of its general assets" and removed the benefit committee's authority as sole authority to construe plan terms and determine benefit eligibility. WFMLA's substitution provision is expressly preempted because it "requires administrators to pay benefits to beneficiaries chosen by state law rather than to beneficiaries identified in the plan documents," the court said.

The court also held that the substitution provision was conflict-preempted because it provided an alternative enforcement mechanism to obtain plan benefits. According to the court, Gerum could have filed a civil action under ERISA Section 502(a)(1)(B) after Nationwide denied her short-term disability benefits claim. Instead, Gerum pursued the benefits using state enforcement procedures available under WFMLA.

Savings Clause Inapplicable. The court was not persuaded that the substitution provision was exempt from preemption under ERISA Section 514(d)'s savings clause, which prevents preemption of "any law of the United States." Both the defendants and the Labor Department argued that preempting the WFMLA substitution provision would inappropriately interfere with the federal FMLA, which permits states to provide greater family and medical leave rights than the federal statute required.

The court examined the federal FMLA and determined that Congress intended that employment benefit plans comply with the federal FMLA. However, the federal FMLA cannot "be read so broadly as to conclude that Congress intended for ERISA employee benefit plans to be bound by any and all state laws enacted as a result of the leeway afforded" by the federal FMLA.

The court concluded that WFMLA's substitution provision was expressly preempted under ERISA Section 514(a) and conflict-preempted under Section 502(a). The court granted Nationwide's request for declaratory relief that its plan was an employee welfare benefit plan and was not required to comply with the WFMLA substitution provision. The court also granted a permanent injunction to prevent the defendants from processing or investigating substitution claims against Nationwide.

Nationwide was represented by Susan K. Hoffman, Melanie A. Houghton, James J. Oh, and Daniel W. Srsic of Littler Mendelson in Columbus, Ohio; Chicago; and Philadelphia. The defendants were represented by Timothy A. Lecklider and Susan C. Walker of the Ohio Attorney General's Office in Columbus and Steven C. Kilpatrick and Richard B. Moriarty of the Wisconsin Department of Justice in Madison, Wis. The Labor Department was represented by Stephen A. Silverman with the Plan Benefits Security Division in Washington, D.C.

Text of the opinion is available at http://op.bna.com/pen.nsf/r?Open=mmaa-8yqhbz.

Telecommuting

Attorney Discusses Law, EEOC Guidance On Telecommuting as ADA Accommodation

The decision to grant or deny a worker's request to telecommute as a reasonable accommodation under the Americans with Disabilities Act should be based on a fact-specific inquiry that considers the company's teleworking history for nondisabled employees with similar job requirements and responsibilities, Amy L. Bess, a shareholder in the Washington, D.C., office of Vedder Price, advised participants at an Oct. 3 seminar sponsored by the firm's labor and employment group.

"You don't have to automatically grant a request to work at home, but the key to handling an ADA challenge is the interactive process. Employers will need to assess the unique facts and circumstances of each case," Bess explained.

She cited *Bixby v. JP Morgan Chase Bank NA*, 25 AD Cases 1745 (N.D. Ill. 2012) (52 DLR A-10, 3/16/12), in which an employee who had panic attacks and other mental disorders was not allowed by the employer to work from home on a temporary basis.

JP Morgan had argued that working as a project manager and supervising other employees was not a job function that could be performed remotely, but the court disagreed and denied the employer's motion for summary judgment.

"[M]ost importantly, the employer had allowed other project managers to telecommute, some on a permanent basis. The request here was to work from home for 90 days," Bess noted.

An employer also may need to get the medical provider involved in that dialogue to determine what the medical provider recommends with regard to an accommodation, Bess added.

EEOC Says Teleworking May Be Accommodation. The presentation focused on the growing trend of teleworking, or "remote working," and its legal implications for employers, including ADA compliance guidance and case law on working from home as a reasonable accommodation.

Bess noted that the Equal Employment Opportunity Commission issued policy guidance in 2005 that explained that telecommuting may be provided as a reasonable accommodation. EEOC is currently working on new guidance on reasonable accommodations under the ADA Amendments Act, which took effect in 2009.

"The 2005 guidance makes it clear that it is not required that employers allow employees to work from home as reasonable accommodation, but there are a number of considerations the EEOC has indicated that employers need to take into account," Bess said. For instance, if nondisabled employees are allowed to telecommute, disabled employees must be given equal opportunity to do so. In addition, based on the guidance, a company may have to modify existing policies and procedures on teleworking.

For instance, an employer with a policy stating that an employee cannot telework unless he or she has been employed with the company for a year may have to modify such a policy if an employee with a disability who has worked at the company for nine months makes a request for a work-at-home arrangement as an ADA accommodation, she added. An employer may have other threshold requirements, such as granting telecommuting options to employees who have had exceptional performance reviews in the last two years. Those types of policies may need to be modified, Bess noted.

Bess urged employers to document conversations and findings regarding telecommuting requests and "consider every relevant fact that the employee brings to your attention, making sure you note what you have

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offered as reasonable accommodations and what the employee has requested."

Equally important, employers have to assess whether the particular job can be done from home, she said. For example, a job managing a retail store will obviously pose a challenge if performed at home. However, a position requiring writing grants and conducting online research is probably easily performed from home, Bess observed.

Case Law in Favor of Employees. Courts recently have taken the position that whether working from home is a reasonable accommodation will depend on the facts of the case. During the presentation, Bess mainly focused on court decisions denying summary judgment to employers who had failed to provide telecommuting as an accommodation.

In one case, an employee requested to work from home because of her sensitivity to chemicals in perfumes (*Core v. Champaign County Board of County Commissioners*, 26 AD Cases 1463 (S.D. Ohio 2012); 148 DLR A-3, 8/1/12). The employer denied her request for a fragrance-free workplace.

"The court concluded in responding to the employer's motion for summary judgment that whether or not working from home is a reasonable accommodation in this particular set of circumstances is going to be an issue of fact. The court denied the employer's motion for summary judgment and the case was sent to a jury," Bess observed.

According to Bess, historically, the ability to commute to and from the workplace is not something that requires reasonable accommodation, according to most courts.

However, in *Nixon-Tinkelman v. New York City Department of Health and Mental Hygiene*, 25 AD Cases 578 (2d Cir. 2011); 160 DLR A-5, 8/18/11), the employer denied the worker's request for assistance in commuting to work after she moved to another section of the city. The court held that, under the ADA, the employer should have considered the option of working from home. The employer was denied summary judgment, she noted.

"Any employer who has to defend a discrimination lawsuit knows that summary judgment is your absolute best weapon. If you lose on summary judgment, then the case is going to go to a jury, which expands dramatically the expenses and risks associated with the ultimate outcome of the case," Bess said.

Seventeen years ago, in *Vande Zande v. Wisconsin Department of Admin.*, 44 F.3d 538, 3 AD Cases 1636 (7th Cir. 1995), which is routinely cited in cases on telecommuting as an ADA accommodation, the Seventh Circuit acknowledged that new technological developments and innovations could well change the landscape in how individuals are able to work from home, Bess said. "That has absolutely been the case," she observed.

By Lydell C. Bridgeford

Unemployment Insurance

ETA Overstated Detection of UI Overpayments By Comparing Incompatible Data, OIG Finds

The Labor Department's Employment and Training Administration overstated the success of its efforts in detecting improper unemployment insurance payments for state-funded benefits and extended benefits because it used incompatible data in its calculations, DOL's Office of Inspector General stated in an audit report dated Sept. 28 and posted on DOL's website Oct. 1.

OIG also concluded that ETA used some unvalidated data and therefore could not ensure the reliability of its performance measurements.

The UI program paid $174 billion in state-funded benefits and extended unemployment benefits to unemployed workers between April 1, 2007, and Sept. 30, 2010, OIG said. ETA estimated that $9.4 billion of this amount represented detectable overpayments.

OIG conducted a performance audit of ETA's measurement to determine the effectiveness of UI overpayment detection activities for state-funded benefits and extended benefits. The extended benefits program provides additional weeks of unemployment compensation benefits in states with particularly high unemployment rates. Since fiscal year 2009, the federal government has funded extended benefits, but before then, the cost for extended benefits was split evenly between the state and federal government.

Inconsistent Handling of Extended Benefits Data. ETA's overpayment detection measure compared actual overpayments detected by the states with the overall estimated detectable overpayments. ETA expected states to meet the acceptable level of performance for the measure, which was 50 percent.

OIG concluded that ETA's calculations were flawed because the agency did not use compatible data. Specifically, it said, ETA did not include extended benefits in the estimated detectable overpayments, but it did include them in the actual overpayments.

ETA reported that the states detected 52.6 percent of estimated detectable overpayments but later determined that the amount was actually 48.5 percent—below the acceptable level of performance of 50 percent. If ETA's estimates for overpayment detections had included extended benefits, the states would have had to detect an additional $142 million to achieve the ALP, OIG explained.

In addition, OIG reported, ETA did not succeed in getting all states to perform cross-matches with the National Directory of New Hires to check whether people receiving unemployment insurance benefits from one state actually had found a job in another state. The absence of cross-matching could reduce the estimate of detectable overpayments, OIG said.

OIG recommended that ETA implement an overpayment detection performance measure for extended benefits, update the reporting system to isolate readily detectable overpayments, and improve data validation. ETA generally agreed with the recommendations, OIG said.