FOCUS On Benefits

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When Personality May Violate ADA

As part of the hiring process, many employers require applicants to take psychological or personality tests. One of the most popular tests is the Minnesota Multiphastic Personality Inventory Test (MMPI), which is a 500 plus question paper and pencil test that measures a person's traits in a variety of areas. A recent decision by the U.S. Court of Appeals for the Seventh Circuit called this practice into question. In *Karraker v. Rent-A-Center Inc*., 2005 U.S. App. LEXIS 11142 (June 14, 2005), the court held that such a test could also be used to diagnose psychiatric disorders and is a prohibited pre-employment medical examination under the *Americans with Disabilities Act* (ADA).

The ADA prohibits medical examinations or inquiries if they tend to screen out persons with disabilities. So employers cannot require job applicants to submit to medical examinations or respond to disability-related inquiries as a condition to being offered employment. Employers may require current employees to undergo a medical examination or respond to disability-related inquiries only if they are shown to be job-related and consistent with business necessity.

In *Karraker*, Rent-A-Center required that applicants for promotions to management positions take the MMPI. The key issue in the case was whether the MMPI constituted a medical examination under the ADA. If so, the MMPI's use in the pre-employment stage would violate the ADA.

In resolving this key issue, the court examined the Equal Employment Opportunity Commission's (EEOC) ADA Enforcement Guidelines, which define a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health." The EEOC guidelines further state that psychological tests that are designed to identify a mental disorder or impairment qualify as medical examinations, but psychological tests that measure personality traits such as honesty, preferences, and habits do not.

The court found that the MMPI is intended, at least in part, to reveal mental illnesses and so harms the employment prospects of individuals with mental dis-

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abilities. The court concluded that it was likely that an ADA-protected person with a mental disorder would receive a score below that desired by the employer, and be denied the promotion based on the MMPI results.

At the time of the lawsuit Rent-A-Center was using an earlier version of the MMPI. The current version, MMPI-2, does not have the objectionable material. The Seventh Circuit, which consists of Illinois, Indiana and Wisconsin, is the first federal appellate court to decide this issue.

Not all personality tests will be considered medical examinations. Before using such a test as a criterion for hiring or promotion, you should confirm with the test provider that it will not have a disparate impact on individuals with psychiatric conditions. If it may, the test should only be used on a post-offer basis and only if a business necessity exists. When faced with similar cases, other Circuits could issue rulings consistent with the Seventh Circuit.

HIPAA Portability Guidance

Every year, representatives of the Joint Committee on Employee Benefits (JCEB) of the American Bar Association have an opportunity to meet with Department of Labor (DOL) staff to review previously submitted questions. The report summarizing the discussions is prepared by JCEB representatives and is not reviewed by the DOL. Although the report represents views that are unofficial and nonbinding, they do provide helpful insights about certain issues.

This year's report has two particularly interesting sections:

- Special enrollment rights when a plan's lifetime maximum benefit is reached and
- How to determine if an individual must be offered an alternative method of achieving a wellness standard.

Lifetime Maximum Benefits

In December of 2004, final *Health Insurance Portability and Accountability Act of 1996* (HIPAA) regulations clarified that reaching a plan's lifetime maximum on all benefits is a loss of eligibility and gives special enrollment rights. Questions were posed to the DOL regarding how this special enrollment right applies when a plan has several benefit options or separate plans sponsored by the same employer.

The DOL responded that in the case of one plan with multiple benefit options, such as a health plan that offers coverage through an HMO option and a PPO option, an individual has special enrollment rights and may change to another option with the same employer if:

- The options have different lifetime maximums such as $1,000,000 in one option and $2,000,000 in another option; or

- All the options have the same lifetime maximum but the benefits are not integrated. (e.g., the HMO and PPO each have a $2,000,000 lifetime maximum but the benefits paid under one option do not count towards the lifetime maximum limit of the other option).

If the employer organizes the coverage as two or more separate plans, employees who reach the maximum in one plan have special enrollment rights in another of the employer's plans.

For employers wishing to limit lifetime maximum benefits, it is important to structure benefit options correctly and have appropriate plan documentation in place that corresponds to the limitation language.

Wellness Standard Alternatives

In general, HIPAA provides that a wellness program must make reasonable accommodations and provide alternate means for an individual to satisfy wellness standards if an individual's health status makes it unreasonably difficult to obtain the reward.

The JCEB discussed an example in which an employer required employees to certify they are non-smokers. Those who could not do so paid an extra ten percent for single coverage. The reasonable accommodation was the waiver of the ten percent surcharge for participating in a smoking cessation program.

However, this accommodation was only offered to participants who submit a "nicotine addiction certification form" co-signed by a physician. The physician must also provide an opinion as to whether or not the addiction is so severe that it makes it unreasonably difficult to stop smoking. The determination is at the discretion of the physician; the form does not impose any standards. Group health plan participants who smoke and who fail to provide this certification must pay the ten percent surcharge.

The DOL agreed with the methodology saying it was reasonable and that a plan may use objective measures to determine if a medical condition exists or if a health factor makes it unreasonably difficult for an individual to meet the standard. This guidance, while unofficial, may provide employers with some insight into the types of objective measures the DOL considers appropriate.

Workplace Protection: Breastfeeding

For the second time, Representative Carolyn Maloney (D-N.Y.) has introduced the *Breastfeeding Promotion Act* (H.R. 2790). This Act would amend the *Civil Rights Act of 1964* to protect the employment rights of women in the workforce who choose to breast pump during designated times throughout the work day. Maloney has introduced this bill for the second time because of what she characterized as the continued inequities and discrimination faced by female workers. She notes that in some cases nursing mother employees have been docked pay or taken off of their shifts because of their desire to pump breast milk for their babies.

Although the federal legislation faces some challenges, many states have already chosen to pass statutes that protect a woman's right to breastfeed her baby. One notable state statute was passed in Florida in 1993 and legalized the ability of a woman to breastfeed her baby in public. Before that, her actions would have been criminal. Since 1993, nearly 40 states have enacted laws that protect a woman's right to breastfeed, and ten states have passed laws that protect a woman's employment while another six states are in the process of enacting similar laws.

Generally, the statutes direct employers to make certain accommodations including providing a room other than a bathroom for pumping and allowing "a reasonable amount of time" for expressing milk. However, the laws generally require that the accommodations for nursing mothers must not unduly disrupt the employer's business operations. Contrary to doubts about this issue, nursing advocates say that the potential benefits include: reduced absenteeism to care for sick children, higher rates of retention of skilled workers and lower turnover, enhanced productivity, higher morale, greater employee satisfaction, and lower health care costs.

According to the Bureau of Labor Statistics, figures for 2002 indicate that 55 percent of all mothers with infants were employed; this compared to 31 percent in 1976. Of those mothers in the workforce, statistics indicate a marked upswing in the number of working mothers who choose to nurse their babies.

In 1990, 45 percent of babies were being breastfed, but in 2003 nearly 70 percent of babies were breastfed.

Given this trend, some employers are evaluating the possibility of creating a lactation program for employees. A company's lactation program typically requires a private room with a locking door, installation of electrical sockets in easy-to-reach locations, and privacy curtains if more than one pumping station will be included within the room. An employer should also consider providing a small refrigerator for storing the expressed milk. Additionally, the room should be clean and comfortable and might include a sink and facilities to wash the pump after use. Such a program should be described to pregnant employees, and all employees should be reminded that discrimination against breastfeeding employees is prohibited.

HIPAA Criminal Penalties

Ever since *Health Insurance Portability and Accountability Act of 1996* (HIPAA) regulations were issued, there has been debate over its criminal penalties. Some thought that since the administrative requirements apply only to covered entities, these organizations are the only target for criminal penalties. [Covered entities are health plans, health care clearinghouses, health care providers who transmit health information electronically in connection with defined transactions.] Others took the position that Congress intended the criminal penalties to apply to individuals who caused the covered entity to violate the privacy rule.

In June, the principal deputy assistant attorney general in the Department of Justice issued a memorandum that addressed two issues. First, the memorandum determined that "knowingly" means only that the person is aware of the actions that give rise to the offense; the person does not need to be aware of the statute or regulations that the action violates.

Secondly, it concluded that the only persons directly liable and subject to prosecution are those to whom the requirements of the statute directly apply (e.g. covered entities). Does this mean that no individuals will ever be prosecuted? Not necessarily.

The memorandum further states that depending on the facts of the case, certain directors, officers, and employees of these entities may be directly liable in accordance with the general principles of criminal liability. Additionally, some who may not be prosecuted directly may be liable under principles of aiding and abetting and of conspiracy. Individuals may also be subject to state privacy laws that protect health information.

The determination in the memorandum seems to conflict with one noted HIPAA criminal case pursued earlier by the Department of Justice. Richard Gibson pled guilty to using individually identifiable health information for personal gain. Gibson was a lab assistant in a hospital with access to medical records of a patient with terminal cancer. He used the patient's social security number and other information to obtain credit cards in the patient's name and charged over $9,000 of merchandise.

This memorandum, while lacking the force of a law or regulation, does indicate the Department of Justice's policy going forward. Since only the Department of Justice can pursue criminal cases under HIPAA, it now seems less likely that rank and file employees will be prosecuted on criminal charges.

Survey: Employers Send Sick Workers Home

According to the findings of a new survey, employers want sick workers to go home rather than spread

their germs at the office. Nearly half of employers who participated in a survey conducted by publishing firm CCH say that sick workers who show up for work are a problem.

Employers fearing lost productivity from illnesses are using a variety of strategies to fight the spread of germs in the workplace, the survey said. Sixty-two percent of the organizations reported they send sick employees home, while 41 percent educate employees on the importance of staying home when sick, and 36 percent indicated that they try to foster a culture that discourages employees from coming to work sick.

Researchers note that costs for missed work days can pile up, with unscheduled absences running employers an average of $660 an employee each year, up from $610 last year. Study authors note that their survey reflects the experiences of randomly polled organizations with an estimated total of more than one million employees.

Aging Population Challenges Health Care

USA Today recently featured an article about the health coverage challenges facing the nation due to an aging population and a historic dependence on employer-provided coverage. Although technological advances ensure seniors will be more active and healthy than ever before, economists warn that the burden of providing care will put serious financial strain on younger generations — an increasingly smaller percentage of the population.

Seniors are also retiring earlier, relying on a belief that Social Security and Medicare will pay for their health needs. However, as they are also living longer, an unaddressed financial liability grows for younger taxpayers. Experts note that even healthy seniors can cost just as much as sick ones, since average total lifetime medical costs after turning 65 are generally the same no matter how long a person lives. Seniors who use costly medical technology to stay healthy can be a particular drain on the system. Experts expect the gap between seniors' and young adults' views on cutting costs to widen as expensive technology becomes an increasingly central part of routine health care. Yet voters reject possible solutions to offset the cost of Medicare, including raising taxes, delaying the retirement age, or cutting benefits.

Since You Asked: Bankruptcy Reform and Retirement Plans

A *FOCUS on Benefits* reader recently contacted us to ask how recent legislative changes affecting bankruptcy would impact employee benefit programs. Interestingly, revisions to the bankruptcy statute did have a subtle impact on employee benefits — particularly as related to retirement plans.

When President Bush signed the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, it appeared that the law would make it more difficult for debtors to be completely absolved from their debts in bankruptcy. However, there were a number of key provisions that actually represent new debtor protections. Specifically, the law provides for favorable treatment of retirement accounts. These new provisions clarify the treatment of these assets and make legal distinctions about how certain assets are treated in different parts of the country.

The Supreme Court's View

Years ago, the Supreme Court ruled that a bankrupt debtor's accounts in qualified retirement plans may not be used to satisfy the claims of the creditors. *Patterson v. Shumate*, 504 U.S.753 (1992). There are restrictions on retirement plan distributions, and they cannot otherwise be reached by the creditors of

plan participants and because ERISA makes all those assets inalienable (e.g., they cannot be given away, pledged, or assigned), most employee benefit professionals would never have assumed otherwise. Interestingly, benefit professionals always understood ERISA to preempt conflicting federal laws just as it preempts state law; nevertheless, it took a Supreme Court ruling to permanently clarify the law.

Continued Uncertainty

Absent from the Supreme Court's decision was guidance as to whether assets in all types of retirement plans, including IRAs, were also exempt from seizure in bankruptcy. Although many states amended their exemptions to include those other types of plans — not all did. So, some bankrupt debtors had their retirement savings seized to satisfy those debts while others did not. Conversely, individuals who left their accounts in their employer plans or rolled them over into a plan of another employer had their accounts protected while those who rolled their accounts into IRAs did not. Just a few months ago, the Supreme Court ruled that traditional IRAs were protected to the extent that the funds were reasonably necessary for the support of the debtor and his or her dependents. *Rousey v. Jacoway*, 125 S. Ct. 1561 (2005). However, the decision is irrelevant to IRA holders who live in states that preclude debtors from using the federal exemptions or for those living in states that allow the option of applying broader state exemptions over federal ones.

Uniform Treatment

Because of the variety of plans and state laws, Congress used the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* to ensure uniform treatment of retirement plan assets in bankruptcy. Although some limitations remain, most assets in all different kinds of retirement plans will now be protected from creditors in the event of bankruptcy.

In particular, bankruptcy reform provides protection for assets in qualified retirement plans and other retirement vehicles including 403(b) plans, 457 plans, and IRAs. Protections for IRAs will be limited to $1 million (indexed) plus any rollovers from other plans. The law also permits debtors to petition the court for relief from the limit. Because few individuals hold IRA assets of over $1 million from sources other than rollovers, this cap will be irrelevant to most IRA account holders.

Plan Loans

Bankruptcy reform also provides that any loan repayments to the qualified plan should continue. This is actually good because stopping the repayments would trigger a "deemed" distribution under applicable tax rules. Such a deemed distribution would result in taxable income to the employee. Often, such a person has already spent the loan proceeds in a usually futile attempt to pay down debt to avoid bankruptcy. Naturally, such a person would not be in a position to pay the increased taxes on the distribution — plus penalties for early withdrawals.

Also, unless the employee voluntarily repaid the loan, the interest would keep accruing on the loan. Only when an actual distribution occurred could the loan and accrued interest be offset with the remaining assets of the employee's account. The legislation is more protective of the employee by allowing loan repayment. Bankruptcy trustees will also have to respect that repayment as a true secured loan rather than using those funds to repay other creditors.

There is an additional protection provided to retirees that affects employers. If a corporate debtor modifies retiree benefits during the 180-day period ending on the date the bankruptcy petition was filed, the court can order the benefits to be reinstated to the level before the modification — unless the court finds that the modification is a more equitable solution. The *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* became effective for bankruptcy cases filed on or after October 14, 2005.

ADA Association Provision

The U.S. Equal Employment Opportunity Commission (EEOC) has published more information about a provision of the *Americans with Disabilities Act* (ADA) that protects applicants and employees from discrimination based on their association with people with disabilities. A document entitled "*Questions and Answers about the Association Provision of the Americans with Disabilities Act*" was issued by the EEOC in October as part of National Disability Employment Awareness Month.

The agency says the "association" provision is little-known, but significant. This provision prohibits an employer from discriminating against an applicant or employee who has a known association with an individual with a disability. This prohibition covers hiring, firing, and other terms, conditions, and privileges of employment. For example, an employer is barred from refusing to hire someone because of an unfounded fear that the individual will be excessively absent or unproductive because of the need to care for a child with a disability.

The agency says the following actions would also be discriminatory:

- Firing or refusing to hire someone based on concerns that the individual will acquire a condition from a family member or other individual with whom he has a relationship;

- Refusing to provide health insurance for an employee's family member with a disability when the employer generally provides health insurance for employee dependents;

- Harassing someone based on the individual's association with a person with a disability;

- Providing lesser benefits to someone who has a relationship or association with an individual with a disability than it provides to all other employees; and

- Firing, refusing to hire, or denying any benefit or privilege of employment to someone because of concern that the employer's image will be negatively affected by an applicant's or employee's association with individuals with disabilities — for example, discriminating against an employee who provides volunteer services for people with HIV/AIDS or psychiatric disabilities is prohibited.

It is important to remember there are limits to the types of questions an employer may ask. However, a general eligibility limitation that does not target individuals with disabilities would not violate the ADA.

Since You Asked: Allocating Costs for QDROs and QMCSOs

A Willis client sponsoring a number or different employee benefit plans asked how to defer costs associated with court-ordered benefits. Employees who divorce often generate additional employer plan expenses because the divorce proceedings may include negotiation of qualified domestic relations orders (QDROs) and qualified medical child support orders (QMCSOs). This employer complained that it unfairly subsidized the cost of a worker's divorce whenever a QDRO or QMCSO went through several versions before a final one was established that could be administered by the plan. This is a longstanding complaint of many employers. It can be a costly and time consuming project, and there is no incentive for the employee to get the issue resolved because the plan is footing a large part of the bill.

Employer plans historically absorbed these costs due to the fact that additional incurred expenses could not be allocated to the employee (based on an Advisory Opinion released by the Department of Labor in 1994). However, the DOL issued Field Assistance Bulletin (FAB) 2003-3 which changes the DOL's approach.

The DOL considered the issue of allocating plan expenses in two ways:

1. Whether all plan expenses can be allocated to accounts based on the value of the accounts (the higher the value, the higher the allocation) or whether they must be allocated equally among all accounts; and
2. Whether expenses may be allocated to a single account or must be allocated among all the accounts.

The DOL looked to the actual language of ERISA and found that generally there is no defined method for allocating plan expenses. So, the DOL determined that the plan document will generally control. If a plan document is ambiguous, then the fiduciary must make a decision consistent with the best interests of the plan participants and beneficiaries. As long as a rational basis exists for the allocation method and is not arbitrary, it will be acceptable *even* if it happens to disfavor a group of participants.

As a result, allocating expenses based on account value is one permissible way to allocate plan costs. However, for expenses such as recordkeeping, legal, or other administrative expenses that do not change based on account size, the equitable division might be to allocate the expenses equally to all the accounts. The bulletin states that if any charges are levied to the plan based on account size, then it would be arbitrary to charge those expenses to all accounts equally — so in that case the allocations should vary.

More importantly, for expenses that are incurred by or on behalf of specific individual participants, the DOL has overturned its opinion that those expenses must be shared. They can now be allocated based on principles similar to those above. The plan must specify how the expenses will be allocated, and the allocation must be rational. The bulletin had a few specific examples where the expenses associated with the service or situation could be allocated to the individual account:

- Hardship withdrawals
- Calculation of benefits payable under different plan distribution options
- Benefit distributions
- Administrative expenses for vested, separated participants
- Determination of QDROs and QMCSOs

As long as the plan is amended to state that those expenses will be allocated to the account of the participant whose actions generated the cost, the QDRO or (QMSCO) costs can be allocated to that employee's account. The SPD should indicate that there will be charges levied for these expenses. If these requirements are satisfied, an employer plan will not be in the position of financing an employee's divorce proceedings.

Issue Spotlight: Dependent Care Flexible Spending Accounts

The following are two scenarios based on real circumstances. Each one presents related questions

about Dependent Care Flexible Spending Accounts. The answers are interesting and the Internal Revenue Service (IRS) rationale may be useful in addressing similar questions.

Scenario One

Husband (employee) and wife are enrolled in a Dependent Care Flexible Spending Account. They have a son with severe medical problems. The boy's medical condition has several times required him to be absent from the day care center for long periods of time — sometimes several consecutive weeks. Although the child was at home for special treatments and detailed care, the day care center charged the parents the monthly fee. The day care center stated that the fee was to hold the child's space in the day care center. Is the fee paid to the day care center during the child's absence reimbursable under the Dependent Care Flexible Spending Account?

The IRS has stated, in informal remarks, that such a fee is not reimbursable if the child has stayed at home under the care of a parent while absent from the day care center. Because the Dependent Care Flexible Spending Account is only available in order to allow a parent to work, the IRS would apply a very strict interpretation to this situation if a parent has been away from home caring for the child.

Scenario Two

Husband (employee) and wife are enrolled in a Dependent Care Flexible Spending Account. They pay a registration fee to add their infant child to a waiting list for a day care center, but the child is not yet enrolled. Is this registration fee reimbursable under the Dependent Care Flexible Spending Account?

Yes, the registration fee is reimbursable if the fee is required in order to obtain future child care at the day care center. However, the registration fee is only reimbursable *after* obtaining child care services — provided the day care services are necessary so both parents can be at work.

U.S. Benefit Office Locations

Anchorage, AK (907) 562-2266	Atlanta, GA (404) 224-5000	Austin, TX (800) 861-9851	Baltimore, MD (410) 527-1200
Birmingham, AL (205) 871-3871	Boston, MA (617) 437-6900	Cary, NC (919) 459-3000	Charlotte, NC (704) 376-9161
Chicago, IL (312) 621-4700	Cleveland, OH (216) 861-9100	Columbus, OH (614) 766-8900	Dallas, TX (972) 385-9800
Denver, CO (303) 218-4020	Detroit, MI (248) 735-7580	Eugene, OR (541) 687-2222	Farmington, CT (860) 284-6137
Ft. Worth, TX (817) 335-2115	Grand Rapids, MI (616) 954-7829	Greenville, SC (864) 232-9999	Houston, TX (713) 625-1023
Jacksonville, FL (904) 355-4600	Knoxville, TN (865) 588-8101	Long Island, NY (516) 941-0260	Los Angeles, CA (213) 607-6300
Louisville, KY (502) 499-1891	Malvern, PA (610) 889-9100	Memphis, TN (901) 248-3100	Miami, FL (305) 373-8460
Milwaukee, WI (414) 271-9800	Minneapolis, MN (763) 302-7100	Mobile, AL (251) 433-0441	Montgomery, AL (334) 264-8282
Mountain View, CA (650) 944-7000	Naples, FL (239) 514-2542	Nashville, TN (615) 872-3700	New Orleans, LA (504) 581-6151
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