



SEVENTH CIRCUIT UPDATE: FALL 2005

This bulletin provides an update of recent employment laws for employers in states served by the United States Court of Appeals for the Seventh Circuit, including Wisconsin, Illinois, and Indiana. Please contact us if you have any questions about these decisions or about their effects on your business.

Don't Try and Play Doctor When Your Employees Return from FMLA Leave

In Harrell v. U.S. Postal Service, decided on July 19, 2005, the Seventh Circuit Court of Appeals addressed what an employer can require from an employee before allowing the employee to return to work after a medical leave. The court determined that an employer with a collective bargaining agreement may not require an employee to undergo return-to-work procedures different from those provided under the Family and Medical Leave Act ("FMLA"), **if** such procedures are more burdensome on the employee than what the FMLA requires.

Rodney Harrell was a member of the collective bargaining unit represented by the Postal Workers' Union. The USPS, pursuant to its collective bargaining agreement, required employees who had taken leave for more than 21 days to submit much more information than a doctor's note in order to return to work. Harrell refused to provide the detailed information requested (such as the nature and treatment of his illness and any medicines he was taking), and was ultimately terminated. In response to Harrell's lawsuit, the USPS argued that its return-to-work requirements in its collective bargaining agreement took precedence over the FMLA's return-to-work provisions.

Under the FMLA, one section of the statute states that the law was not meant to supercede state or local laws or collective bargaining agreements. However, another section provides that the rights established for employees under the law shall not be diminished by any collective bargaining agreement. The Seventh Circuit held that the collective bargaining agreement, while it could provide differing requirements that were **more** favorable to employees, could not diminish any substantive rights provided by the FMLA.

The Court did explain that “nothing in the FMLA, or its implementing regulations, forbids a more stringent fit-for-duty examination once the employee has returned from FMLA leave, so long as any such examination is job-related and consistent with business necessity in accordance with Americans with Disabilities Act guidelines.” Under the FMLA, however, an employer is required to rely on the evaluation of the employee’s own health care provider with regard to return-to-work issues.

Employers should never try and step into the role of physician. If an employee provides a return-to-work certification from his or her physician that complies with the FMLA, the employee is entitled to resume employment. From that point forward, employers should address performance-related issues through standard counseling and disciplinary methods, and address questions about fitness for duty through methods that are ADA-compliant.

Don’t Test the Limits With Your Employment Testing

In Karraker v. Rent-A-Center, Inc., decided on June 14, 2005, several current and former employees of Rent-A-Center filed a class action against Rent-A-Center, asserting that its use of the Minnesota Multiphasic Personality Inventory (“MMPI”) to select candidates for promotion violated the ADA as an improper medical examination. The MMPI was intended to assess such potentially relevant personality traits as whether a candidate worked well in groups or was comfortable in a fast-paced environment.

The plaintiffs asserted, however, that it also assessed where a candidate fell on scales measuring traits such as depression, hypochondria, hysteria, paranoia and mania. For example, one of the questions was: “True or False: I commonly hear voices without knowing where they are coming from.”

The Seventh Circuit Court of Appeals addressed whether the MMPI is a “medical examination” under the ADA. Rent-A-Center did not argue, for purposes of that appeal, that the test was “job related and consistent with business necessity” or that, because the test was not used for applicants it was not a “pre-offer” examination. Based on the limited issue before it, the Seventh Circuit held that the MMPI was “best categorized as

a medical examination” because, at least in part, it produced results that could suggest mental illness.

Employers should review the tests they use, both in the initial hiring phase and when selecting candidates for promotion, to ensure that those tests are not seeking or eliciting information involving a candidates’ medical or mental health condition.

This Seventh Circuit update was prepared by Donna Eich Brooks, an attorney with the law firm of Lehr, Middlebrooks, Price & Vreeland. Donna can be reached for questions/further information at dbrooks@lmpv.com or at (205) 226-7120.

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