



## Articles

➔ Monthly Program and Luncheon

➔ Mark Your Calendar!

➔ Diversity Calendar

➔ Legal Briefs

## Monthly Program & Luncheon

**TOPIC:** Getting the Best Health Care System at the Best Price (Update on How to Reduce Pediatric Emergency Room Abuse and Misuse)

**WHEN:** Thursday, November 5, 2009

**TIME:** Lunch served from 11:30AM to noon;  
Program from noon to 1:00PM

**WHERE:** 1300 George Bush Drive and Holik Drive,  
College Station Conference Center Room 101

**COST:** \$10/member & first time guest  
\$15/non-RSVP guest

**SPEAKER:** **Stuart J. Yoffe, M.D., F.A.A.P.** of *Innovative Health Care* Dr. Stuart Yoffe is a Board Certified Pediatrician with special training in the field of allergy and immunology. He was trained at the University of Kentucky School of Medicine, then Ohio State Children's Hospital and finally at Baylor College of Medicine, where he was part of the team that cared for the bubble baby.

Dr. Yoffe was a weekly guest on Houston, Texas channel 13's "Good Morning Houston" television show for 9 years and was the radio show host "the Washington County Healthline" for 23 years. He is the author of several parenting books, which he completed during 39 years as a physician. His recent interest in cost effective medicine has led Dr. Yoffe to investigate unnecessary over-utilization of emergency department facilities and its relationship to overall health care costs.

**MENU:** Baked chicken, roasted potatoes, green bean casserole, dinner rolls, tossed salad, and sweet and unsweet tea (subject to change)

**If Attending:** [rsvpprograms@gmail.com](mailto:rsvpprograms@gmail.com) by noon on Tuesday, **November 3, 2009**. *Please reply by the deadline to ensure that the appropriate number of meals are ordered.*

*This program has been approved for 1.0 (General) recertification credit hour towards PHR, SPHR and GPHR recertification through the HR Certification Institute. Please be sure to note the \*\*\*program ID number on your recertification application form. For more information about certification or recertification, please visit the HR Certification Institute website at [www.hrci.org](http://www.hrci.org).*  
**\*\*\*If you would like to count this program as 1.0 recertification credit towards your PHR, SPHR, or GPHR, please be sure to pick-up your receipt for this meeting, the program ID number will be listed on the receipt. You will need to pick-up your receipt on 11/05/09.**



*Mark Your Calendar!*  
*BVHRMA December 2009 Program*

Please join us on December 3, 2009 at the Briarcrest Country Club for our **Annual Holiday Program and Food Drive**.

NOVEMBER DIVERSITY DATES

**November 14** - World Diabetes Day

**November 16** - International Day of Tolerance

**November 20** - Universal Children's Day

**November 25** - International Day for the Elimination of  
Violence Against Women

**November 26** - Thanksgiving Day (U.S.)



## HR CORNER....It's Legal Briefs Time!!!

Welcome to Legal Briefs for HR, an update on employment issues sent to over 4000 HR professionals, in-house counsel and business owners to help them stay in the know about employment issues. Anyone is welcome to join the email group . . . just let me know you'd like to be added to the list and you're in! Back issues are posted on my firm's website at [www.munckcarter.com](http://www.munckcarter.com) under E-Newsletter.

Here's what's up:

- 1. ABCs of ADA** - In restoring the Americans With Disabilities Act (ADA) to its original intent, Congress' first step was to amend the statute via the ADAAA, effective 1-1-09. The second step is for the EEOC to amend the implementing regulations, starting with the issue of a Notice of Proposed Rulemaking (NPRM). This was done on 9-23-09 with a 60-day comment period which will end on 11-23-09. You'll find a complete copy of the NPRM and some FAQs on the EEOC website at [www.eeoc.gov/policy/regs/index.html](http://www.eeoc.gov/policy/regs/index.html). The changes in the ADA included [1] no more use of mitigating measures when considering whether an individual has an impairment that substantially limits a major life activity; [2] expansion of the list of major life activities; and [3] broadening of the "regarded as" prong of the definition of qualified individual with a disability. The regs provide additional direction including a non-exhaustive list of impairments that will consistently meet the definition of disability. This is a big departure from the prior approach, of evaluating each situation independently since there were no "per se" disabilities. These changes will mean many more applicants and employees will have the protection of the law and employers' focus will shift from fighting "disabled" status to determining the existence and scope of a reasonable accommodation, as well as the undue hardship and direct threat defenses, which remain.
- 2. Floored by the ADA?** - If a disabled employee's service dog is slippin' and slidin' on the employer's slick tile floors, is installation of a nonskid surface a form of reasonable accommodation for the employee? Maybe, says the MT Supreme Court in reversing the trial court's "no duty" finding for the employer and remanding the case for further inquiry into the "reasonable accommodation" analysis. *McDonald v. Dep't of Environmental Quality* (Mont. 7-0-9). Don't let your managers make these calls solo, as they are likely to bark up the wrong tree. Educate them on the fundamentals of employment law, designate a point person to receive and consider accommodation requests and involve legal counsel where needed, to avoid being bitten.
- 3. The Eyes of Feds Are Upon You, Texas** - It's not your imagination. Federal agencies, across the board, are increasing enforcement activity in the Lone Star State. As one example, shortly after questioning the state's safety record during a June speech in San Antonio, Secretary of Labor Hilda Solis sent extra inspectors from other states into Texas. Upshot? A 60% increase in construction site inspections and 85% increase in citations issued.

4. **At A Minimum** - We all know that the federal minimum wage ratcheted up to \$7.25/hour on 7-24-09, but don't forget that you might be subject to a more generous state minimum wage rate. Further, ten states' rates are adjusted annually for inflation, including AZ, CO, FL, MO, MT, NV, OH, OR, WA and VT, so you may need to stay on top of those changes. CO is currently considering dropping its rate, since it experienced negative inflation. You can check out rates on your states' government website and/or check out a nationwide compilation at [www.dol.gov/esa/minwage/america.htm](http://www.dol.gov/esa/minwage/america.htm).
5. **Are You Secure, Part 2** - As mentioned in last month's LB4HR, the failure to protect individuals' personal information from disclosure to unauthorized individuals is resulting in significant penalties to the organizations whose systems allowed the breach. Add to the mix the implementing provisions of the Health Information Technology for Economic and Clinical Health (HITECH) Act, which will affect health care providers, health plans and other entities covered by HIPAA beginning on 9-23-09. Entities subject to the rule must have procedures to deal with a breach, train its workforce in handling breaches, sanction those who don't comply with the procedures and have a complaint procedure to report noncompliance. With certain exceptions, HITECH requires that breaches be reported. You can find a copy of the Interim Final Rule and more info at [www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/breachnotificationifr.html](http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/breachnotificationifr.html).
6. **Smoke Signals** - The line is still being drawn, to determine how far employers can go in conditioning employment on applicants' and employees' healthy habits. One employer had a wellness plan which prohibited employees from using tobacco both on and off the job, as a means to control medical expenses. A recent hire sued, when he was fired for testing positive for nicotine. In 2-08, the court dismissed two of plaintiff's four claims, but held he had viable claims invasion of privacy and unlawful interference with the right to health insurance benefits, in violation of ERISA section 510. Fast forward to 7-09 where the employees remaining claims are given the boot because [1] his smoking was public, not private; and [2] he was not yet a health plan participant because the employment offer was conditioned upon a clean drug test. The plaintiff has appealed and employers are left to wonder if there would be a different outcome, had the termination of employment applied to a current, rather than a conditional, employee and/or if the smoking habit was unknown to the employer. *Rodriguez v. EG Systems dba Scotts Lawnservice* (D. Mass. 7-09).
7. **To Form a More Perfect Union?** - A possible compromise version of the Employee Free Choice Act (EFCA), as extolled to the AFL-CIO by Sen. Arlen Specter (D.-Penn.), would include [1] accelerating the timeframe for holding an election to within 5 to 21 days after a union showing of 30% interest via signed authorization cards; [2] access to employees for union organizers during work time; [3] triple penalties for employer unfair labor practices; and [4] a "last best offer" approach to imposing a collective bargaining agreement if negotiations fail, where the arbitrator chooses between the last/best offer from management and from the union. Lacking the 60 votes needed to

move EFCA along, Senate Democrats were waiting to see if the Mass. legislature would change the current law, to allow their Governor to elect an interim replacement for recently deceased Sen. Ted Kennedy, or if they will have to wait until a special election scheduled for 1-19-10. The law was changed on 9-23-09 and an interim replacement, Paul G. Kirk, Jr., was named by Mass. Gov. Deval Patrick on 9-24-09.

8. **Heads' Up, New York** - Effective 10-26-09, employers in New York will need to provide all newly hired employees with written notice of the employee's rate of pay and identify the normal paydays. Non-exempt workers must also be advised of their overtime rate of pay and employers must retain a signed written acknowledgment from each employee, upon hire, of receipt of this written notice. The notice must comply with requirements set by the Commissioner of Labor, but no sample form has been provided yet. Don't forget that overtime in most jurisdictions is 1.5 times the "regular rate" of pay, which in some cases is not the same thing as the employee's hourly rate or "straight time" rate. If you'd like to see full text of the new law, you can find NY state laws at <http://public.leginfo.state.ny.us> and this provision is section 195 of the Labor Law (LAB).
9. **More Contractor Conundrum** - As example of the creeping erosion between employee and contractor status, the Third Circuit Court of Appeals has allowed an independent contractor to pursue race discrimination claims under 42 U.S.C. sec. 1981 (aka Civil Rights Act of 1866) against her former employer. *Brown v. J. Kaz, Inc.* (3<sup>rd</sup> Cir. 9-09). This is not a case where the court found an employee had been misclassified as a contractor, since the plaintiff could schedule her own sales appointments, was not provided with a sales script (only a ban on making misleading statements about the product, an automatic bed) and she provided her own sales equipment, office space and transportation. As a contractor, Title VII and the state's fair employment practice law did not apply to her. Instead, the court followed the lead of three other Circuit Courts of Appeal in noting that Sec. 1981, a post-Civil War enactment, provides that all persons shall have the right to make and enforce contracts as white citizens do. The law has been applied to employment relationships, whether at-will or contractual in nature, and now to independent contractor relationships, too. Lesson learned? Although it's unlikely that many employers are utilizing contractors in lieu of employees to avoid liability under anti-discrimination laws, those that are using contractors should be aware of this emerging right to pursue actual or perceived racial discrimination.
10. **E-Verify FAQ** - Many bankers have wondered if they are considered federal contractors for purposes of being subject to the E-Verify mandate which took effect on 9-8-09. The regulations explain that "Agreements or activities performed by financial institutions that are not subject to the FAR (Federal Acquisition Regulation) are not required to comply with the e-Verify provisions and clauses of the FAR." Since issue of or payment on U.S. Savings Bonds and being FDIC insured are not covered by the FAR, a bank will not trigger E-Verify coverage by engaging in those activities. Also, financial agency agreements (FAAs) between banks and the federal government are not subject to the FAR either.

11. **For the Birds** - If you like being "tweeted" and want breaking news on employment law changes, follow me on Twitter. I'm at @amross.

Until next time,

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*\*\*\*See everyone at the BVHRMA  
luncheon on November 5<sup>th</sup>!! \*\*\**

If attending: [rsvpprograms@gmail.com](mailto:rsvpprograms@gmail.com) by noon on Tuesday, November 3, 2009.