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REASONABLE ACCOMMODATION

ADA doesn't require reassignment of employee without competition

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

On December 7, 2016, the U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) held that the Americans with Disabilities Act (ADA) merely "requires an employer [to] allow a disabled person to compete equally with the rest of the world for a vacant position" as a reasonable accommodation.

Facts

A disabled nurse who worked in the psychiatric ward at St. Joseph's Hospital sought reassignment to another unit because she required the use of a cane, which posed a safety hazard in her ward. The hospital gave her 30 days to apply for other jobs but required her to compete for them. When she failed to obtain another position, she was terminated.

The nurse subsequently filed a charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC sued the hospital on the nurse's behalf, alleging it failed to reasonably accommodate her disability because it should have granted the reassignment without requiring her to compete with other applicants. The lawsuit eventually made its way to the 11th Circuit.

Court's holding

The ADA requires employers to provide reasonable accommodations to employees with disabilities, and the statute specifically lists "reassignment to a vacant position" as a form of accommodation that "may" be reasonable. The EEOC's guidance on reasonable accommodations echoes that mandate but also provides that if another job is available and the disabled employee meets the basic job qualifications, she must be given the position without having to compete for it, unless the employer can show that would be an undue hardship.

The 11th Circuit rejected the EEOC's position and held that the "ADA does not require reassignment without competition for, or preferential treatment of, the disabled." In support of its findings, the court relied on a previous case in which the U.S. Supreme Court upheld an employer's right to rely on a bona fide seniority system to deny reassignment. The 11th Circuit found that requiring reassignment "in violation of an employer's best-qualified hiring or transfer policy is not reasonable." Thus, the court found that passing over the best-qualified candidates "in favor of less[-]qualified ones is not a reasonable way to promote efficiency or good performance."

The court concluded that the ADA requires an employer only to allow a disabled employee to compete equally for vacant positions, and the statute was never intended to give disabled employees priority in hiring or reassignment over nondisabled coworkers or applicants. *EEOC v. St. Joseph's Hospital.*

Employer takeaway

Although reassigning a disabled employee to a vacant position in violation of your "best-qualified" hiring policy isn't always required, that doesn't mean it will never be a reasonable accommodation. The 11th Circuit noted that there might be "special circumstances" in which a noncompetitive reassignment is a required reasonable accommodation.

The ADA lists "reassignment to a vacant position" as a form of accommodation that "may" be reasonable.

Multistate employers should exercise caution when making reasonable accommodation decisions, however. Several federal circuit courts of appeal have agreed with the EEOC's position on reassigning disabled employees without competition even if they aren't the most-qualified candidates. Given the split between the circuits, this issue is likely to make its way to the U.S. Supreme Court.

As with all requests for reasonable accommodation, you should engage in the interactive process with employees who seek reassignment to a vacant position and document your ultimate decision and the reasons behind it.

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MINIMUM WAGE

Florida's minimum wage sees slight increase in 2017

Florida's minimum wage increased from $8.05 to $8.10 an hour on January 1, 2017. Moreover, employees who qualify for the tip credit under the Fair Labor Standards Act (FLSA) must be paid an hourly minimum wage of $5.08 in 2017. Although the federal minimum wage set by the FLSA is only $7.25 an hour, Florida employers should remember that the higher state minimum wage preempts the lower federal rate. ✤

LABOR LAW

11th Circuit upholds NLRB's ruling that Turkey Point security guards weren't supervisors

by G. Thomas Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

Just before Thanksgiving, the 11th Circuit upheld a decision in which the National Labor Relations Board (NLRB) found that two lieutenant security guards at the Turkey Point nuclear power plant didn't have enough authority to qualify as supervisors under the National Labor Relations Act (NLRA). Their employer, G4S Regulated Security Solutions, thought the two men were supervisors under the NLRA and their concerted activity therefore wasn't protected. (Concerted activity occurs when two or more employees act together to complain about or protest their working conditions, pay, or benefits.) Here's what happened.

Fired for performance issues

Thomas Frazier and Cecil Mack were lieutenants in a G4S force that provides military-type security at Florida Power & Light's (FPL) Turkey Point nuclear power plant. G4S expects its lieutenants to discipline the security guards under their command. Both Frazier and Mack were suspended from work and then terminated in February 2010 for not meeting the company's expectations.

G4S project manager Michael Mareth later testified that the company hadn't "hit the mark in our performance of supervisors . . . because we didn't have the right oversight of the officers in the field." Senior executives at G4S headquarters and FPL agreed to initiate a leadership effectiveness program, under which performance reviews were conducted for all supervisors, including Frazier and Mack. Mareth testified that after the reviews, "a number of individuals . . . were terminated because they didn't meet the expectations." Five lieutenants, including Frazier and Mack, were fired.

Frazier's termination notice stated: "Failure to meet satisfactory leadership expectations." Mack's termination notice stated: "Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process[,] management completed a review of [his] personnel file. As a result of the review[,] it is management's perspective that Cecil's performance does not meet satisfactory job performance or behavior standards."

Frazier and Mack filed a charge with the NLRB claiming they were terminated for engaging in protected concerted activity in violation of Section 8(a)(1) of the NLRA. Although they denied that they had any

supervisory authority, an NLRB administrative law judge (ALJ) who heard their case rejected their arguments and found that they were both supervisors. As a result, the ALJ dismissed their charges against G4S.

The testimony before the ALJ revealed that Frazier had raised concerns about certain issues on behalf of the security guards, including complaints about inadequate bathroom facilities, uncomfortable chairs, and insufficient water; a requirement that they have lanyards on their weapons; and FPL's requirement that they wear vests not mandated by the Nuclear Regulatory Commission. Mack raised issues about security guards being posted in the sun for six hours without any shelter, having an inadequate supply of water, being required to wears vests that were too hot, and "not being treated fairly."

G4S acknowledged that Frazier and Mack had brought those issues to the attention of management. Raising such workplace concerns and complaints on behalf of the security guards would be considered protected concerted activity under the NLRA if Frazier and Mack weren't supervisors. After reviewing the case, the NLRB reversed the ALJ, finding that Frazier and Mack were not supervisors and were therefore protected by the NLRA.

Supervisory exemption under NLRA

The NLRA exempts from its coverage supervisors who (1) have the authority to engage in one of the 12 supervisory functions listed in Section 2(11), (2) use independent judgment in the exercise of such authority, and (3) hold their authority "in the interest of the employer." The 12 factors in the NLRA's definition of "supervisor" include the authority to (1) hire, (2) transfer, (3) suspend, (4) lay off, (5) recall, (6) promote, (7) discharge, (8) assign, (9) reward, or (10) discipline other employees or (11) to responsibly direct them or (12) adjust their grievances, or effectively recommend such action, if exercising such authority isn't merely routine or clerical in nature but requires the use of independent judgment.

The burden of establishing supervisory status rests on the party asserting it—usually the employer. Congress exempted supervisors from the NLRA based on its judgment that "an employer is entitled to the undivided loyalty of its representatives." The supervisory exemption is an important part of the national labor policy devised by Congress.

'Supervisors' had no authority to discipline

On appeal, the 11th Circuit upheld the NLRB's decision. Frazier and Mack were paid more than security guards, received additional training that wasn't given to guards, were included in management meetings that guards didn't attend, and performed little actual guard work. That wasn't enough to prove that they were supervisors.

In reversing the ALJ's decision, the NLRB found that Mareth didn't cite a single instance in which a lieutenant had exercised discretion or independent judgment regarding a disciplinary matter. The NLRB quoted previous cases in which it found that "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." According to the Board, Mareth's generalized testimony was insufficient to satisfy that requirement.

Moreover, although eight disciplinary notices were admitted into evidence at the hearing, none of them was issued by Frazier or Mack. Because the disciplinary notices were issued by other lieutenants, the evidence was insufficient to show that Frazier and Mack exercised independent judgment. According to the NLRB, "To exercise independent judgment, an individual must, at a minimum, act or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data, provided that the act involves using a degree of discretion rising above the 'merely routine or clerical.'"

Because there was insufficient evidence that they exercised independent judgment, Frazier and Mack were found to be "employees" protected by the NLRA. Next, an ALJ from the NLRB may conduct a back-pay hearing to determine the amount of wages they are owed after their discharge in 2010. *G4S Regulated Security Solutions v. National Labor Relations Board,* Case No. 15-13224 (11th. Cir., November 21, 2016).

Takeaway

Knowing who is on your team is important. As this case shows, supervisory status under the NLRA is different from the text for exempt status under the Fair Labor Standards Act (FLSA). You should decide whom

AGENCY ACTION

Time for employers to use revised Form I-9. Employers must now use the revised version of Form I-9, Employment Eligibility Verification (dated November 14, 2016), according to the U.S. Citizenship and Immigration Services (USCIS). Among the changes in the new version, Section 1 asks for "other last names used" rather than "other names used," and it streamlines certification for certain foreign nationals. Other changes include the addition of prompts designed to ensure information is entered correctly, the ability to enter multiple preparers and translators, a dedicated area for including additional information rather than having to add it in the margins, and a supplemental page for the preparer/translator.

OSHA updates walking-working surface standards, fall protection. The Occupational Safety and Health Administration (OSHA) has issued a final rule updating its general industry walking-working surfaces standards specific to slip, trip, and fall hazards. The rule, which went into effect January 17, also includes a new section under the general industry personal protective equipment standards that establishes employer requirements for using personal fall-protection systems. OSHA estimates the final standard will prevent 29 fatalities and more than 5,842 injuries annually. The rule will affect approximately 112 million workers at 7 million worksites. OSHA said the most significant update in the new rule allows employers to select the fall-protection system that works best for them, choosing from a range of accepted options, including personal fall-protection systems. OSHA has permitted the use of personal fall-protection systems in construction since 1994, and the final rule adopts similar requirements for general industry.

EEOC reports fiscal year 2016 statistics. The Equal Employment Opportunity Commission (EEOC) reported in its annual Performance and Accountability Report published in November 2016 that it secured more than $482.1 million for victims of discrimination in private, state and local government, and federal workplaces during fiscal year 2016, which ended September 30. That includes $347.9 million through mediation, conciliation, and settlements for workers in the private sector and state and local government; $52.2 million for workers through agency litigation; and $82 million for federal employees and applicants. The report notes that the EEOC increased the number of charges staff resolved to 97,443 charges, 6.5 percent more than the charges the agency received. That resulted in a reduction of charge workload by 3.8 percent to 73,508, a 2,900-charge reduction compared with fiscal year 2015. ✤

you want acting as supervisors and give them enough authority to qualify for that position. Then be sure your supervisors are actually making managerial decisions and using the authority you have given them.

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CONSTITUTIONAL RIGHTS

11th Circuit rules on challenge to sheriff's power to make political appointments

by Jeffrey D. Slanker
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In addition to the major changes that will be ushered in after the recent national elections, many local governments throughout Florida are facing changes as a result of local elections. Indeed, there are almost assuredly many incoming local governmental officers, including sheriffs, who will be taking over and setting up new administrations. But how much power does the "new sheriff in town" have to make political appointments after being elected? And when can a sheriff be held liable for his actions based on political motivations? The 11th Circuit recently provided some guidance on those issues.

Facts

Jeffrey Stanley worked for the Broward County Sherriff's Office (BSO). He left the BSO voluntarily but later reapplied for another position there. He wasn't rehired, and the BSO indicated that it was because he supported the sheriff's opponent in the local election.

Stanley filed suit, alleging that he was retaliated against for engaging in protected activity under the First Amendment to the U.S. Constitution. Essentially, he argued that the BSO retaliated against him for engaging in his right to free speech and freedom of association. The trial court dismissed his complaint.

The basis for the court's dismissal was that the sheriff is an "arm of the state" and therefore is immune from suit under the Eleventh Amendment to the Constitution. The Eleventh Amendment provides immunity from suit in federal court for state government actors, which has been interpreted to mean that a state may not be sued in a federal court. Stanley appealed the lower court's decision, and the 11th Circuit reversed on appeal.

Appellate court's decision

The 11th Circuit noted that the trial court premised its ruling on a finding that the sheriff is an arm of the state entitled to immunity from suit. The court of appeals noted that municipalities are not typically arms of the state entitled to such immunity. Whether a sheriff is an arm of the state or a local governmental actor largely depends on the sheriff's functions and how intertwined with the state his office is. Ultimately, the court held that state laws defining the authority of a sheriff in Florida are crucial to determining whether sheriffs are immune from challenge to their hiring decisions based on free speech violations.

The court held that an interpretation of Florida law indicates that a sheriff is not an "arm of the state" but rather a local government official who can be sued for constitutional violations. In practical terms, that means the BSO isn't immune from being sued for allegedly violating Stanley's First Amendment rights by failing to rehire him.

Indeed, the authority of a sheriff, or some other local government official, to take an employment action such as firing, hiring or not hiring, replacing, suspending, or demoting an employee or a job applicant because he was politically connected to another candidate is highly circumscribed by federal constitutional law. Ultimately, such actions may be taken only in very limited circumstances. *Jeffrey Stanley v. Broward County Sheriff, Scott Israel,* Case No. 15-13961 (11th Cir., Dec. 14, 2016).

Takeaway

Local governmental employers and political figures need to be cautious about basing employment decisions on an individual's political affiliation or speech. Such actions are legal only in certain circumstances. Further, employment actions based on political connections are limited by state law and may also be prohibited under municipal ordinance, collective bargaining agreements, or civil service systems. This case makes it easier for sheriffs to be sued in Florida, which is all the more reason for local governmental entities to consult employment law counsel before implementing risky personnel decisions.

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DISCRIMINATION

EEOC guidance delves into intricacies of national origin discrimination

Discrimination based on national origin has been unlawful since passage of the Civil Rights Act of 1964. Lately, however, the Equal Employment Opportunity Commission (EEOC) has seen an uptick in the number of national origin discrimination claims. In fiscal year 2015, approximately 11 percent of the 89,385 private-sector charges filed with the agency included claims of national origin discrimination.

In response to that number of claims and an increase in diversity in the American workforce, the EEOC has released new guidance on national origin discrimination—guidance that includes, among other things, issues related to discrimination based on a combination of protected characteristics, human trafficking, and job segregation.

What's new?

The new guidance replaces guidance from 2002 and points out that Title VII of the Civil Rights Act of 1964 (which covers employers with at least 15 employees) protects applicants and employees from discrimination based on their race, color, religion, sex, and national origin. The fact that national origin is included in the list of protected categories means that regardless of whether someone—or her ancestors—is from a different country or belongs to a particular ethnic group, she is entitled to be free from employment discrimination.

The overview of the EEOC's new guidance also points out that immigrant workers are present in every occupation in the United States, and they are highly represented in many of the largest-growth occupations. "Twenty-five percent of foreign-born workers aged 16 and older work in service occupations," the guidance says. "In the near future, second- and third-generation descendants of at least one foreign-born parent are expected to enter the workforce in increasing numbers."

In explaining what constitutes national origin discrimination, the guidance recognizes that national origin discrimination often overlaps or intersects with other bases protected under Title VII, such as race, color, and religion.

The new guidance also includes an explanation of how human trafficking constitutes employment discrimination. "When force, fraud, or coercion is used to compel labor or exploit workers, traffickers and employers may be violating not only criminal laws, but also Title VII," the guidance states. "In particular, Title VII may apply in trafficking cases if an employer's conduct is directed at an individual and/or group of individuals based on a protected category, such as national origin."

WORKPLACE TRENDS

Glassdoor studies gender pay gap in tech. The gender pay gap in the tech industry is real even when researchers use a control for men and women choosing to work in different roles, according to the chief economist at Glassdoor. In a November 2016 post on Glassdoor's economic research blog, Andrew Chamberlain said millions of the company's salary reports from around the world show the gap even after adjusting for factors such as age, education, years of experience, location, year, job title, and company. Among 16 of the tech roles for which Glassdoor has data, 12 had gender pay gaps above the U.S. adjusted average pay gap of 5.4%.

Research shows workplace preferences differ among age groups. Research from Monster shows workers in different age groups have different preferences regarding workplace communication, technology, and work schedules. The Multi-Generational Survey finds that 84% of boomers (aged 51 to 70) and 88% of Gen X (aged 35 to 50) rank e-mail as their workplace communication medium of choice, while 51% of Gen Y (aged 20 to 34) and 66% of Gen Z (aged 15 to 20) believe that texting is an important tool in the workplace. The research found that 61% of Gen Z gravitates toward social media for workplace communications. The research also shows that roughly 75% of Gen Z workers value laptops and smartphones in their workplace, while 74% of boomers and Gen X still rate desktop computers as valuable workplace technological tools. Regarding work schedules, 56% of boomers say it doesn't matter what time someone arrives at or leaves from work as long as the work is done.

Survey finds 28% of employers don't conduct background checks. Despite the high cost attributable to bad hires, a CareerBuilder survey finds that 28% of employers don't conduct background checks on new hires. The survey found 72% of employers run background checks on all new employees before they are hired. The survey placed the average cost of one bad hire at nearly $17,000. Employers that do background checks analyze for the following aspects: criminal background (82%), confirm employment (62%), confirm identity (60%), confirm education (50%), check for illegal drug use (44%), check licensing (38%), and check credit (29%). Among employers reporting that they had made a bad hire, 37% said it was because the candidate lied about qualifications. The most common ways employers said a bad hire affected their business in the last year were less productivity, compromised quality of work, lower employee morale, and time associated with recruiting and training another worker. ✤

Job segregation is another issue covered in the new guidance, which states that "Title VII prohibits employers from assigning or refusing to assign individuals to certain positions, facilities, or geographic areas; denying promotions; physically isolating employees; or otherwise segregating workers into jobs based on their national origin." For example, the guidance says the law prohibits a retailer from requiring all Filipino employees to work in lower-paying stocking jobs away from public contact because of an actual or assumed customer preference for non-Filipino sales representatives.

The EEOC also says that national security concerns—in limited circumstances—may justify employment selection decisions. The guidance explains that Title VII provides employers with a defense against a complaint or charge of discrimination for refusal to hire, refusal to refer, or termination when an individual doesn't meet job requirements that are imposed in the interest of national security.

Promising practices

The guidance includes suggestions for employers working to prevent national origin discrimination. It acknowledges that although all workplaces are different and following the suggested practices "does not insulate an employer from liability or damages for unlawful actions," the implementation of promising practices "may help reduce the risk of violations, even where they are not legal requirements."

The promising practices covered in the guidance relate to recruitment; hiring, promotion, and assignment; discipline, demotion, and discharge; and harassment.

Recruitment. The guidance states that reliance on word-of-mouth recruiting "may magnify existing ethnic, racial, or religious homogeneity in a workplace and result in the exclusion of qualified applicants from different national origin groups." The EEOC suggests using a variety of recruitment methods to attract a diverse pool of jobseekers.

Hiring, promotion, and assignment. The guidance suggests establishing written objective criteria for evaluating job candidates. The criteria should be communicated to prospective candidates and applied consistently to all candidates. "Appropriate objective criteria for employment decisions will be tied to business needs, and help ensure that all individuals are given an equal opportunity when being considered for open positions, assignments, and promotions. An employer's decision to apply criteria that are not related to the performance of the job, such as real or perceived coworker or customer preferences, may improperly screen out individuals based on their national origin," the guidance states.

Discipline, demotion, and discharge. The guidance says employers can reduce the risk of discriminatory employment decisions "by developing objective, job-related criteria for identifying the unsatisfactory performance or conduct that can result in discipline, demotion, or discharge." It also points out that employers will benefit by carefully recording the business reasons for disciplinary or performance-related actions and sharing those reasons with the affected employees.

Harassment. The guidance suggests that employers communicate to employees through policies and actions that harassment won't be tolerated and that employees who violate the prohibition against harassment will be disciplined. ✤

HEALTH INSURANCE

Answers to questions on managing employee status changes under ACA

Even HR professionals with a good handle on the Affordable Care Act (ACA) can be thrown for a loop when an employee's status changes—and as an HR pro, you know such changes take place all the time.

Here we provide some tricky ACA status-change situations—and plain-English answers—for you. Note that many ACA status-change questions can be very fact-specific, and consultation with experienced benefits counsel is always recommended.

Q *An employee who has worked full-time for over a year changed status to a part-time employee. We offered her benefits during the stability period because she qualified during the prior measurement period. Eight months into the stability period, she returned to full-time status. Do we measure her hours worked in the measurement period for coverage in 2017, or do we focus solely on the fact that she is now a full-time employee and eligible for coverage? (Assuming, of course, she remains a full-time employee.)*

A The answer to this question would turn on your applicable measurement periods and stability periods for ongoing employees. The beauty of the lookback method (if "beauty" could ever reasonably be applied to anything ACA-related!) is that it provides a degree of administrative simplicity when employees change categories—even more than once—during a given period.

As a quick overview, there are two general ways to calculate "full-time" for ACA purposes—month to month and the lookback method. Month to month is pretty self-explanatory: An employee's status is determined by looking at every single month individually. The lookback method, by contrast, allows employers to designate a certain period of time (between three and 12 months) as a standard measurement period to determine whether an employee qualifies as full-time under the ACA. If the employee qualifies as full-time during the measurement period, she is treated as full-time during a subsequent "stability period"—which must be the longer of six months or the length of the standard measurement period—even if her hours drop below the ACA's full-time threshold during that time.

In the situation you've described, the employee should continue to receive benefits during the current stability period because she qualified as full-time during the prior measurement period.

Going forward, you would then look at the number of hours worked in the new measurement period to determine whether the employee has the requisite number of hours to qualify as full-time under the ACA for that measurement period. If so, she would then be eligible for coverage during the subsequent stability period.

UNION ACTIVITY

Unions speak out against court action on overtime rule. Labor interests voiced their disapproval of a Texas federal judge's action in November that thwarted a new overtime rule from taking effect on December 1, 2016. The judge issued a preliminary injunction blocking the rule change, which would have made millions more workers eligible for overtime. Under the new rule, workers earning less than $913 a week wouldn't qualify for exempt status under the Fair Labor Standards Act (FLSA). Therefore, they would be eligible for overtime pay. "President Obama's decision to update the overtime threshold—which previous presidents have made with no legal challenge—was proper, legal, and well within his authority," Mary Kay Henry, international president of the Service Employees International Union (SEIU), said after the November 23 court decision. "This decision was wrongly decided and should be overturned." The International Brotherhood of Teamsters also issued a statement criticizing the judge's decision. The Teamsters statement said the rule change "would have stopped employers from shielding themselves from having to pay overtime to workers merely by deeming them 'professional' staff."

Hoffa says union will work with Trump on worker issues. Teamsters General President James P. Hoffa, in a statement following the November election, vowed to work with Donald Trump on issues involving workers. "For more than a year, the Teamsters have been pushing a platform that prioritizes building, maintaining, and repairing the nation's faltering infrastructure—a stated priority of President-elect Trump," Hoffa said. "U.S. roads, rails, energy plants and water systems have been ignored for far too long. This country needs a plan to invest more, and we will work with the Trump Administration to craft a solution." Hoffa also mentioned "promises to the American people on trade and manufacturing," saying the union is "ready to work with him to find common ground that will benefit working families."

Minneapolis airport workers win union representation. SEIU Local 26 has won the right to represent Minneapolis-St. Paul airport workers employed by Delta subcontractor Air Serv, including baggage handlers, cabin cleaners, cart drivers, wheelchair agents, unaccompanied minor escorts, and lavatory and water service fillers. The union victory came after a neutral third party verified a majority of workers signed cards supporting the union. A statement from the SEIU said the victory "is the latest in the larger Fight for $15 movement of contracted airport workers to stand together to ensure every airport worker wins decent wages, good benefits, and union rights." ✤

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This answer assumes that only the employee's hours are changing, not the job itself. If, for example, the employee is moving between one job that is measured using the lookback method and another that is measured using the monthly measurement method, or vice versa, the answer could vary.

Q *We have a per-diem employee who had worked enough hours during the measurement period to be ACA-eligible. She worked pretty steady and then took an unofficial leave of absence and didn't work for a period of time. She stopped paying her premiums, and after several certified mail requests for payment, she failed to reimburse us, so we terminated her benefits. Well, she recently started working again, and I'm not sure if I'm supposed to offer her benefits. Do we offer benefits only if she repays us what she owes?*

A It's not entirely clear what you mean by "per diem" employee in this situation or what your measurement period is, but we're going to assume that she was considered a full-time employee under the ACA and eligible for benefits.

Under the ACA, an employee who terminates her employment and is then rehired may be considered a "new" employee only if she had a full break in service of at least 13 consecutive weeks (or 26 weeks for certain educational organization employers). But an employee may be treated as "new" after a break of only four or more consecutive weeks if that break is longer than the employee worked for you immediately before the break.

We have set aside the issue of the employee's prior nonpayment of premiums because that is entirely separate from the issue of whether she should be offered health coverage now. Consultation with counsel is recommended because recouping money owed by employees (past or present) tends to be complicated, fact-specific, and legally risky.

Q *We have an employee who retired on August 31, 2016. This person elected COBRA. What codes should we use? 1H and 2C and then the dollar amount of the insurance premium the retired employee will pay?*

A For September through the remainder of 2016, this person would likely be coded on the 1095-C as 1H for line 14 (no offer of coverage) and 2A for line 16 (employee not employed during the month). The draft 2016 1095-C filing instructions are clear that 2C is not to be used in this situation: "Do not enter code 2C in line 16 for any month in which a terminated employee is enrolled in COBRA continuation coverage or other post-employment coverage (enter code 2A)."

You also ask about how to code the amount this former employee will be paying. The "Employee Required Contribution" amount is generally entered on line 15 of the 1095-C form. However, you fill out line 15 *only* if you use 1B, 1C, 1D, 1E, 1J, or 1K on line 14. Therefore, if you use 1H on line 14, you leave line 15 blank. ✤

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