in utilizing their proprietary component mutual funds rather than a competitor's better-performing mutual funds. A problem along these lines may be difficult to cure, but there likely won't be a cure unless you identify the problem.

REMOVING UNDERPERFORMING COMPONENTS MAY BE IMPOSSIBLE

This is a corollary of the preceding item. Even if you are alert to the problem, you may have limited ability to cause your TDF provider to remove underperforming components of a particular TDF. Of course, we would like to think that TDF providers would take the initiative in that regard, but we have seen situations where that did not occur, for whatever reason.

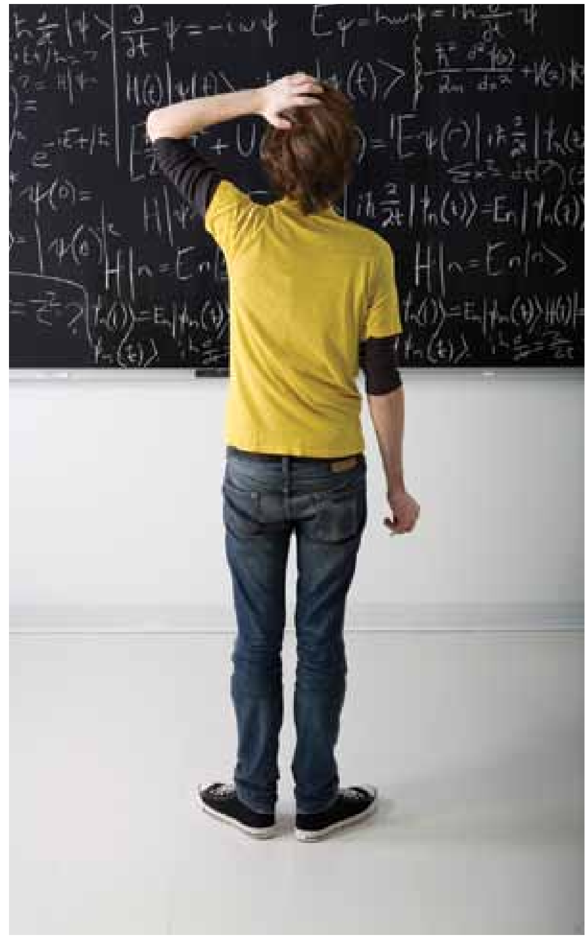
COMPARING TDF PROVIDERS IS TRICKY

It can be difficult to define and monitor appropriate peers for a particular TDF lineup. Because of the different approaches to creating TDFs and their different equity exposure, different TDFs perform differently over time, making it extremely difficult to compare one TDF lineup with another from a different provider. In addition, most TDFs do not have a long investment history that permits comparison over a lengthy period of time.

AUTOMATIC REBALANCING MAY ACTUALLY BE HARMFUL

Automatic rebalancing is usually a good thing. Participants seldom rebalance on their own initiative, so having a TDF provider handle that task is beneficial. However, there can be circumstances where that rebalancing, if done automatically on a set timetable by the TDF provider, harms participants. For example, if a TDF provider rebalances by increasing equity exposure in the middle of a significant market downturn – because the downturn has reduced the value of the equity component of the TDF – a participant in effect buys more equities in his TDF which then further decrease in value as the downturn continues.

Granted, over time, the additional equity exposure may significantly benefit the participant as the market recovers. The point is not to rebalance; the point is simply to be aware of how the TDF provider handles rebalancing so that information, too, can be passed on to participants as part of their decision-making process.



So, let's look at our friend, Joe, who earns $110,000 a year and is about to retire.

The 80 percent guideline suggests that Joe will need an annual expenditure of $88,000 in retirement, or $7,333 per month. Social Security will address some of Joe's needs but perhaps not as much as Joe might think. The current maximum Social Security benefit is $2,366 per month and that assumes that Joe has earned the maximum Social Security taxable amount for every year he has worked from age 21 forward. Just like for most people, that probably isn't true for Joe. In any event, we will assume that Joe will receive $2,366 per month in Social Security benefits, which will leave a gap of around $5,000 per month, or $60,000 per year.

Twenty times that annual need of $60,000 per year is $1.2 million. Accumulating 20 times his annual need allows Joe to withdraw 3 percent (on the conservative side) to 5 percent (on the aggressive side) of his account per year and still have a reasonable chance of sustaining a 30-year retirement. But with "only" $1.2 million in the bank, Joe would have to withdraw an aggressive 5 percent per year in order to have $60,000 in retirement income to supplement his Social Security benefit.

Another approach, which often produces a similar result, is to aim for an accumulation equal to 12 times your income in assets by age 65, once again in order to replace 80 percent of your pre-retirement income. Twelve times Joe's annual income of $110,000 per year prior to retirement suggests that Joe should accumulate a bit more – $1.32 million.

Joe should bear in mind as well that an inflation rate of 3 percent per year over 10 years erodes purchasing power by 25 percent. Over 20 years, that 3 percent inflation rate erodes purchasing power by 50 percent.

Joe should also be concerned about spending on health care in retirement. The nonpartisan Employee Benefit Research Institute just released a study indicating that men retiring in 2010 at age 65 will need anywhere from $65,000 to $109,000 in savings to cover health insurance premiums and out-of-pocket expenses in retirement, just to have a 50/50 chance of success in that regard. To have a 90 percent chance of covering those expenditures in retirement, the amount increases to between $124,000 and $211,000.

Women retiring in 2010 at age 65 will need between $88,000 and $146,000 for a 50 percent chance of having enough money to cover health insurance premiums and out-of-pocket expenses, and $143,000 to $242,000 to have a 90 percent chance. This study assumes eligibility for Medicare, so anyone retiring earlier than age 65 would need even more.

In addition, Joe needs to consider that defined contribution plans do not spread the risk of living longer than anticipated over a wide population of people. Rather, the risk rests with the individual. In that regard, of 10 people who reach age 65 and retire, one will have to pay for just four years of retirement while another will have to pay for 34 years. The other eight will have to pay for a period of retirement between four and 34 years. So even if a participant saves enough for his or her life expectancy, 50 percent of participants will outlive that life expectancy.

Perhaps Joe, armed with this information, will wish that he had increased his elective deferrals to the plan. On average, participants contribute 6 percent of pay (5.2 percent for non-highly compensated employees and 6.7 percent for highly compensated). Let's assume Joe has been contributing 6.7 percent of his pay. For the year prior to retirement, this would be $7,370 (6.7 percent times $110,000). At that contribution rate, it is doubtful that Joe will have accumulated anywhere near his target of $1.2 million to $1.3 million by age 65.

In fact, Vanguard recently released a recommended contribution level of 12-15 percent of current pay, assuming contributions are made on a regular basis over one's entire working career. It may be too late for Joe . . . .

Congress is beginning to catch on. It's too early to tell for sure, but we may see Congress mandating communication with participants about these issues and perhaps an eventual requirement that annual benefit statements for 401(k) plans translate the account balance each year into projected monthly income for the participant.

That is a potentially helpful development, but it may be prudent to begin addressing this retirement math sooner rather than later. The sooner participants realize the road they have to be on in order to retire successfully, the more likely they are to reach that destination.

discriminatory adverse impact on individuals of certain races or national origins.

As such, an employer would be well advised not to adopt a blanket policy or practice that bars anyone with a criminal conviction from employment. The employer should also be prepared to show that, before rejecting an applicant because of a prior criminal conviction, it considered the nature and seriousness of the crime, the time that has passed since the conviction or completion of the sentence, and the nature of the job sought or held by the individual.

Employers who use traditional credit reports in the hiring process must not only comply with the FCRA, but recognize that such a practice is subject to the same adverse-impact concerns as conviction records. The EEOC, concerned that use of credit reports and credit scores has a discriminatory adverse impact against certain individuals, is suspicious of such practices and is contemplating publishing guidance on the subject.

Furthermore, several states have laws which prevent employers from using credit history in the hiring process unless there is some particular relevance to the job in question. Legislation prohibiting or limiting an employer's ability to use credit reports or scores in the hiring process is pending in several states, including Michigan. A bill that was recently introduced in the Michigan House would prohibit employers from inquiring into or refusing to hire or recruit an individual for employment based on his or her credit history unless good credit history is a "bona fide occupational requirement" for the position at issue (e.g., employees of banks, credit unions, securities firms, etc.).

Finally, federal bankruptcy laws prohibit public employers from denying employment to, or discriminating in employment against, a person "solely" because that person is or has been a bankruptcy debtor or is associated with a debtor. Private employers, on the other hand, are prohibited from discriminating in employment against a bankruptcy debtor "solely" because of that status, but almost every court has found that prohibition does not extend to a private employer's refusal to hire a bankruptcy debtor.

In summary, employers should investigate the background of every employee they hire. The extent of that investigation may depend upon the position at issue, but in doing so, ensure that you are complying with the applicable state and/or federal laws.

> "A bill that was recently introduced in the Michigan House would prohibit employers from inquiring into or refusing to hire or recruit an individual for employment based on his or her credit history unless good credit history is a 'bona fide occupational requirement' for the position at issue."

Employers should also limit the type of information sought to that which is relevant to the job in question. Those employers who establish blanket policies risk liability if their standards or qualifications have the effect of excluding persons of a particular race, national origin or other protected characteristic. As for information that is requested, ensure the candidate verifies that the information provided is accurate as falsification or omission of information can be a separate reason for rejection (or dismissal if it is discovered after the person is hired).

If you need help navigating the FCRA maze or evaluating your other hiring policies and procedures, please contact anyone in our Labor and Employment Law Practice Group.

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- The EEOC regulations make clear that employers cannot consider mitigating factors such as medicine, treatment, hearing aids, prosthetic devices, etc. when deciding whether an employee is disabled. So, even if a person has a disabling condition that is completely controlled by medication and there are no outward symptoms, that person is still disabled. Further, the EEOC makes clear that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active, even if the active episode(s) are "brief" and "occur[s] infrequently."

- The EEOC regulations make it easier for individuals to establish that they are "regarded as" having a disability by putting the focus on how the employee has been treated because of an impairment, regardless of whether the employer actually believed the impairment was a disability. So, an employee who has a minor lifting restriction following hernia surgery could be "regarded as" and thus protected as "disabled" even though the condition is clearly not a disability under the statute. It is important to note, however, that the regulations do state that employers do not have to provide accommodations to employees who are simply "regarded as" disabled.

"The key analysis now is whether or not a disabled employee is otherwise qualified to perform the essential job functions with or without a reasonable accommodation."

So what should employers do in the face of these new rules? Here are a few suggestions. First, and most simply, if an employee has a condition and requests an accommodation that is easy and cheap to provide, employers should simply grant the request. Do not investigate if the employee has a disability. Avoid mentioning the ADA or the legal buzzword "reasonable accommodation." Just call it a job modification and make a record of it. By doing so, the employer has met its obligations under the ADA and could still argue the person does not have a disability if the situation breaks down in the future.

Second, if the necessary accommodation is not easy or cheap and the employer needs to do an analysis of whether or not it has to provide the accommodation, the employer should not rely on an argument that the person does not have a disability – unless the condition is very minor and/or short term (i.e., 3-month duration or less).

Third, since the key analysis now is whether or not a disabled employee is otherwise qualified to perform the essential job functions with or without a reasonable accommodation, employers should review their job descriptions and make sure they are accurate and list all key components of the job.

The ADAA and the EEOC regulations will assuredly be the subject of much litigation, which will help define employer's obligations. We will keep you apprised of any major developments. In the meantime, if you have questions about the new regulations or would like assistance in your disability accommodation process, you may contact Jon Kok (jkok@wnj.com or 616.752.2487) or any member of Warner's Labor and Employment Practice Group.

So should you dump your exception timekeeping system? Of course not. We already told you that it is lawful under the FLSA if it results in an accurate record of non-exempt employees' hours worked. Just don't forget that accuracy is the employer's burden, and may be harder to ensure when time is calculated automatically.

The St. Joseph's Hospital class action suit should serve as a reminder that supervisors must keep an eye on employees. Under the exception timekeeping system, employers must be notified when employees don't take meal breaks. And don't forget, if employees do work through lunch – even when you don't want them to – you have to pay them. You also might want to talk to them about following directions.

It is never a solution to refuse to pay an employee when the employee is working. Always remember, no timekeeping system relieves you of your responsibility to make sure that your timekeeping records are accurate.

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