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### CONTRIBUTORS:

- Rebecca L. Dobbs, Editor
- Jeffrey A. Risch
- Julie A. Proscia
- Jonathon D. Hoag
- Jennifer M. Reddien

### LABOR & EMPLOYMENT ATTORNEYS:

- Molly A. Arranz
- Jill A. Cheskes
- Rebecca L. Dobbs
- Terry A. Fox
- Jonathon D. Hoag
- Anita S. Johnson
- Jacqueline Lentini McCullough
- Christina Lopez-Nutzman
- Julie A. Proscia
- Jennifer M. Reddien
- Jeffrey A. Risch
- Lawrence R. Smith
- Ronald S. Stadler
- Sara M. Stertz
- Neil G. Wolf

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## Efforts to Provide Reasonable Accommodations Now Critical to Avoiding Liability Under the Amended ADA: A Recent 7th Circuit Case Shows Employers How to Do It Right

By Jonathon D. Hoag

Jeanne Gratzl suffered from incontinence as a result of pregnancy complications. In 2001, she applied for a court reporter position with DuPage County working exclusively in the control room. In this position, she was able to step away quickly to use the restroom, so she never had to make her supervisors aware of her medical condition.

A few years after Gratzl was hired, the Illinois Coordinator of Court Reporting Services issued a directive requiring all court reporters to rotate through live courtrooms as well as the control room. Gratzl informed Chief Judge Ann Jorgenson about her medical condition and that it would prevent her from performing as an in-court reporter. Gratzl also requested a leave of absence for scheduled surgery for a separate issue. Judge Jorgenson approved the leave and subsequently sent correspondence to Gratzl stating that Gratzl needed to decide if she was going to participate in the full rotation.

Gratzl's attorney submitted a formal request to accommodate Gratzl's condition by returning her to work full time in the control room. The request was supported by a letter from Gratzl's physician. The employer responded by offering to limit Gratzl's assignments to juvenile courtrooms, which did not have jury trials. Gratzl's physician rejected the offer as inconsistent with Gratzl's condition and insisted that she be returned to her position in the control room.

The employer sought to accommodate Gratzl by offering a number of possible accommodations, such as (1) allowing her to avoid assignments to any courtrooms in which a trial was scheduled; (2) not assigning her to juvenile courtrooms, which were farther from the restrooms; and (3) establishing a "high sign" that she could use to signal to the presiding judge that she needed a break." Gratzl rejected all of these proposals without first reviewing them with her physician. The employer wrote to Gratzl and reiterated that the job duties for all court reporters required rotating through the court rooms and the control room. The employer repeated its proposals of accommodations and set forth a deadline for Gratzl to identify specific reasons why the offer was incompatible with her medical condition.

Gratzl replied stating that her condition had not changed, so further back-and-forth debate served no purpose. Gratzl was terminated and she then sued under the ADA.

The employer prevailed in large part because it took good faith steps to engage in the interactive process to identify a reasonable accommodation for Gratzl. Although the ADA Amendments of 2008 (which expressly state that elimination of bodily waste is a major life activity) did not apply to this case, the case is still instructive because the court focused on the essential functions of the job and the employer's efforts to identify reasonable accommodations for the employee to perform those essential functions. Under the ADA Amendments of 2008, these are now the critical issues for ADA cases.

The court focused on the fact that Gratzl's only suggestion for a reasonable accommodation was to return her to the control room position. The court recognized that the concept of "reasonable accommodation" does not require an employer to create a new job or strip a current job of its principal duties. Likewise, Gratzl's employer was not required to maintain an existing position or structure that – for legitimate business reasons – it no longer needed or desired. In short, Gratzl's only suggestion was not reasonable as a matter of law and she had no reasonable basis for rejecting the employer's proposals.

The court pointed out that employer's are not obligated to provide an employee the accommodation she prefers – just one that is reasonable. The court emphasized that the employer proposed a

few different accommodations that were structured to conform to Gratzl's physician's recommendations. The court went on to conclude that Gratzl rejected the employer's proposals for personal reasons and, therefore, she was the one responsible for terminating the interactive process. Accordingly, she was not entitled to relief under the ADA.

Under the ADA amendments, employers are forced to focus more on the accommodation process rather than whether a condition qualifies as a "disability" under the Act. This case provides excellent guidance for how employers should handle employee requests for accommodation. That is, employers should ask employees to submit ideas for reasonable accommodations supported by the employee's physician review of how the employee's condition relates to the essential functions of the job. The employer can identify reasonable adjustments that address the physician's recommendations and then put the burden on the employee to identify why the proposals are insufficient and/or come forward with other proposals for the employer to consider. Employers should be sure to document the back-and-forth efforts to make a reasonable accommodation because this will be the critical aspect of the inquiry if the issue is ever reviewed by the court.

*If you have questions about making reasonable accommodations or questions about any other employment-related matter, please contact Jonathon Hoag at 630.587.7914 or via email at [jhoag@salawus.com](mailto:jhoag@salawus.com).*

## Becker's Controversial Appointment to the NLRB Could Mean Pro-Union Decisions

Jennifer M. Reddien

On April 5, 2010, former union attorney, Craig Becker (D) was sworn into office to begin his recess appointment as a new member of the National Labor Relations Board. Becker's appointment faced heated opposition from the Republican Party. All forty-one Republican senators signed a letter requesting that President Obama not appoint Becker to the Board.

Becker's appointment has caused significant controversy, as some have referred to his opinions regarding labor law as radical and overly pro-union. Moreover, some have speculated that allowing Becker to serve as a member of the Board could disrupt the balance of current labor law, resulting in decisions that significantly, and unfairly, disfavor employers.

Becker has been an associate general counsel for the Service Employees International Union since 1990. The National Right to Work Legal Defense Foundation has filed motions with the Board requesting that Becker recuse himself in eleven pending cases involving Service Employees International Union, due to Becker's history of hostility toward the Foundation. Becker has also been staff counsel for the AFL-CIO since 2004. He has taught law school classes and written articles regarding labor law.

Less controversial nominee, Mark G. Pearce, was also recently sworn in as a member of the board on April 7, 2010. Pearce was a partner at a firm in Buffalo, New York, Creighton, Peace, Johnsen and Giroux, where he represented unions and employees in labor and discrimination case.

Both Becker and Pearce will join the NLRB Chair, Wilma Liebman (D) and Member Peter C. Schaumber (R) as members of the Board. The NLRB, which consists of a five-member board, has been operating with just two members for over two years. The newly appointed democratic members will create a Democratic majority on the Board for the first time since December 2001.

The Board was designed to have five members and decide most cases with three-member panels. In the past, the Board has consisted of two Democrats, two Republicans, and a fifth member from the president's party. Schaumber's term expires on August 27, 2010, which places pressure on the Republican Party to reach an agreement with the President in order to ensure that there are Republicans on the Board.

Many Republicans have criticized President Obama for choosing a partisan path despite Republican opposition, especially since the President failed to announce a recess appointment for his third nominee, Brian E. Hayes (R), a former management attorney and current labor policy director for the Republicans on the Senate Health, Education, Labor and Pensions Committee.

The new appointments are significant for employers because it is possible that the Board will now hand down more pro-union decisions since it is dominated by Democrats. Additionally, it is possible that many of the pro-employer decisions that the Board has handed down over the past nine years, could be overturned.

*If you have questions about this or any other employment-related matter, please contact Jennifer Reddien at 312.894.3245 or via email at [jreddien@salawus.com](mailto:jreddien@salawus.com).*

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## The EEOC Gets a New Face with Four Recess Appointments

By Julia A. Proscia

At the end of March and throughout April President Obama made numerous recess appointments, filling two vacancies on the NLRB, including controversial union lawyer Craig Becker, and appointing four commissioners to the EEOC. The EEOC nominees included: Jacqueline A. Berrien to serve as Chair, Victoria A. Lipnic and Chai R. Feldblum to serve as Commissioners, and P. David Lopez to serve as General Counsel.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The U.S. Equal Employment Opportunity Commission (EEOC) is a bipartisan Commission comprised of five presidentially appointed members, including the Chair, Vice Chair, and three Commissioners. The Chair is responsible for the administration and implementation of policy for and the financial management and organizational development of the Commission. The Vice Chair and the Commissioners participate equally in the development and approval of Commission policies, issue charges of discrimination where appropriate, and authorize the filing of suits. In addition to the Commissioners, the President appoints a General Counsel to

support the Commission and provide direction, coordination, and supervision to the EEOC's litigation program.

The new appointees have been very active in this field and have biographies that present and forecast an active commission in the future. Chai R. Feldblum played a leading role in drafting the ADA and later, as a law professor, in the passage of the ADA Amendments Act. She has also worked on advancing lesbian, gay, bisexual, and transgender rights. Jacqueline A. Berrien served as Associate Director-Counsel of the NAACP Legal Defense and Educational Fund. Victoria A. Lipnic, a Republican, was employed as of counsel in the Washington, DC office of Seyfarth Shaw LLP; she previously served as assistant secretary of labor for employment standards from 2002 to 2009, and before that, counsel to Republican members of the House Education and Labor Committee. P. David Lopez, a supervisory trial attorney with EEOC's Phoenix office, served at EEOC for 13 years in both field and headquarters positions. Prior to joining EEOC, he worked in the DOJ's Civil Rights Division.

With the swearing in of Lipnic, on April 20, 2010, the EEOC returns to its full complement of five commissioners. The new EEOC commission and its composition will prove exceedingly interesting as the commissioners are activists in the civil rights arena and are likely to be very aggressive in enforcement.

*If you have questions about this or any other discrimination issues arising in the workplace, please contact Julie Proscia at 630.587.7911 or via e-mail at [jproscia@salawus.com](mailto:jproscia@salawus.com).*

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## Health Care Reform Amends Wage and Hour Law: New Federal Regulations Regarding Employee Breaks for Breast Feeding

By Jennifer M. Reddien

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, which includes one provision that amended the Fair Labor Standards Act (FLSA) that applies to employers immediately.

The new health care law amended the FLSA to now require employers to provide a reasonable break time for an employee to express breast milk for her nursing child, each time she has such a need, for up to one year after the child's birth. Employers must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by the employee to express breast milk.

The law, which applies to all employers subject to the FLSA, grants a reprieve to an employer with less than 50 employees if the requirement would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. The law

does not define the terms "reasonable break time" or "undue hardship." It also lacks guidance regarding the appropriate duration and frequency of the breaks and what constitutes a suitable place to express milk.

Although the federal law is new, many states, including Illinois, have already enacted similar laws. In 2004, Illinois enacted the Right to Breastfeed Act. The Act guarantees nursing mothers the right to breastfeed in any location, public or private, as long as the nursing mother is otherwise authorized to be at that location. Additionally, nursing mothers cannot be faced with criminal liability for exposing any part of the breast in the process of nursing. If the owner or manager of a public or private location (other than a residence or place of worship) denies a woman the right to breastfeed there, the mother may sue to enjoin future denials and recover attorney's fees and expenses.

*continued...*

The Right to Breastfeed Act works in conjunction with the Nursing Mothers in the Workplace Act (NMWA), which has been in effect since 2001. Similar to the new federal law, NMWA requires employers to provide nursing women with reasonable unpaid break time each day to express breast milk, unless the break time would “unduly disrupt the employer’s operations.” The break time may run concurrently with any break time already provided to the employee. Additionally, employers must make reasonable efforts to provide nursing women

a private room; under the NWMA a bathroom stall expressly is not an acceptable private location.

As a practical matter, to comply with the federal and Illinois laws, employers may not prohibit nursing women from breastfeeding or expressing milk at their workplace and must provide them with reasonable times and private facilities to do so.

*If you have questions about this or any other employment-related matter, please contact Jennifer Reddien at 312.894.3245 or via e-mail at jreddien@salawis.com.*

## Illinois Department of Labor (IDOL) is Hammering Contractors on Illinois Prevailing Wage Act Audits

By Jeffrey A. Risch

Often times, issues and controversies most often arise when interpreting key definitions contained in the Illinois Prevailing Wage Act (820 ILCS 130/0.01 et. seq.) (“IPWA”). Specifically, the meaning of the terms “public works,” “construction,” and “general prevailing wage” is often maligned by the IDOL, local public bodies, and contractors. Although there is very little *published* authority interpreting these critical terms, the IDOL has historically been consistent in its own interpretations. While not always agreeing with the IDOL’s interpretations over the years, I have benefited from a comfortable sense of awareness and insight into where the IDOL stands on many prevailing wage issues. Based on my years of experience in handling prevailing wage matters, I can attest to the unmistakable fact that the *IDOL is changing many of its prior opinions on what constitutes covered work subject to the IPWA.*

As most can appreciate and attest to, the Illinois Department of Labor’s enforcement of the IPWA was ramped up considerably under former Governor Blagojevich. However, the Quinn Administration is actually more aggressive. Efforts to better fund, support, and allow the IDOL to enforce and administer the IPWA are at an all time high --- and growing.

Recently Governor Quinn signed into law a series of bills aimed to strengthen Illinois’ prevailing wage law. These new laws went into effect on January 1, 2010 and I have previously “blogged” on these changes many times. Also, these revisions are currently summarized on the IDOL’s Web page at <http://www.state.il.us/Agency/idol/>.

Although these statutory changes are important, I personally believe the more critical change is coming directly from the IDOL itself in the form of the most historically liberal and broad interpretations of what constitutes performing “*construction*” work on “*public works*” projects requiring the payment of the “*general prevailing wage*.”

In short, the IDOL is administering and enforcing the IPWA in unprecedented fashion. Anyone and everyone impacted by prevailing wage issues should immediately:

- Review, revise, and update written contracts --- with specific attention to prevailing wage obligations;
- Educate management and personnel on the legal interpretations of the key definitions contained in the IPWA (and do not rely solely on what the IDOL is saying...); and
- Understand your company’s or organization’s obligations under the IPWA --- in other words, what may be “right” for one may not be “right” for all. The IPWA will be applied differently depending on the nature, scope and geographic area where the work is performed together with the size, shape and industry of the employer(s) at issue. *A one-size-fits all mentality DOES NOT WORK.*

*Jeff Risch concentrates his practice on representing employers in many areas of labor and employment law including prevailing wage with a particular focus on Illinois’ Prevailing Wage Act. Jeff may be contacted at 630.569.0079 or via e-mail at jrisch@salawis.com.*

## OSHA Orders Employer to Pay Whistleblower \$575,000

By Jonathon D. Hoag

The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) sent an extreme reminder – to the tune of \$575,000 for one employer – that the law protects those who report work-related accidents or illness.

Anthony Araujo suffered a work-related illness after witnessing a fatal accident of a co-worker. The employer extensively investigated the matter and questioned Araujo. The employer initially told Araujo that he did nothing wrong and sent him to the employee assistance

program (EAP) for counseling. The counselor determined that Araujo was unable to work and referred him for treatment.

The employer disagreed with the direction taken by the EAP counselor and eventually initiated disciplinary actions against Araujo for missing work. In addition, the employer cut Araujo’s pay and suspended his employment. Araujo filed a whistleblower complaint through OSHA’s Whistleblower Protection Program alleging that the employer took retaliatory action because Araujo

sought relief from his work-related illness.

OSHA found merit to Araujo's claims and ordered the employer to pay \$500,000 in back pay, lost benefit payments, interest, compensatory damages, and attorneys' fees. OSHA also awarded \$75,000 in punitive damages and required the employer to post information about employee whistleblower rights. This award has been noted as historic because of size and broad application of "make whole" damages.

The Obama Administration's stepped up enforcement effort is no joke. As this case illustrates, getting caught in the crosshairs of the U.S. Department of Labor comes at a high cost. Unfortunately, we expect to see more press releases from these enforcement agencies. Be sure you take the necessary preventative steps to keep your company from being named in one of these headlines!

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## CALENDAR OF EVENTS 2010

### MAY

#### SECURING PUBLIC WORKS IN ILLINOIS: BEYOND THE BASICS

Presenter: Jeffrey Risch

Jeffrey Risch will present a webinar in conjunction with the Associated Builders and Contractors of Illinois on Securing Public Works in Illinois: Beyond the Basics. The webinar will include updates and developments that every contract must know, including:

- Responsible Bidder Act
- Prevailing Wage Law
- Project Labor Agreements

■ Date: May 7, 2010

■ Webinar

■ To register for this free webinar, please contact Kari at 217.523.4692 or [kari@abcil.org](mailto:kari@abcil.org).

#### U.S. DOL DECLARES WAR ON MORTGAGE LOAN ORIGINATORS: IS YOUR BANK READY?

Presenter: Jeffrey Risch

Jeffrey Risch in conjunction with the Illinois Bankers Association will present a webinar entitled "U.S. DOL Declares War on Mortgage Loan Originators: Is Your Bank Ready?"

Banks throughout Illinois find themselves scrambling for accurate answers and clear direction on what they should do now in light of the apparent all too real crackdown in wage/hour enforcement. This program offers a detailed summary and lively discussion on the latest wage and hour developments specific to the banking industry and will include timely material and updates on the following topics:

- Are Mortgage Loan Originators Exempt or Not?
- What Should My Bank Be Doing Going Forward?
- Areas of Other Vulnerabilities with Wage/Hour Law
- How to Responsibly Respond to a US DOL or State DOL Wage/Hour Audit?
- Common Sense Tips/Strategies in Preventing Claims, Lawsuits and Audits

■ Date: May 12, 2010

■ Webinar

■ Time: 2:30 pm - 4:00 pm

■ For additional information and to register, please click here.

#### EMPLOYEE V. INDEPENDENT CONTRACTORS: MAKING THE DISTINCTION AND TIPS ON HOW TO CREATE AND STRENGTHEN INDEPENDENT CONTRACTOR STATUS

Presenter: Julie Proscia

Julie Proscia will present at the 2010 ARCO Annual Meeting in Chicago, IL. Julie's presentation will focus on employment law and independent contractor issues and concern, and she will address questions surrounding the issues raised by the use of independent contractors in the workforce.

■ Date: May 17, 2010

■ Location: Chicago, IL

#### DRUG TESTING: HOW YOU CAN LAWFULLY DISCRIMINATE

Presenter: Jeffrey Risch

In 60-minutes, employers will realize that they can implement drug testing programs designed specifically for particular job functions. In addition, employers will receive detailed policy language and plan implementation procedures designed to combat unlawful drug use and alcohol abuse without having to use a "one-size-fits-all" approach.

■ Date: May 18, 2010

■ Webinar

■ Time: 11:00 am - 12:00 pm

■ For additional information and to register, please click here.

#### A MULTI-STATE DRUG TESTING: HOW TO COMPLETE THE MAZE

Presenter: Jeffrey Risch

For employers maintaining multi-state operations, far too often drug testing programs are put to the side due to a failure to design, maintain and manage various policies in conformity with specific state law. This 60-minute webinar will summarize a multi-state approach with the intent of simplifying a complex set of applicable rules, laws and regulations. This complimentary webinar is a can't miss for any employer trying to operate drug free in more than one state.

■ Date: May 27, 2010

■ Webinar

■ Time: 11:00 am - 12:00 pm

■ For additional information and to register, please click here.