# *MHTL Monthly Labor/Employment/Benefits Update Useful Cases And Updates For HR Professionals - November 1, 2003*

## *MISTAKE OF THE MONTH* - **<u>Company Required To Make Benefit Contributions For "Casual" Employees</u>**

The attraction of so-called "casual," "spare," "per diem" or "contingent" employees is they generally are not considered eligible for benefits. But if they are used in a way that brings them within the definition of "employee" under a benefit plan, wherever that definition comes from, then an employer could be liable to make benefit payments on their behalf, as yet another employer recently learned the hard way.

In <u>*Dugan v. Corman Railroad Co.*</u>, 2003 U.S.App. LEXIS 19521 (7th Cir. 9/22/03), a collective bargaining agreement specified that casual employees were not eligible for pension contributions, but that casual employees could only be used for sporadic, isolated projects for particular customers. These casual employees, however, had been used for years by the employer as, in effect, "regular" employees doing other work in the employer's shop between assignments.

The court found that the casual employees "worked approximately the same total hours . . . as the regular staff." Thus the employer was required to pay pension fund contributions for the 25 casual employees in question.

As in many other areas, notably wage & hour, the misclassification of employees can have costly consequences. Constant vigilance is necessary to ensure that employees are properly classified, and are used properly within those classifications.

## <u>Ditto For "Independent Contractors"</u>

Recall that Microsoft several years ago had to pay tens of millions of dollars for past benefit contributions for employees the company called "independent contractors" but whom the courts found were actually regular employees entitled to benefits under the company's own policies and plans. As was the case with Corman Railroad, above, some companies have not learned the lesson.

In <u>*Godshall v. The Franklin Mint*</u>, 2003 U.S.Dist. LEXIS 17400 (E.D.Pa. 9/24/03), for example, 2 people signed agreements specifically agreeing to be independent contractors and specifically agreeing that they were not eligible for the employer's benefit plans; these people worked side-by-side with regular employees and in practical effect were indistinguishable from regular employees.

Nevertheless the two sued the employer claiming they were eligible for the employer's benefit plans under the plan's terms and definitions and the employer misled them into believing that they could waive those rights in their independent contractor agreement. The Court ruled that there was an issue of fact as to whether or not they were, despite their agreements, independent contractors or regular employees entitled to participate in benefit programs, and thus the Court refused to dismiss the case.

Again, misclassification can be costly, as well as relying on contracted people to

supplement regular staff without implementing appropriate safeguards to avoid situations like the Franklin Mint and Corman Railroad have confronted.

## ***OTHER EMPLOYMENT LAW HEADLINES***

### Under *Weingarten*, Does An Employee Have A Choice Of Representative?

Yes, the National Labor Relations Act really can apply to your company even if you don't have any union-represented employees; remember, the Act primarily shields the "protected" and "concerted" activity of employees, *whether a union is involved or not*. One employee complaining about his raise may be protected activity because it relates to working conditions, but is it not concerted. One employee complaining on behalf of several about their raises is both protected and concerted.

Background - In *Epilepsy Foundation*, 331 NLRB 676 (2000), the National Labor Relations Board ruled that *Weingarten* rights apply also to employees of non-union employers, a decision that was later affirmed by a federal appeals court. Thus an employee is entitled to the presence of a union representative or co-worker during an interview with the employer that the employee reasonably believes could lead to discipline. A nettlesome issue for both unorganized and organized employers has been how far that right extends. Two recent cases flesh out the issue somewhat:

-*No Right To Have Non-Employee Present*. In *IBEW Local 236*, 339 NLRB No. 156 (8/21/03), a non-union employee (the employer happened to be a union) sought the presence of a non-employee who lived two hours away from the employer. The Board ruled that the *Weingarten* right meant the employee was entitled only to the presence of a co-worker, not a non-employee. This case seems also to answer the question of whether or not an employer has to permit the presence of the employee's attorney, the answer being "no," at least under the Act.

-*But There Is A Right To Pick The Union Representative*. In another case, however, *Anheuser-Busch v. NLRB*, 338 F.3d 267 (8/1/03), the Fourth Circuit upheld a Board ruling which held that an employee in a union workplace could have his choice of union representative absent extenuating circumstances. The employer should have waited until the employee's chosen shop steward came back from lunch rather than summoning a more available steward. In the non-union setting, this would appear to mean that an employee has a similar right as to a co-worker.

### Can An Employee Be Required To Submit To A Mental Examination Under The ADA?

A dicey proposition in some cases it seems. Claiming he was "perceived" as disabled rather than being disabled and that the exam was not limited to determining his ability to perform the essential functions of the job, an employee refused a mental exam ordered by his employer after two recent workplace accidents and a longer history of generally erratic behavior. The ADA, wrote the judge in *Jackson v. Lake County*, 2003 U.S.Dist. LEXIS 16244 (N.D. Ill., 9/15/03), protects disabled employees from being subjected to medical exams unless they are job-

related and consistent with a business necessity. But, wrote the judge, to be afforded that protection the employee would effectively have to demonstrate that he was disabled by taking the very test he was trying to avoid.

Thus, even a person "perceived" as having a disability could invoke the job-related and business necessity protections. The employer's argument that those protections applied only to actually disabled employees was rejected and the employer's summary judgment motion denied. This case illustrates the increasingly frequent and frustrating land mines with claims of "perceived" disability.

## "Retaliation" Evidently Is In The Eyes Of The Beholder

In *EEOC v. Bojangles Restaurants*, 2003 U.S.Dist. LEXIS 16834 (M.D.N.C. 9/22/03), the Court agreed with the employer that a waitress could not recover on her retaliation claim when she allegedly was fired because her co-worker fiancé complained to their employer about racial discrimination just against him. The Court ruled that a retaliation claim could only lie against someone who actually acted to oppose discrimination, and under that theory the fiancé was the actor and not her, thus she could not prevail on that retaliation theory.

Nevertheless, the Court on its own then divined another retaliation theory and allowed the case to proceed. The Court reasoned that Plaintiff actually had engaged in protected activity by providing her fiancé with economic support (they lived together) and being a potential witness to his own discrimination complaints, and there was enough evidence that she was terminated for those reasons to allow the case to proceed to trial. After doing Plaintiff's work for her, the Court then denied the employer's summary judgment motion.

## Salvation Army's "English Only" Work Rule Upheld

While avoiding the question of the validity of EEOC regulations concerning English-only work rules, the federal Massachusetts District Court ruled that the Salvation Army's English-only rule at least "minimally" complied with the regulations and thus a violation of the rule was a legitimate non-discriminatory reason to terminate an employee.

In *Cosme v. Salvation Army*, 203 U.S.Dist. LEXIS 17224 (9/23/03), Judge Young noted that the EEOC's rule provides that an English-only rule in the workplace can be justifiable and enforceable if (1) it is communicated to employees; (2) justified by business necessity; and (3) is limited in its nature and is not a blanket rule; otherwise "the [EEOC] will consider the employer's application of the rule as evidence of discrimination on the basis of national origin."

In the Salvation Army's case, the rule required the use of English in work areas when speaking to customers, co-workers and supervisors, but employees on their breaks could speak other languages. This rule, held the Court, was consistent with the regulations. Thus the termination of Ms. Cosme for insubordination for refusing to speak English on certain occasions was justified.

## FMLA "Serious Health Condition" Requires 3 Full And Consecutive Calendar Day Incapacity

The DOL for several years has had a rule stating that for a medical condition to qualify as

a "serious health condition" involving continuing treatment (as opposed to inpatient treatment) the employee must have a period of incapacity of "more than three consecutive calendar days." This rule recently was upheld in *Russell v. North Broward Hospital*, 2003 U.S.App. LEXIS 20190 (10/2/03), with the Court also adding that the three consecutive days must be full days, and partial days simply do not count.

Thus in Ms. Russell's case, she was terminated for excessive absenteeism when, in essence, over a ten-day period following a slip and fall at work she would come and go from work as her pain dictated; the final straw was a no-call/no-show. Most of these days were partial absences, and she was never incapacitated for three full consecutive calendar days. She claimed (among other things) she was retaliated against for taking FMLA leave and that her partial day absences counted towards the three consecutive calendar day requirement which would make her eligible for FMLA. The Court disagreed, held the regulation was a valid exercise of DOL's regulatory authority, held it meant full days and that partial days did not count, and affirmed a jury finding in favor of the hospital and against Ms. Russell.

## To Shop While On FMLA Intermittent Leave, Or Not To Shop?

Plaintiff in *Jennings v. Mid-America Energy Co.*, 2003 U.S.Dist. LEXIS 16388 (S.D.IA, 9/17/03), was a customer service representative with rheumatoid arthritis who was allowed to use FMLA intermittent leave as she needed it, often by leaving work early. On Saturday, December 15, 2001, she left work early because of swelling in her hand, but stopped on the way home at a Toys-R-Us, where she was seen by two co-workers. On Monday the 17th, she called in sick. That evening, she was seen shopping by another co-worker at a SuperTarget with a "cart full of goodies," her hair and makeup "done up," and supposedly "did not look at all like she was sick." She denied being at SuperTarget that evening. She called in sick the next day. On the 20th she was terminated for misusing FMLA leave.

She argued that her employer (1) interfered with her FMLA entitlement by not restoring her to her position; and (2) retaliated against her for her use of leave. As to #1, she had to show that she had a serious health condition, that upon return she was not reinstated, but also that she used the leave for the purpose for which it was intended. The Court ruled that this claim could go forward because there was an issue of fact as to whether or not she used the leave time for its intended purpose. She claimed, and the Court agreed, that "a reasonable jury could conclude that she was unable to perform the essential functions of her job when her supervisor sent her home on [the 15th], but capable of stopping at a store to purchase one item on her way home." As the Court wrote, "[t]he FMLA contains no requirement that an individual on intermittent leave must immediately return home, shut the blinds, and emerge only when prepared to return to work." Moreover, she denied being at the SuperTarget store on the 17th.

As to claim #2, the Court dismissed the claim. The Court ruled that she had not yet established a causal connection between proper use of FMLA time and an adverse employment action, because a jury might or might not find that she had used the leave time for its intended purpose. Assuming she could, however, the employer's reason to terminate her, misuse of leave time, was a legitimate non-discriminatory reason for discharge. Thus, she then had to show that reason was a pretext for discrimination, and she had no evidence of actual discrimination. Absent evidence of pretext, the Court dismissed that portion of the case.

Notably, the Court rejected the employer's argument that it could not be liable for

retaliation where it held an "honest good faith" belief, even if mistaken, that the plaintiff had misused leave time, despite the fact that most other courts have ruled to the contrary in prior FMLA cases.

## **Breach Of Duty Of Loyalty Can Void Severance Provision Of Employment Agreement**

In a Massachusetts Appeals Court case, *Prozinski v. Northeast Real Estate Services, LLC*, 2003 Mass. App. LEXIS 1099 (10/16/03), the Court ruled that the employer's claim that the employee had violated his fiduciary duty of loyalty to the company should have been submitted to the jury. The employer claimed that Prozinski's (the COO and CFO) breach of fiduciary duty included false reimbursement requests and conduct resulting in complaints of female employees that he created a hostile work environment, and the use of office equipment to send obscene e-mail and pornography.

The Court wrote that Prozinski owed the employer the "duties of loyalty, utmost good faith, and of protecting Northeast's interests," which duties could be violated if the company was able to prove the allegations. And if violated, a jury could find that such conduct could constitute a breach of a material feature of his employment contract and thus terminate the employer's obligation to provide severance pay under the contract. The Court also ruled that severance pay did not constitute "wages" under the state's payment of wages statute, and so the employer was not exposed to multiple damages and attorney's fees.

Notable in this case is the odd situation created of the employer basically having to prove (among other things) that the employee had in fact created a hostile work environment and sexually harassed female employees, for which the company might be liable. If successful in this endeavor, one could reasonably expect an effort to use such a result against the employer by those female employees if they were so inclined, so the approach is potentially hazardous.

## **Can The Child Of An Employee Sue The Employer For Misrepresenting The Safety Of The Mother's Workplace?**

Yes, according to the New York Supreme Court (App. Div., 2nd Dept.), in *Curtis v. IBM*, 2003 N.Y.App. Div. LEXIS 9683 (9/22/03). The mother and infant daughter claimed that while the mother was pregnant the employer repeatedly told her that the work environment (a semiconductor manufacturing plant) was safe for her fetus when the employer knew it was not, and that she relied on those representations to continue working during her pregnancy. The infant plaintiff asserted fraud claims against the employer, claiming that her mother relied on the employer's misrepresentations to continue working and as a result she was born with serious birth defects. The Court allowed the case to proceed on these grounds.

While there certainly will be many factual issues in dispute as this case proceeds, the case highlights the necessity of being very careful about the representations supervisors and managers make to employees, especially those of a medical nature. "You should ask your doctor" certainly would seem to be a more appropriate response than "Yes, it's safe."

In another case on a somewhat similar issue, *LM v. United States*, 2003 U.S.App. LEXIS 19663 (7th Cir. 2003), the father of a young girl sexually abused by a postman on his route

claimed that the Postal Service was responsible. Years previously, because of a similar claim made, the postman had been reassigned to a desk job, and then some years later was assigned to a route on which this girl lived. The father claimed that by taking the postman off the street the first time, in response to a similar concern, the Postal Service had in effect voluntarily assumed a perpetual duty to protect all persons from this postman, and his later reassignment to the girl's route violated that duty. The Court ruled against the father and noted that if a simple reassignment could create this type of broad and perpetual liability then employers would be discouraged from ever taking precautionary steps in the first place.

## ***WAGE & HOUR DEVELOPMENTS***

### Interrupted Breaks Can Be Compensable And Drive Overtime

This is an oft-ignored but frequent issue in many workplaces, in this case a hospital. The question is whether the degree of interruption of unpaid meal periods caused employees to spend the time primarily for the employer's benefit. The Appeals Court in Beasley v. Hillcrest Medical Center, 2003 U.S. App. LEXIS 20783 (10th Cir. 10/9/03), ruled that this was a question of fact which required a trial to resolve, and thus returned the case to the lower court.

With part-time employees this is not much of an issue unless the employer has an overtime over 8 hours/day policy. But for full-time employees who have, say, a 9 hour/day schedule but with an unpaid 1 hour meal period in the middle of the shift during which the employee supposedly is relieved from duty, having to pay those extra hours can quickly add up.

Just because an employee is on-call during an unpaid meal period, however, or is restricted in travel, or has some responsibilities does not necessarily make that time "working time" and thus compensable. But the more interruptions, the more responsibilities, then the more likely that time is to be compensable. In *Beasley*, for example, nurses were required to watch monitors and respond to frequent problems, and technicians reported being interrupted at least 75 percent of meal periods by pages and patient calls. And if that time would have generated overtime in that pay week, then that overtime would have to be paid. Not to mention the possible multiple damages and the employees' attorneys fees.

### Common Control Of Two Separate Companies = Joint Employer + Common Employees = Overtime Problem

In *Chao v. A-One Medical Services, Inc.*, 2003 U.S.App. LEXIS 20304 (9th Cir. 10/6/03), two separate companies, but commonly owned and sharing much of their administrative structure (shared payroll, employees, supervision, patients, accounting and compliance) were held to be both a single enterprise and joint employers under the FLSA. Consequently, employees who worked for both companies had to be aggregated when looking at their hours worked for overtime purposes. Because they had not been aggregated, but paid separately by each, the companies were liable for damages and attorneys fees. And because one company had substantial prior experience with the FLSA and had settled prior cases, the Court ruled the companies' actions were wilful; thus they also were liable for liquidated damages.

## ***AT THE SUPREME COURT***

## **Can An Employee Fired For Failing A Drug Test Later Be Entitled To Rehire Despite A "No Rehire For Misconduct" Policy?**

Many employers have formal or informal no-rehire policies for employees terminated for misconduct, in large part simply because of common sense - why rehire someone who could not behave himself the first time around? But can a former employee get around such a policy just by claiming he has a record of a disability? And if the misconduct was failing a drug test? That is at least part of the issue in the most interesting employment case currently before the United State Supreme Court, *Raytheon Co. v. Hernandez*, No. 02-749, on which the Justices heard oral argument on October 8, 2003.

In 1991, after failing a drug test, Raytheon allowed Hernandez to quit in lieu of termination. In 1994, claiming he was rehabilitated, Hernandez applied for rehire. Raytheon refused to consider him for rehire and claimed it had a neutral and uniformly enforced policy against rehiring former employees who had been terminated for misconduct.

Hernandez sued and claimed he was being discriminated against under the ADA for having a record of a disability or impairment and was denied rehire solely because of his past record of addiction. There are factual questions in the case about the nature and extent of the alleged "no rehire" rule, especially in light of a written rule for applicants providing that an applicant that tests positive may reapply after 12 months, and that an applicant who admits past drug use may still be hired if s/he tests negative.

There is at least an argument that the written policy contradicts the alleged informal unwritten no rehire policy. Whichever way the Court rules about the validity under the ADA of the alleged no-rehire policy, certainly one lesson to be learned from this case is to make sure that the reasons given for employment actions are consistent with company policies, and if the employer is relying on an unwritten policy, it had better be consistent with any existing written policies. Otherwise one has a recipe for serious and problematic issues of pretext.

## ***LEGISLATIVE AND REGULATORY ACTIONS OF NOTE***

## **IRS Increases Standard Mileage Rate And Eases Recordkeeping Burdens**

Effective 1/1/04, the standard automobile mileage rate for business deductions will increase from 36 cents to 37.5 cents. In Revenue Procedure 2003-76 (10/15/03), the IRS also announced that taxpayers who use no more than four vehicles at the same time in a business may use the standard rate beginning in 2004. Previously, any business with more than one vehicle could not use the standard rate at all, but had to track actual expenses for all vehicles. The IRS estimates that more than 800,000 businesses nationwide will become eligible to use the standard rate and no longer have to track such costs.

## **OK To Pay For Over-The-Counter Drugs With FSAs**

The IRS ruled on 9/3/03 that it was permissible for employees to pay for over-the-counter

("OTC") medications with pre-tax dollars through health care flexible spending accounts. In Revenue Ruling 2003-102, the IRS recognized that many prescription drugs are now available OTC and that many health plans cover only prescription drugs, and thus justified the use of FSA dollars.

## Is HIPAA Confusing?

Most people think so. One problem is getting claims information from insurers so an employer can negotiate intelligently over renewal or replacement coverage. According to HHS, employers are generally only entitled to enrollment, disenrollment and summary claims information. HHS says that if an employer needs more specific information for renewal or replacement, then it should amend plan documents to ensure specific protections for such information and carefully describe how that information would be used for health care operations purposes. Then the information can be used for underwriting, creation, renewal or negotiating purposes because those functions fall under health care operations purposes.

## Proposed Federal FLSA Wage/Hour Changes Highly Controversial

Recent proposed revised regulations governing eligibility for overtime issued by DOL earlier this year have created a political imbroglio in Washington. The proposed revisions would, among other things, increase the salary required for exemption from overtime, streamline the duties test, and also provides a reduced duties test for highly compensated employees. Employee groups claim 8 million employees would lose overtime protection under the current proposal, while DOL estimates about 644,000.

On 9/10/03, the Senate approved a DOL appropriations amendment barring DOL from implementing most changes. A similar measure lost in the House by only 3 votes, but on 10/2/03 the House approved a nonbinding resolution to include the amendment in the final conference report on the bill. The bill will now go to a joint Senate-House Committee if efforts to resolve differences fail before then, with the result uncertain. President Bush has stated he will veto any bill blocking the proposed regulations. The DOL is presently reviewing the 78,000 comments it received on the proposal.

## FCRA Changes Also Uncertain

The House on 9/10/03 voted to amend the Fair Credit and Reporting Act to largely eliminate the provision that (at least according to the Federal Trade Commission) subjects third-party investigations into employee misconduct to the Act's notice and disclosure requirements. Given that many courts and commentators have encouraged 3rd party investigations into, for example, sexual harassment claims, employers have found these notice and disclosure requirements particularly onerous. On 9/23/03, the Senate Banking panel sent the full Senate a FCRA reauthorization proposal without any changes to the employee misconduct requirement. Whatever the result in the Senate, any difference would be thrashed out in a joint committee, and thus this result also is uncertain.

## Genetic Bias Bill Approved By Senate

On October 14, 2003, the U.S. Senate voted 95-0 to approve a bill barring employers from using an individual's genetic information when making employment decisions. Locally, state laws in Massachusetts, Connecticut, Maine, Rhode Island and Vermont have already prohibit discrimination in employment or the basis of genetic information. The bill also applies to health insurers and bars them from making coverage or premium decisions based on genetic information. At present, the bill applies only to intentional discrimination, and would not encompass so-called "disparate impact" types of cases, where the alleged discrimination need not be intentional but could be shown by policy having unfair impacts on a particular group of employees. The bill now goes to the House, where there likely will be hearings beginning after the first of the year. The Bush administration has supported the Senate bill.

## Useful ADA Guidance Published By EEOC

The EEOC recently published guidance for job applicants on the Americans with Disabilities Act. While targeted towards job applicants, it is always useful to review what the agency is telling applicants and what to watch out for during the application process. The guidance is at www.eeoc.gov/facts/jobapplicant/html.

## Mold Information From OSHA

OSHA recently released a Safety and Health Information Bulletin (10/14/03) detailing methods to prevent and clean up mold growth and how to protect employees and others. Indoor mold exposure in particular can trigger allergic reactions in some individuals, and several public schools in Massachusetts have experienced serious mold problems necessitating expensive cleanups and renovations. The Bulletin is available at www.osha.gov/dts/shib/shib101003.html.

# ***ON THE LABOR FRONT***

## Illustrating Again That The NLRA Can Surprise Non-Union Employers

As noted in the earlier discussion about *IBEW Local 236*, some of the National Labor Relations Act's protections apply to all employees and employers, not just those workplaces in which a union is present. Just one example is *Air Contact Transport, Inc.*, 340 NLRB No. 81 (9/30/03). At a farewell luncheon for a trucking terminal manager, one employee raised his hand and stated that he had "some questions on behalf of [himself] and other coworkers." He then asked a series of questions about the employer's 401(k) plan and evaluations. That employee subsequently received a written reprimand for his "challenging, loud, animated and insubordinate tone" which embarrassed the employer. The memo also encouraged him to seek other employment. The employer asked him to sign the memo and he refused. Then he was terminated.

The Board ruled that speaking up at the meeting on behalf of other employees was "concerted" activity, and it was "protected" because it involved terms and conditions of employment. Thus it was unlawful to discipline him for engaging in that protected concerted activity. Then requiring him to sign an unlawful reprimand and then terminating him for his refusal to sign only compounded the original illegality. Thus, the employer was ordered to offer

the employee reinstatement with back pay and post a Board notice in the workplace for 60 days stating the employer had violated federal labor law, and remove any record of the unlawful discipline from its files.

## **Is Sending Recklessly False E-Mail Protected Conduct Under The Act?**

Sensibly enough, no. This is another example of the Act applying to a non-union employer, though resolved favorably. On November 11, 2001, an employee sent an e-mail to co-workers confirming the presence of anthrax in the employer's warehouse, without confirming any of the statements in her e-mail. The employee was terminated. The Administrative Law Judge found the employee deliberately falsified some assertions, and made others with reckless disregard of their truth or falsity. The Board, affirming the ALJ in *Sprint/United Management Co.*, 339 NLRB No. 127 (8/15/03), ruled that such statements were not protected under the Act and thus her termination was upheld.

## **Off-Duty And Subcontractor Employees Entitled To Access For Organizing**

Two recent off-duty employee access cases are of note. Generally, an employer may bar off-duty employees from access to the employer's interior premises, and to the exterior "work area" premises; barring such employees from exterior non-work area premises is permissible if there is a sufficient business reason to do so and there is a non-disparately enforced rule to that effect.

-*Off-Duty Employees From Other Facilities:* In *First Healthcare Corp. v. NLRB*, 2003 U.S.App. LEXIS 19426 ($6^{th}$ Cir., 9/19/03), involving a chain of nursing homes, the Court affirmed the Board and ruled that an employer could not prohibit off-duty employees from engaging in organizing activities in outside nonworking areas at facilities other than the facility where they worked, and could not maintain or enforce a rule barring off-duty employees from soliciting in the outside nonwork areas of the facility where they worked. The Court also affirmed the Board's remedy of a posting not only at the single facility in question, but at all of its numerous nonunion facilities in California.

-*Employees Of A Subcontractor May Have Access Rights:* In another twist on the same theme, the Board is currently reconsidering two related off-duty access cases that were remanded by the D.C. Circuit Court of Appeals. A Las Vegas casino subcontracted with Ark to operate a restaurant within the casino. In one instance, off-duty Ark employees handbilled at the casino entrance; in another instance off-duty Ark employees handbilled at the restaurant entrance on casino property, but within the restaurant's leasehold. The Board had ruled in the first case that "employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on the property pursuant to the employment relationship, even when off duty." In the second case the Board had ruled the same.

The Court remanded for the Board to explain why off-duty Ark employees should be allowed on casino property outside of Ark's leasehold. The Board's General Counsel has argued to the Board (1) that the off-duty Ark employees should be allowed anywhere on the casino's property when seeking to organize Ark because they are not "strangers" by virtue of their

employment relations with the casino's subcontractor, but (2) to the extent those employees are seeking to deal with the casino itself, or to appeal to casino customers in support of their Ark organizing, they could be treated as trespassers. Those cases are pending and a decision is not likely for several months.

## Board Changes Law On Health Care 10-Day Notices

Under Section 8(g) of the National Labor Relations Act, a union must give a health care institution 10 days notice of the date and time of a strike or picketing. Previously the Board had ruled that a union could delay the beginning of picketing or a strike up to 72 hours, leaving health care institutions oftentimes guessing as to when picketing or a strike would begin. In *Alexandria Clinic*, 339 NLRB No. 162 (8/21/03), the Board overruled those cases and held that a union must begin picketing at the date and time in the notice, and thus it was lawful for the employer to terminate 22 nurses who began a strike four hours after the time stated in the 8(g) notice.

## Extraordinary Board Remedies Imposed

Because of "numerous, pervasive and outrageous" unfair labor practices committed during a union organizing and election campaign, including withholding a wage increase, numerous threats of varying kinds, overbroad and disparately enforced solicitation and distribution policies and interrogation, the Board in *Federated Logistics*, 340 NLRB No. 36 (9/19/03) imposed "extraordinary" remedies upon the employer in addition to the usual cease and desist order and a posting. These included (1) suppling the Union every 6 months for 2 years, or until a certification after another election, the names and addresses of its current unit employees, "so that the Union can help to counteract the effects of these violations in its communications with employees"; (2) publicly read a Board notice by a responsible corporate management official or by a Board agent in the presence of a responsible management official, to employees "so that employees will fully perceive that the Respondent and its managers are bound by the requirements of the Act"; and (3) have an interpreter also read the notice to employees in Spanish and Haitian Creole. The Board also ordered a rerun election.

## Evidence Of Fraud In Arbitration Could Be Grounds To Vacate Award

Under most states' arbitration statutes, and the Federal Arbitration Act, fraud in securing an arbitration award is grounds to vacate an award. In *MidAmerican Energy Company v. IBEW*, 2003 U.S.App. LEXIS 19798 ($8^{th}$ Cir. 9/26/03), the only employee at a natural gas facility with millions of gallons of liquid natural gas on hand left his post without authorization shortly after midnight, after shutting down about 40 security devices and taking a company van rather than his own car so his absence would not be discovered; he returned about 3:30 A.M. The employer discovered his absence when a supervisor was called by someone wondering why a company van was driving around town. He was terminated.

At arbitration, he testified that he had received a telephone call from his wife and learned that his son was missing and he was worried he was the victim of gang violence. His wife corroborated his story. While the arbitrator was skeptical of his story, he was impressed that the grievant did not seek to evade responsibility for what he had done and had cooperated in the

investigation. Thus he ordered the grievant's reinstatement without back pay, but to a less safety-sensitive position if the company so desired.

After the arbitrator's award, the company received an anonymous phone call claiming that the grievant had lied about his whereabouts that evening and suggested the company speak with a particular individual. That individual later testified in a deposition that she had been having an affair with the grievant and he had been with her that evening during the time in question. The District Court had denied the employer's motion to vacate the award on the basis of fraud. The Circuit Court overruled the lower Court's ruling and stated that, if proven, the alleged fraud was material and could be grounds for vacating the arbitrator's award.

While it is extremely difficult to overturn an arbitration award - generally errors of fact or law are not sufficient - where a case rises or falls on the credibility of the grievant or other critical witness, one must always be alive to the possibility of dishonest testimony. Of course this cuts both ways, and many unions believe that employer witnesses routinely lie on the witness stand.