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EEOC Challenges TB Testing Practices

By A. Kevin Troutman (Houston)

For years, hospitals and most other healthcare providers have regularly screened new and existing employees for tuberculosis as part of their required infection-control programs. However, the U.S. Equal Employment Opportunity Commission's (EEOC) recent challenge of an employer's TB screening practices may change the way healthcare employers approach this fundamental and long-practiced precaution.

Expanding Its Approach

On May 30, the EEOC announced a consent decree with a Michigan rehabilitation and nursing company, settling a lawsuit initiated by the Commission. As a result, the company must pay an employee $25,000.00 and retrain employees involved in its hiring and screening processes. The EEOC contended that the company violated the ADA by not allowing an employee to work after she tested positive during a preliminary TB screening. Specifically, the Commission alleged that the company discriminated by regarding the employee as disabled, even though she was purportedly not contagious and posed no direct health risk to those around her.

The facts of this case are highly specific, but the implications illustrate some challenges of ADA compliance and could have far-reaching implications. According to the U.S. Centers for Disease Control and Prevention (CDC), people who work or receive care in healthcare settings

are at higher risk for becoming infected with TB. Therefore, healthcare facilities must have detailed infection-control plans to ensure prompt detection of infectious patients, airborne precautions, and treatment of people with *suspected* or confirmed TB disease. A fundamental goal of these plans is to reduce the risk to uninfected people who may be exposed. Testing of healthcare workers, under the supervision of qualified healthcare professionals, meets these requirements and goals.

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Weighing The Risks Of Not Hiring Obese Applicants

By A. Kevin Troutman (Houston)

While most supervisors intuitively recognize and grasp some fundamentals of non-discrimination laws, other questions are becoming increasingly complicated, even for seasoned human resources professionals. Setting aside the complexity of issues like "admissible evidence" or "disparate impact," it's easy to understand that employment decisions should not and cannot be based upon factors such as race, national origin, gender, age, pregnancy, or disability. Federal and state laws make this abundantly clear. On the other hand, emerging issues, some of which are arguably more related to lifestyle choices than immutable characteristics, continue to raise complicated questions.

"You're Too Heavy"

For example, a Texas hospital's policy disqualifying applicants for being too overweight presents such thorny issues. In deciding that it would not hire applicants with a body mass index (BMI) of 35 or higher, Citizens Medical Center (CMC) in Victoria asserted its rights to establish appearance standards for its employees. Thus, a person who stands 5-foot-10 and weighs 245 pounds would have a BMI of about 35 and be ineligible to work at the hospital.

No federal or Texas law prohibits discrimination on the basis of weight – only one state and a few cities in this country have adopted such laws. However, the EEOC has filed lawsuits on behalf of morbidly obese employees whom it contends were disabled and thus entitled to protection under the Americans with Disabilities Act (ADA).

Not far away, in Sealy, Texas, the EEOC filed suit on behalf of a morbidly obese employee allegedly terminated because of his weight. This was not the first time for the EEOC to take up this issue. It remains to be seen whether it will weigh in on CMC's policy, but such questions seem certain to spark more litigation.

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Automatically Deducting For Meal Breaks Can Be Costly

By A. Kevin Troutman (Houston)

Automatic deductions, where the employer's timekeeping system assumes and deducts for a 30-minute meal break, have proved to be a fruitful target for plaintiffs. During the past 10 years, over 40,000 lawsuits have been filed under the federal Fair Labor Standards Act (FLSA), and the trend shows no signs of easing. Filings increased by 10% in 2010. There has been a similar flood of lawsuits under state and local laws.

This wage-and-hour litigation has become almost a "cottage industry" for plaintiffs' lawyers seeking high-dollar, high-profile cases. These cases are becoming increasingly common not only because they usually involve numerous employees, but because the law allows prevailing employees to recover liquidated (or double) damages, plus attorneys' fees.

These cases are also unique and troublesome because, unlike most employment litigation, the hospital's intentions are irrelevant. In other words, even a logical, well-intentioned policy does not prevent liability when a technical violation occurs.

Within the broad classification of so-called "off the clock" FLSA cases, missed meal-and-break periods allegations are increasingly common. These allegations can be even more costly because the allegedly unpaid work time often pushes the employee's compensable time to more than 40 hours in a week, thus into a higher overtime pay rate. Fortunately, it is also relatively easy to reduce or even eliminate exposure in these cases.

The Legal "Lay of the Land"

Federal law (and many states' laws) do not even require employers to provide meal breaks for employees. But regardless of whether break or meal periods are involved, you *must* pay workers for all time worked. This includes not only time that was authorized, but *all* time worked, if you either knew or *should have known* about it.

The employer is responsible for creating and keeping accurate records of all such time. In fact, in the absence of solid evidence to contrary, courts and the U.S. Department of Labor (DOL) are likely to accept an employee's recollections, sometimes even when contradicted by a hospital's documented records. Thus, your records *and practices* must demonstrate compliance with the law.

Short 10- or 20-minute breaks are normally compensable and cannot be considered unpaid meal breaks. To be excluded from compensable work time, a meal break must normally last at least 30 minutes and be *uninterrupted*. If employees are unable to leave their workstations or are interrupted, the meal period will probably be considered compensable time.

In a patient-care setting, it can be difficult for an employee to take an uninterrupted, bona fide meal break. This is why the practice of automatically assuming (and deducting time for) 30-minute meal breaks can result in repeated and costly violations of the law. This practice apparently originated to streamline record-keeping where employees were normally able to take meal breaks. On occasions when employees couldn't take such breaks, they were responsible for reporting or documenting it in their time records.

While that approach may sound logical, a hospital cannot escape liability by simply instructing employees to record and report missed meal breaks, especially during today's lean economic times. Some employees

inevitably forget or neglect to do this. Recognizing that this practice does not relieve employers of the responsibility to record and pay for all time that employees work, plaintiffs' lawyers and the DOL have made this practice a favorite target area in wage and hour investigations and litigation. Some plaintiffs' firms have aggressively marketed in this area, using billboards and websites. Some have even purchased lists of registered nurses and used direct mail solicitations addressing this very issue with hospital workers.

Our Advice

To safeguard against this trend, many hospitals have returned to the nearly-abandoned practice of having workers literally clock out for meal periods and clock back in when they return to their workstations. By itself, this change considerably reduces the risk of lawsuits seeking unpaid wages for missed (but deducted) meal periods.

But hospitals can do more to avoid a wave of wage-and-hour litigation. First, ensure that your time-recording policies are current and accurately describe actual practices. Second, and even more important, policies *and practices* should emphasize that – although employees must check with a supervisor before working overtime or missing a meal break – the most important thing to do is to record all time accurately. The hospital's time records could be rendered nearly useless if a plaintiffs' lawyer shows there was an actual practice of working "off the clock."

Finally, when a question or problem arises, establish a pattern of addressing it promptly and fairly, without permitting any semblance of retaliation against the person who complained.

The rising tide of wage-and-hour litigation shows no signs of relenting, but with these few steps, hospitals can significantly reduce their risk of getting soaked.

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Other Topics Also Lead To Controversy

Obesity is not the only issue generating controversy in the area of hiring policies. Prohibitions related to off-duty, off-premises use of tobacco can also be complicated. In some states, it is illegal to discriminate against an employee because of such activity. There is no such law in Texas, however, so Baylor Health System announced a blanket policy not to hire employees who use tobacco products. Many other employers have adopted such policies.

While questions regarding tobacco use appear to be more straightforward for employers, the answers to questions concerning other lifestyle or related issues are not. For example, an employee's transgendered status, or questions regarding an applicant's criminal background, can present not just practical, but legal dilemmas. Although neither category is expressly protected by law, the EEOC recently made clear that it considers employment discrimination based upon gender identity to be a violation of Title VII, and recently issued new guidelines allowing only very limited consideration of an applicant's history of criminal convictions.

The Commission even went so far as to opine that state laws *requiring* the use of criminal background checks may not save an employer from being found in violation of federal law. In each of these situations, the required analysis is very fact-specific and an error could lead to an inadvertent violation of the law.

More On Obesity

CMC's position regarding obese applicants illustrates the complexity of adopting and administering policies in these areas. Even though not expressly protected by law, morbid obesity may be protected if it rises to the level of a disability under the ADA or if it is the result of an underlying disability. If a condition significantly limits a person in the performance of one or more major life activities, it can trigger ADA coverage.

In such a case, regardless of what the employer's policy says, the employee or applicant would likely be entitled to a reasonable accommodation, if that accommodation would enable the person to

perform the essential functions of the job in question. Because the ADA requires a fact-specific, individualized analysis of accommodation requests, blanket policies are inherently risky. Those involved in the analysis must proceed and document their evaluation appropriately.

Staying Safe

That means a blanket policy barring all morbidly obese applicants from consideration could easily violate the law with respect to at least some jobs. For example, even though no accommodation might be available to enable an obese maintenance worker to perform all the essential functions of a job, reasonable accommodations may permit a telephone or computer operator to do so. Failure to consider this and offer such accommodation requested by an eligible employee or applicant would violate the ADA.

The bottom line is that evolving lifestyle and similar issues continue to pose tricky questions for employers trying to attract and retain a qualified workforce while complying with the law. Traps and risks are not always apparent, so it's worthwhile to think through such policies carefully and consult legal counsel where the result may disqualify applicants or employees from jobs. Failure to take such precautions could prove costly.

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In the Michigan case, the tension apparently arises from the contention that a positive result on a preliminary screening test led to an employee being unreasonably kept from working, even though she was purportedly not infectious. Although that analysis ultimately turns on the informed opinions of medical professionals, this scenario makes one powerful point: under the Americans with Disabilities Act, there are virtually no "one size fits all" solutions. In every case, employers must be able to demonstrate that they have conducted an individualized analysis of the employee's circumstances. Without an analysis tailored to the employee's specific condition, working conditions and duties, simply following "standard" practices or policies will not pass muster.

In other words, an employee who tests positive for an infectious condition can likely be excluded from direct patient contact and perhaps from contact with fellow employees. On the other hand, if the condition is not infectious or may be reliably addressed by the use of "standard precautions," there may be no legitimate reason to remove the employee from the workplace.

Thus, even though the EEOC's action may at first blush seem to be unreasonable or overly-intrusive, the points of controversy are becoming increasingly clear. To avoid potential ADA violations, you must conduct and document individualized evaluations not just when you receive requests for accommodations, but when an employee's medical or mental condition appears to be interfering with the safe performance of the employee's duties.

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DOL Targets Healthcare Employer For Violations

By Ted Boehm (Atlanta)

A recent announcement from the U.S. Labor Department's Wage and Hour Division highlights the risks that healthcare employers face when they do not properly compensate employees for overtime hours and do not maintain accurate records. In May, DOL announced that Extended Health Care, Inc. of Downey, California had agreed to pay more than $654,000 in back wages to 108 current and former registered nurses and licensed vocational nurses. The settlement culminated a multi-year DOL investigation that began in 2009. The company, which provides skilled nursing care to patients in their homes, also committed to comply with the Fair Labor Standards Act (FLSA) in the future.

In this case, the company committed several FLSA violations, including failing to maintain required timekeeping records, misclassifying employees, and failing to make mandatory payroll withholdings. Perhaps most significantly, the company also failed to properly pay overtime to employees. According to the DOL, the company paid certain employees only "straight time" for hours worked in excess of 40 per workweek, rather than time and one-half their regular rate for overtime hours.

DOL has also implied that the company misapplied the "8 and 80" rule, set forth under section 7(j) of the FLSA, although it has not publicly identified a precise violation of the rule. Under section 7(j), hospitals and residential care establishments may use a fixed work period of fourteen consecutive days, instead of the 40-hour workweek, for purposes of computing overtime. The "8 and 80" rule allows covered employers to pay one and one-half times the employee's regular rate for all hours worked in excess of 8 in a workday or 80 in a 14-day period, whichever is greater.

The DOL's announcement is just the latest example of an increasing trend of enforcement action by the agency. It represents an example of the consequences of incorrect wage and hour policies. Employers should use the announcement as a reminder to ensure that their method of computing overtime payments is compliant **both** with the FLSA and any applicable state law.

The "8 and 80" rule itself underscores the confusion that employers can experience when confronted with an apparent conflict in federal and state wage and hour laws. While the FLSA permits the "8 and 80" method of computing overtime payments for qualifying employers, state law may not.

For example, a Philadelphia Court found in 2010 that a hospital system violated Pennsylvania's Minimum Wage Act by calculating employees' overtime payments based on the "8 and 80" rule because, according to that court, state law did not provide for that method of overtime calculation. Employers must therefore remember that compliance with the FLSA does not necessarily translate into compliance with state law. To be fully compliant, you must review the requirements of both.

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Other News and Resources for Healthcare Employers

Healthcare Reform – Time to Get to Work

Now that the Supreme Court has upheld the Affordable Care Act, employers face plenty of work to prepare for implementation. The benefits attorneys at Fisher & Phillips have prepared a free webinar to help employers understand how to begin the planning and preparation process. You can access a recorded version of this webinar at our Webinar Library. It's under the "news and events" tab on our website at www.laborlawyers.com.

The 13(a)(15) Companionship Exemption is Still Under Attack

The U.S. Labor Department (DOL) has proposed a regulation that would drastically limit this important exemption to the Fair Labor Standards Act. As proposed, the new rules would drive up the cost of in-home care for the elderly and infirm, thereby forcing more senior citizens away from receiving assistance in private homes and into group homes or institutions. Members of both the House and Senate have introduced legislation to prevent the DOL from implementing these changes. Follow these and related developments on the Fisher & Phillips Wage and Hour Blog, at http://wage-hour.net.