

Employment Advisory: Employers Are Required to Compensate Employees for Non-Working Hours and Travel Expenses for Medical Treatment Sought under OSHA's Bloodborne Pathogens Standard

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Overview

The United States Third Circuit Court of Appeals ruled earlier this month that employers must compensate employees for the time they spend and the travel expenses they incur while seeking medical treatment for occupational exposures to bloodborne infectious diseases.¹

Facts and Procedural History

In separate incidents, two nurses employed by Beverly Healthcare-Hillview ("Beverly"), a nursing home in Pennsylvania, received "needlesticks" while at work, which potentially exposed them to a number of bloodborne infectious diseases, such as hepatitis and HIV. At the end of their shifts, both employees sought treatment at a medical clinic authorized by Beverly. Notably, they scheduled these appointments during their non-working hours because the clinic was not open during their regular shifts. Beverly paid for both employees' medical treatments, but *not* for their time and travel expenses.

The Occupational Safety and Health Administration ("OSHA") cited Beverly for violating 29 C.F.R. § 1910.1030(f)(1)(ii)(A), a provision of the Bloodborne Pathogens Standard ("BPS"), for failing to compensate the nurses for their travel expenses and the hours of non-working time they spent receiving treatment for the needlesticks. The applicable provision of the BPS states: "(ii) The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are: (A) *Made available at no cost to the employee.*" (emphasis added).

Beverly challenged the citations issued by OSHA before an administrative law judge ("ALJ"), arguing that the "at no cost" language was ambiguous. Beverly further argued that it fully complied with the plain language of the BPS because it paid for the cost of the medical tests and procedures and employees were not otherwise "charged" for seeking treatment. The ALJ upheld the citations, finding that the language of the BPS was not ambiguous. Beverly appealed the ALJ's decision before the Occupational Safety and Health Review Commission (the "Commission"), and again argued that the "at no cost" language was ambiguous. The Department of Labor ("DOL"), on behalf of OSHA, argued that its interpretation that the phrase "at no cost" includes an employee's time and travel expenses is reasonable. A two-member majority of the Commission decided that the "at no cost" language in the BPS was ambiguous, and reversed the ALJ's decision. The Commission also noted that Beverly lacked fair notice of the DOL's interpretation for due process purposes.

The Third Circuit's Decision

The DOL appealed the Commission's decision to the Third Circuit. The Court reversed the Commission, and held that the DOL's interpretation of the phrase "at no cost to the employee" not only conforms to the language and purpose of the BPS but also is consistent with the intent of the BPS as set out in its preamble. Moreover, the Court held that case law, compliance directives, and opinion letters regarding employers bearing costs under various OSHA standards provided adequate notice (for due process purposes) to employers that the BPS requires employers to compensate employees for travel time and non-working hours spent seeking medical treatment. As such, the Court ordered Beverly to reimburse its employees wages for time spent during non-working hours for treatment and for the costs of mileage driving to the clinic where they sought treatment.

Action Items for Employers

It is critical for employers subject to the BPS standard to understand the Third Circuit's decision whenever an employee receives a needlestick while at work. It is now clear that OSHA requires employers to compensate employees for non-working hours and travel expenses for medical treatment sought pursuant to the BPS. More specifically, if employers are not already following this practice, they now must ensure that employees are being adequately compensated for such costs.

Endnotes

¹ See *Sec'y of Labor v. Beverly Healthcare-Hillview*, No. 06-4810, 2008 WL 4107489 (3rd Cir. Sept. 4, 2008).

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