

# PREVENTIVE *Strategies*



EMPLOYMENT, LABOR,  
 BENEFITS AND IMMIGRATION  
 LAW FOR EMPLOYERS

## DISABILITY MANAGEMENT

### ADA DOES NOT PROTECT BLIND EMPLOYEE WITH PERFORMANCE PROBLEMS AND INSUBORDINATE BEHAVIOR

**S**AYING THE AMERICANS WITH DISABILITIES ACT “ONLY PROTECTS ‘QUALIFIED INDIVIDUALS’: those who can perform the essential functions of their job with or without reasonable accommodations,” a federal appeals court upheld the performance-based termination of a blind employee. Ruling unanimously in the employer’s favor, the U. S. Court of Appeals for the 7th Circuit reasoned that the ADA’s protections do not “shelter disabled individuals from adverse employment actions if the individual, for reasons unrelated to his disability (such as a poor work ethic, carelessness, bad attitude, insubordination or unprofessional demeanor), is not qualified for the job or is unable to perform the job’s essential functions or fulfill the requirements of the position as prescribed by the employer or ‘fails to meet his employer’s expectations’” [*Hammel v. Eau Galle Cheese Factory* (7th Cir., 2005)].

The employee who was sightless in one eye and had “tunnel vision” in the other eye was hired on a trial basis for a general laborer position with the employer, a cheese factory in Wisconsin. From the start of his employment, his supervisors noted performance problems with various stages of the cheese-making process, such as failing to “turn” or “flip” cheese wheels during the molding process and failing to stamp each wheel with a production date. The supervisors also noted that the employee did not keep up with the production line, and the performance problems were resulting in damaged products and waste.

In addition to the performance problems, the employee was alleged to have a poor attitude about work and safety, evidenced by a variety of incidents that potentially were dangerous to himself and other workers. He also was alleged to have ignored admonitions to stop making personal phone calls on work time and taking unauthorized cigarette breaks. He was terminated before the end of his probationary period, and was told by the employer’s business manager it was because of “his limited vision and the fact that it ‘interfered “to some extent” with his work and caused [management] concern for his safety and the safety of his coworkers.’”

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Rejecting the employee's contention that evidence of his poor performance and attitude and his careless behavior was irrelevant in determining whether he was a "qualified individual with a disability" under the ADA, the appeals court upheld the termination. The court noted that evidence that the employee repeatedly disregarded safety and operational rules, ignored warnings about work rule violations, and failed to keep up with the factory's workflow for reasons unrelated to his blindness was plainly relevant. The appeals court also agreed with the trial court that the employee was not a "qualified individual" under the ADA, since he did not establish how the employer could have reasonably accommodated him to perform the essential functions of the job. 📌

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#### PREMATURE MEDICAL EXAM MAY INVALIDATE HIRING PROCESS

A DECISION FROM THE FEDERAL APPEALS COURT IN San Francisco has reinforced the admonishment that employers must follow the provisions of the Americans With Disabilities Act to the letter to avoid liability. In the case, the U.S. Court of Appeals for the Ninth Circuit has ruled that an employer's hiring processes may violate the ADA and related state statutes if those processes do not exactly follow the ADA-prescribed sequence.

Three individuals, all of whom are HIV positive, applied for flight attendant positions. After initial interviews, the airline issued each of them conditional offers of employment contingent upon passing both background checks and medical examinations. As part of the exams, they were also required to complete medical history questionnaires that asked, among other questions, whether they had any "blood disorder or HIV/[AIDS]." None of the applicants disclosed their HIV-positive status or that they were taking related medications.

When the applicants' blood tests subsequently revealed they were HIV-positive, the airline rescinded the job offers, citing the applicants' failure to disclose information during their medical examinations. The applicants, all California residents, challenged the airline's medical inquiries and examinations, claiming they were prohibited by the ADA and California's Fair Employment and Housing Act (FEHA).

**The ADA's protections do not "shelter disabled individuals from adverse employment actions if the individual, for reasons unrelated to his disability, is not qualified for the job or is unable to perform the job's essential functions."**

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Although the U. S. District Court granted summary judgment for the airline on all counts, the Ninth Circuit reversed that ruling. The appeals court found that the ADA and FEHA not only bar intentional discrimination in the hiring and employment of persons with disabilities, they also regulate the sequence of the employers' hiring processes. Both statutes prohibit medical examinations and inquiries until after the employer has made a "real" job offer to an applicant.

In this case, the airline administered the medical questionnaire and gave the blood tests before a background check was conducted. Since the medical exam was not the last stage of the airline's hiring process, according to the appellate court, "the offers were therefore not real, the medical examination process was premature, and [the airline] cannot penalize the applicants for failing to disclose their HIV-positive status." The Ninth Circuit also held there was an issue whether the applicants' privacy rights under California law were violated when the airline failed to provide notice or obtain consent prior to the blood tests, which were outside of the ordinary and accepted medical practice regarding general or pre-employment medical exams. [*Leonel v. American Airlines, Inc.* (9th Cir., 2005).]

#### What Employers Should Consider

This decision requires employers to review their hiring procedures to ensure that medical examinations occur as the final step in the pre-employment process. Employers should also ensure that blood and other tests conducted during exams are not outside of the ordinary and accepted medical practice for general or pre-employment medical exams. If exams necessarily require tests that are outside general practices, procedures should be established for providing notice to applicants and for obtaining their consent to such tests.

Jackson Lewis attorneys are available to assist employers in re-examining their hiring processes and developing required procedures and notices. 📌

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For more information, please contact the attorney with whom you regularly work, or **Disability Management Practice Area** coordinators:

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## EMPLOYEE BENEFITS

### CAFETERIA PLANS MAY BE AMENDED TO PROVIDE PARTICIPANTS MORE TIME TO USE THEIR FSA BENEFITS

ON MAY 18, 2005, the Treasury Department issued Notice 2005-42, which allows employers to modify their cafeteria plans to extend the deadline for reimbursement of health and dependent care expenses up to two months after the end of the plan year. Although this Notice will chiefly impact health Flexible Spending Arrangements (FSAs), it also applies to other cafeteria plan benefits, including dependent care assistance programs. See <http://www.irs.gov/pub/irs-drop/n-05-42.pdf> for a copy of the Notice.

A health FSA may be included as part of a cafeteria plan (also known as a section 125 plan). FSAs allow employees to elect to have a portion of their earnings withheld on a pre-tax basis to be later drawn on as reimbursement or payment for qualified medical expenses.

One of the biggest drawbacks for employees had been that any contributions for a plan year that were not used for expenses incurred during that year were forfeited (this is known as the "use-it-or-lose-it rule"). The new rule does not abolish the use-it-or-lose-it rule, but as Treasury Secretary John Snow stated, "The new rule will give workers with FSAs more time to pay for medical and dependent care expenses and will ease the year-end spending rush prompted by the prior rule."

### Key Provisions of Notice 2005-42

The key provisions of Notice 2005-42 are:

- **Two Month Grace Period:** An employer has the option to amend its cafeteria plan to provide participants a grace period lasting no longer than two months following the end of a plan year. An employee may apply any unused FSA funds from the plan year preceding the grace period toward qualified expenses incurred during the grace period.
- **Applicable To All Participants:** If adopted,

*"The new rule will give workers with FSAs more time to pay for medical and dependent care expenses and will ease the year-end spending rush prompted by the prior rule."*

the grace period must apply to all participants in the cafeteria plan. The IRS has yet to clarify whether this would preclude employers from applying the grace period to certain benefits (such as a health FSA), but not others (such as dependent care).

- **No Cash-Out, Conversion, or Carryforward:** During the grace period, unused FSA funds may not be cashed-out or converted to any other benefit. This means that unused health FSA funds may not be used to pay or reimburse dependent care or other expenses incurred during the grace period. Furthermore, the unused FSA funds at the end of the grace period are forfeited under the use-it-or-lose-it rule.
- **Run-Out Periods Still Permitted:** Employers may provide a "run-out" period following the grace period to permit employees to submit their expenses incurred during the plan year and grace period.
- **Amendment For The Current Plan Year Permitted:** An employer may adopt a grace period effective beginning with the current cafeteria plan year, provided that the plan document is amended before the end of the current plan year.
- **Future Guidance:** The IRS will modify Prop. Reg. § 1.125-1, Q&A 7 and Prop. Reg. § 1.125-2, Q&A 5 to reflect Notice 2005-42.

### Examples of How the Notice May Affect Cafeteria Plans

In Example One, an employer with a cafeteria plan year ending on December 31, 2005, amended the plan document before the end of the plan year to permit a grace period, which allows all participants to apply unused benefits or contributions remaining at the end of the plan year to qualified benefits incurred during the grace period immediately following that plan year. The grace period adopted by the employer ends on the fifteenth day of the

third calendar month after the end of the plan year (March 15, 2006 for the plan year ending December 31, 2005).

Employee X timely elected salary reduction of \$1,000 for a health FSA for the plan year ending December 31, 2005. As of December 31, 2005, X has \$200 remaining unused in his health FSA. X timely elected salary reduction for a health FSA of \$1,500 for the plan year ending December 31, 2006. During the grace period from January 1 through March 15, 2006, X incurs \$300 of unreimbursed medical expenses. The unused \$200 from the plan year ending December 31, 2005 is applied to pay or reimburse \$200 of X's \$300 of medical expenses incurred during the grace period. Therefore, as of March 16, 2006, X has no unused benefits or contributions remaining for the plan year ending December 31, 2005. The remaining \$100 of medical expenses incurred between January 1 and March 15, 2006 is paid or reimbursed from X's health FSA for the plan year ending December 31, 2006. As of March 16, 2006, X has \$1,400 remaining in the health FSA for the plan year ending December 31, 2006.

In Example Two, assume the same facts as Example One, except that X incurs \$150 of medical expenses during the grace period (January 1 through March 15, 2006). As of March 16, 2006, X has \$50 of

**E**mployers that amend their cafeteria plans to provide a grace period will have to adjust their administrative and record-keeping procedures accordingly.

unused benefits or contributions remaining for the plan year ending December 31, 2005. The unused \$50 cannot be cashed-out, converted to any other taxable or nontaxable benefit, or used in any other plan year (including the plan year ending December 31, 2006). The unused \$50 is subject to the "use-it-or-lose-it" rule and is "forfeited." As of March 16, 2006, X has the entire \$1,500 elected in the health FSA for the plan year ending December 31, 2006.

### Action Item for Employers

Employers that amend their cafeteria plans to provide a grace period will have to adjust their administrative and record-keeping procedures accordingly. It is hoped that the Internal Revenue Service will provide further guidance on whether adopting a grace period could impact the COBRA or HIPAA obligations of a Flexible Spending Arrangement.

Jackson Lewis Employee Benefits Practice Group attorneys are available to discuss questions about this development, or provide assistance in amending employer cafeteria plans. 📧

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## IMMIGRATION

### PRESIDENT SIGNS APPROPRIATIONS ACT WITH SIGNIFICANT IMMIGRATION PROVISIONS

**T**HE \$82 BILLION APPROPRIATIONS legislation, "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005," was signed into law by President Bush on May 11, 2005. It contains a wide variety of immigration measures which significantly impact the admission and employment of foreign nationals in the United States.

Among the changes to immigration, the legislation sets minimum standards for federally acceptable state-issued identifica-

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tion cards and driver's licenses, provides H-2B relief to small and seasonal businesses, creates a new professional visa for Australian nationals, and recaptures unused Employment-Based Immigrant Visas for "Schedule A" occupations.

### The REAL ID Act of 2005

Perhaps most significantly, the appropriations act addresses provisions for Acceptable Identification Cards and Driver's Licenses, to become effective May 2008, as follows:

- Establishes minimum document requirements and issuance standards,

including verification of immigration status, for federal recognition of state-issued identification cards and driver's licenses. These requirements and standards will make it almost impossible for undocumented workers to obtain these documents.

- Prohibits federal agencies from accepting any state-issued identification card or driver's license which does not meet the above requirements for purposes of accessing federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, etc.
- Restricts issuance of driver's license to aliens in temporary nonimmigrant visa status on a temporary basis not to exceed the duration of their authorized stay.
- Requires states to enter into a Memorandum of Understanding with the Department of Homeland Security under the SAVE Program no later than September 11, 2005 to verify the legal presence of all noncitizen driver's license applicants.
- Requires any state-issued alternative identification documents that do not comport with the federal requirements to have a unique design or color indicator and clearly state that the card may not be accepted by any federal agency.

The Real ID Act also provides for the construction of a border fence between Tijuana, Mexico and Southern California and appropriates substantial funds for the addition of over 500 new Border Patrol Agents and almost 2,000 beds for detainees.

### Save Our Small and Seasonal Businesses Act of 2005

The appropriations act also includes immigration provisions applicable to small and seasonal business. The act exempts from the H-2B numerical cap aliens who have already been counted toward the H-2B cap during any one of the previous three fiscal years. Such an alien is considered a "returning worker. The exemption takes effect as if enacted on October 1, 2004 and expires on October 1, 2006.

**The use of the visa "bank" is reserved for immigrant worker petitions based on Schedule A immigrants (nurses, physical therapists, and performing artists of exceptional ability).**

The Act imposes a \$150 fraud prevention and detection fee on employers filing an H-2B petition. A \$500 fraud prevention and detection fee already applies to new H-1B and L-1 visa petitions. It also authorizes the Department of Homeland Security to assess penalties against employers for substantial failure to comply with any conditions of the H-2B petition, effective October 1, 2005.

### New Professional Visa for Australian Nationals

The appropriations measure creates a new reciprocal E-3 visa category for nationals of Australians who have U.S. job offers in "specialty occupations". The new law will largely take Australians out of the H-1B quota and offer them a visa that is similar, but more flexible than the H-1B. The E-3 visa also has some of the elements of an E treaty visa and can be viewed as a hybrid that should be highly useful to Australian nationals seeking work in the U.S.

### Recapture of Unused Employment-Based Immigrant Visas for "Schedule A" Occupations

The appropriations act also allows for the use of previously unused employment-based visas by placing the unused visa numbers from fiscal years 2001-2004 in the "bank" for use in future fiscal years when the demand for employment-based visas in EB-1, 2, and 3 exceeds the annual quota. The use of the visa "bank" is reserved for immigrant worker petitions based on "Schedule A" immigrants (nurses, physical therapists, and performing artists of exceptional ability) and for accompanying or following family members. The total number of visas used from the "bank" may not exceed 50,000. This provision will provide much needed relief from the three-year backlog caused by the January 1, 2005 retrogression of immigrant visa numbers for the EB-3 category (professional and skilled workers) for persons born in India, China and the Philippines. 🌱

FOR MORE INFORMATION, please contact the Jackson Lewis **Immigration Practice Group**, or partner **William J. Manning**, (914) 514-6115; [ManningW@jacksonlewis.com](mailto:ManningW@jacksonlewis.com).

## LABOR RELATIONS

### FOUR UNIONS CHALLENGE AFL-CIO AND SWEENEY TO SHOWDOWN ON REFORM TO CHANGE LEADERSHIP AND PRIORITIES

LEADING A CHARGE BY FOUR of the country's largest labor unions – the Service Employees, UNITE HERE, the Teamsters, and the Laborers, SEIU President Andrew Stern has challenged incumbent leadership at the AFL-CIO to make significant changes or face the union's withdrawal from the Federation. With 1.8 million members, the SEIU bills itself as "the largest and fastest growing union in North America."

In addition to calling for new leadership at the AFL-CIO, which has scheduled elections at its July convention, the unions issued a joint reform plan, which they plan to send to every local, state federation, and central labor council in the United States. Entitled "Restoring the American Dream, Building a 21st Century Labor Movement That Can Win," the plan is a response to the one released by President Sweeney and other AFL-CIO officers in April, 2005. Calling the Federation's proposals "too little, too late," the four unions will mail the document to the 27,000 local affiliates so they can decide if they want to "sign on." Citing disappointment with the Sweeney proposals, SEIU's Stern described Sweeney's plan as an attempt to move closer to the proposals of his coalition, but criticized the plan as merely maintaining the status quo.

### Rearranging Responsibilities: Federation to Coordinate and Inform, Affiliates to Act and Implement

The four unions propose a repositioned AFL-CIO with primary responsibilities that include providing central coordination of labor activities, performing essential functions on behalf of individual unions, and establishing and enforcing rules that consolidate and enhance the bargaining strength of workers. According to the proposal, political and legislative action, public communication, legal action, national and global coalitions to engage large employers, and capital strategies and corporate and

**The four unions repeated their call for a 50% rebate of the per capita tax paid to the Federation to those unions with a strategy and commitment to organize their core industries.**

economic research fall within the Federation's responsibilities.

The proposal lays out a five-point plan for the work of the AFL-CIO, including unifying workers economically, representing all workers, using member funds and contributions for the benefit of working families, reaching across borders to unite workers, and working for health care and retirement security. Specifically, the unions repeated their call for a 50 percent rebate of the per capita tax paid to the Federation to those unions with a strategy and commitment to organize their core industries, creating the incentive for national unions to invest more into organizing.

In announcing the proposal, the SEIU's website lists "some highlights of the unions' joint proposal," including the following, excerpted from [www.seiu.org](http://www.seiu.org):

- Specific and significant investments of a billion dollars a year to help millions of working people form unions and begin to restore the American dream.
- Specific incentives and changes in structure and rules to unite the strength of everyone who works in the same industry.
- A \$25 million initial investment in making companies respect our communities and provide health coverage and a paycheck that will support a family.
- The dramatic changes to increase the number of union families and build broad community alliances so we can win access to affordable, quality health care and retirement security for everyone in America.
- A real commitment to help millions of working women and people of color win higher living standards, and to ensure that our movement at all levels reflects the diversity and commitment to change of today's workforce.
- A change in AFL-CIO leadership to a team committed to these principles.

### Effecting Political Change Through Increasing Union Membership

Rebuffed by the outcome of the November

2004 elections, the labor movement has suffered damage to its reputation as a wielder of political clout. Addressing this decline, the unions' proposal calls for investing "the maximum resources possible to build a movement of working people that can confront and restrain corporate power" and effecting a change in political course through bringing more members into the union ranks. "A pro-worker political consensus in America will emerge only when millions more American workers belong to unions."

Summarizing the need for leadership change at the AFL-CIO, the four unions call for the Federation to adapt to the global economy of the 21st century and reject the status quo, and adopt "dramatic and meaningful change" in engaging the

struggles of our day. "And that requires a change in the operations and orientation of the AFL-CIO." 🌱

TO READ THE FULL REPORT, go to the website for UNITE HERE and click on [www.unitehere.org/presscenter/restore050516.pdf](http://www.unitehere.org/presscenter/restore050516.pdf).

### editor's note:

THE CALL FOR A CHANGE in leadership and direction of the AFL-CIO begins to look like desperation when viewed in light of the most recent statistics on union membership from the Department of Labor. In January 2005, the DOL reported 2004 another year of decline, as the share of all U.S. wage and salary workers who were members of a labor union fell to 12.5 percent. Down from 12.9 percent in 2003, the trend of declining union membership has continued for more than 20 years, since 1983, the first year for which comparable data were available, when union membership totaled 20.1 percent. In the private sector, which accounts for more than four-fifths of the total nonfarm labor market, union membership was just 7.9 percent in 2004, down from 8.2 percent a year earlier.

## LITIGATION

### U. S. SUPREME COURT TO REVIEW QUESTION OF SMALL EMPLOYER COVERAGE UNDER TITLE VII

IN A CASE QUESTIONING THE REACH OF Title VII over small employers, the U. S. Supreme Court has agreed to decide whether the 15-employee threshold under the statute is an absolute requirement for federal court jurisdiction over a Title VII lawsuit. At issue is whether the federal trial court had "subject matter jurisdiction" in an employee's sexual harassment lawsuit when the employee failed to qualify that the restaurant where she worked employed 15 employees and was therefore covered by the dictates of Title VII. [*Arbaugh v. Y&H Corp.*, Docket No. 04-944, cert. granted, May 16, 2005; prior decision, 5th Cir., 2004.]

When the employee sued the restaurant company and its individual owner for sexual harassment in violation of Title VII of the Civil Rights Act of 1964 and Louisiana state law in 2002, the jury returned a verdict in favor of the employee. The employer filed a motion to dismiss, asserting the company did not employ enough people to qualify as an employer under Title VII. Agreeing with the employer's argument, the U. S. District Court for the Eastern District of Louisiana vacated and reversed the jury

*The appeals court agreed that the delivery drivers, the restaurant owners, and their wives were not "employees" of the restaurant to be counted toward the 15-employee threshold.*

verdict for lack of subject matter jurisdiction. Affirming that decision, the U. S. Court of Appeals for the Fifth Circuit held that the employee's failure to qualify the employer as subject to Title VII's anti-discrimination prohibitions was fatal to her case because she had failed to establish that the court had jurisdiction over the matter. The Court of Appeals found delivery drivers, restaurant owners, and their wives were not "employees" of the restaurant.

In support of her case, the employee argued that the number of employees was not a determinative factor for subject matter jurisdiction for claims under Title VII. However, the 5th Circuit held that, in the absence of a clearer statement by the Supreme Court or a reconsideration of the issue by the entire bench of the appeals court, it was bound to follow the precedent that the number of employees determines subject matter jurisdiction. The appeals court further agreed with the district court that delivery drivers and owners' wives are not "employees" under an appropriate legal analysis of such employment relationships, and the restaurant and its owner did not meet the definition of employer under Title VII.

When the Supreme Court will issue a decision is unknown, but we will report on the decision when it is published. 🌱


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## LITIGATION AVOIDANCE

### FTC RULE REQUIRES "REASONABLE MEASURES" TO DISPOSE OF CONSUMER INFORMATION ON EMPLOYEES

**N**EW FEDERAL TRADE COMMISSION REGULATIONS prompted by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) require employers obtaining consumer reports to "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." Such consumer information includes any reported information provided to an employer by a third party consumer reporting agency, which conducts a background check for purposes related to current, former and prospective employees, and any compilation of such information. The regulations are effective as of June 1, 2005.

The intent of this new regulation is to protect an employer's prospective and former employees from the potential for identity theft resulting from consumer report information the employer may have obtained and stored. The FTC offers the following suggestions:

- Adopt policies requiring the burning, pulverizing, or shredding of consumer information so that information cannot

be read or reconstructed, and monitor compliance with such policies;

- Adopt and monitor compliance with a similar policy addressing the destruction or erasure of electronic media containing consumer information;
- Conduct due diligence and select a qualified vendor engaged in the business of properly disposing of consumer information.

This rule applies to the physical discard of consumer information as well as data stored on a computer that is to be donated or transferred to another party. Under the Fair Credit Reporting Act, aggrieved parties have remedies for rights violations, including damages and attorneys fees. The text of the regulations is published in the Federal Register, 16 C.F.R. Part 682.

Given the growing sensitivity to employee privacy issues, all employers should review their record retention and destruction practices and create a "best practice" for retaining as well as disposing of unnecessary personnel-related documentation. 🌱

FOR MORE INFORMATION contact the Jackson Lewis attorney with whom you regularly work, or partner **Susan M. Corcoran**, (914) 514-6104; email: [corcoraS@jacksonlewis.com](mailto:corcoraS@jacksonlewis.com).

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