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Employment Practice

## Employer Must Pay for Travel and Non-Work Time Related to Treatment for OSHA Injuries Third Circuit Rules

Employers must compensate employees for travel expenses and non-work time related to treatment and follow-up care for exposure to blood-borne diseases while on the job under the Occupational Safety and Health Act ("OSHA"). In *Secretary of Labor v. Beverly Healthcare-Hillview*, No. 06-4810 (3rd Cir. Sept. 4, 2008), the Third Circuit ruled that a nursing home operator was given sufficient notice that travel expenses and non-work time were covered under the Bloodborne Pathogens Standard ("BPS"). Promulgated in 1991, the BPS, 29 C.F.R. § 1910.1030, applies to all "occupational exposure" which might be "reasonably anticipated" to lead to employee contact with blood or other potentially infectious materials. Following such exposure, the employer must provide medical evaluations, procedures, and vaccinations at "no cost to the employee."

The ruling stems from two citations issued to Beverly following OSHA inspections in 2003 and 2004. Beverly owns and operates a nursing home in Pennsylvania. Two of Beverly's employees, both nurses at the nursing home, received needle sticks while at work. The first incident occurred on December 8, 2002 and the other on January 4, 2004. The employees sought treatment and follow-up care at a designated off-site medical facility during non-work hours. Beverly paid for the cost of the medical treatment but did not reimburse the employees for non-work time spent receiving the treatments or for travel expenses to the facility. Following inspections after each incident, OSHA cited Beverly for failure to provide post-exposure evaluation "at no cost."

The Court held that the language of the BPS is ambiguous as the term "cost" has many common definitions and meanings and because the language is ambiguous the Court must give effect to the Secretary's interpretations so long as it is reasonable. Moreover, the Court reasoned that the interpretation was "reasonable and consistent with the language and purpose of the regulation."

The Court also held that Beverly had sufficient notice of the Secretary's interpretation of "cost." Beverly received the first citation on September 19, 2003 and the second on January 4, 2004. The Court reasoned that the first citation provided Beverly with actual notice of the Secretary's interpretation of the provision. Secondly, OSHA had issued an opinion letter in 1999 specifically addressing issues related to the BPS cost provision. The letter stated that "while transportation may not need to be provided by the employer, its cost must be covered by the employer." The letter further stated that an employee must be considered "on-duty" when receiving vaccines or commuting to a facility to have the vaccine administered.

Beverly argued that it was deprived of fair notice, citing a 1987 Department of Labor opinion letter interpreting the Fair Labor Standards Act, which stated that time spent receiving medical treatment was only compensable if it occurred during the employee's normal work hours. The Third Circuit reasoned, however, that the Opinion Letter was only tenuously related to the issue in this case as it was not issued under the OSHA statute. Moreover, the FLSA Opinion Letter predated the Opinion Letter issued by OSHA

in 1999, superseding the FLSA Opinion Letter to the extent it is contradictory. The Court further noted that Beverly had notice of a 1984 Ninth Circuit decision construing a similar provision. In *Phelps Dodge v. Occupational Safety and Health Review Comm'n*, 725 F.2d 1237 (9th Cir. 1984), the court held that an employee given an examination during non-work hours and not reimbursed for travel expenses has incurred a "cost" under the regulation.

The Third Circuit vacated the OSHA Review Commission's order finding that Beverly did not have fair notice that time spent receiving medical treatment is a "cost" and therefore compensable and remanded the case for further proceedings.

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