



LABOR AND EMPLOYMENT OBSERVER

2013/2014

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MESSAGE FROM THE CHAIR

We are pleased to provide you with our 2013/2014 Observer, which looks back at the developments in labor and employment law over the past year and forward to what employers can expect in 2014. The Observer has articles on a variety of topics, including:

- The recent onslaught of litigation centering on employers' use of unpaid interns;
- What employers should know about the burgeoning issue of social media in the workplace;
- How the Supreme Court's decision in *United States v. Windsor* impacts employers;
- New regulations issued by the Office of Federal Contract Compliance Programs;
- Developing issues surrounding pre-employment background checks;
- Trends in employee privacy;
- Insights into what the "but for" causation standard set out in *University of Texas Southwestern Medical Center v. Nassar* means for employers;
- How to properly administer wellness plans under new regulations effective January 1, 2014;
- Immigration-related worksite enforcement issues, and an update on the status of immigration legislation; and
- Essential insights into "big data" and its implications for employers.

We trust that you will find the enclosed articles both interesting and informative. As always, we welcome your inquiries and look forward to serving your labor and employment needs in the new year.

Best Regards,

Mark J. Foley
Chair, Labor & Employment
215.665.6904 | mfoley@cozen.com

Social Media and the Workplace: 2013 and Beyond



Michael C. Schmidt
212.453.3937
mschmidt@cozen.com

Another year is about to pass, and, along with it, another period of many companies continuing to ask the same question: Is social media a “fad” that is ready to pass as well? The simple (and accurate) answer: No.

2013 continued the journey of attempting to determine precisely how social media impacts the law and commonly-accepted practices governing workplaces around the country, and precisely how employers decide to effectively manage the technological realities that will continue as we head into another new year. The numbers bear out that social media, and your company’s employees’ use of social media, is not going away any time soon. Just to highlight a few staggering statistics: According to reports, Facebook hit the **1.9 billion** active monthly user mark as of September 2013, with its revenues rising by 60 percent in Q3 2013 to reach \$2.02 billion. Similarly, reports state that more than 259 million registered users are on LinkedIn as of June 2013.

We expect that companies will continue to see a rise in harassment, discrimination and retaliation claims based on employee comments or activities on social media.

So, if you have made it to this third paragraph without tossing aside the notion that social media is here to stay, we applaud you and (hopefully) offer something of value to you in the ensuing paragraphs. We expect that companies will continue to see a rise in harassment, discrimination and retaliation claims based on employee comments or activities on social media. Employees, as is the case with human beings in general, appear to feel more comfortable saying and posting things through social media – often alone, from the comfort of their own homes – than they might if engaged in an in-person conversation at the office water cooler. It is critical for employers to continue to understand that traditional workplace claims apply to the more modern social media platforms, and to ensure that workplace practices and policies are updated to match today’s realities.

Beyond expecting social media-based harassment, discrimination and retaliation claims to continue, there are five other important issues that your company should consider in 2014 in the area of social media and employment law.

ISSUE #1 – AVOIDING VIOLATIONS OF STRICT WAGE AND HOUR REQUIREMENTS

Social media and technology has created a 24/7 world, where employees now perform work for your company, anywhere and anytime. Decades-old wage and hour laws continue to be applied to non-traditional work circumstances, and make it more difficult for employers to control when and where employees are working, and, in turn, to comply with pay and record-keeping obligations. For example, a non-exempt employee may review and respond to emails during halftime at a New York Knicks basketball game, and the time spent may need to be counted and compensated (at time-and-a-half if the time puts the weekly time over 40 hours). Or imagine that a non-exempt employee who fully or partially telecommutes accesses the company’s systems from home and engages in after-hour document review or sales calls from home. Has your company ensured that the time spent working is properly counted and compensated?

It is beyond cavil at this point that wage and hour claims make up a substantial portion of the federal court dockets, and significant monetary remedies can be awarded against employers who fail to comply (even inadvertently) with federal and state obligations, including the full amount of unpaid wages, additional liquidated damages in the amount of 100 percent of the unpaid wages, and the employee’s attorneys’ fees, potentially multiplied based on the number of employees in any representative “class.” Your company should look carefully at its wage and hour compliance, and particularly at the impact that social media and technology may have on such compliance.

Questions to Consider Heading Into 2014:

- (i) Does your company properly classify your exempt employees, independent contractors and unpaid interns?
- (ii) Do you have adequate policies and practices addressing those who can access company emails and files off premises and outside of “normal” work hours?
- (iii) Do you ensure that all work performed anywhere and anytime is properly counted and that you comply with all notice and record-keeping requirements?
- (iv) Are you in the best position to defend claims brought against your company in this area?

ISSUE #2 – UNDERSTANDING THE IMPACT OF SOCIAL MEDIA ON HIRING DECISIONS

Many companies revel in the amount of social media information that is available on prospective and current employees, and even inquire whether there is some duty to look for such information as long as it is out there. With free and unfettered access to so much web-based information, employers are mining social media activity and sites in greater numbers. The potential danger arises, however, when companies view profile pages and learn information that could not have been obtained during a traditional in-person interview. For example, it might be difficult to put the horse back in the barn when a hiring decision-maker has viewed a social networking site that contains pictures suggesting a person's sexual orientation, age, pregnancy or other protected characteristics.

Questions to Consider Heading Into 2014:

- (i) Does your company appropriately view Facebook and other social media sites on applicants (and current employees)?
- (ii) Do you have appropriate practices to avoid (even unintentionally) obtaining protected-class information that cannot be relied upon in a hiring decision?
- (iii) Are you in the best position to defend claims brought against your company in this area?

ISSUE #3 – AVOIDING TRIGGER-HAPPY EMPLOYMENT DECISIONS BASED ON EMPLOYEE SOCIAL MEDIA USE

Many instances arise when an employer may disagree or dislike a comment posted by an employee through social media. Depending on the nature of the post or activity, and whether other co-workers become involved or solicited, your company should not be trigger-happy when it comes to making an adverse employment decision based on the employee's social media activity.

The National Labor Relations Board (with jurisdiction over unionized *and* non-unionized workplaces) has been and will continue to be vigilant in seeking to enforce an employee's right to engage in "protected concerted activity." As with wage and hour laws, these rights have been around for decades, yet continue to wreak havoc on employers because of how easy it is for employees to say and do things through social media that might be considered inappropriate or harmful to business.

Questions to Consider Heading Into 2014:

- (i) Does your company sufficiently analyze whether the employee has engaged in protected concerted activity before taking adverse action?
- (ii) Do you properly and effectively document the employee issue so that you are better prepared to argue that adverse action was, in fact, taken based on legitimate business concerns?
- (iii) Are you in the best position to defend claims brought against your company in this area?

ISSUE #4 – CREATING AND IMPLEMENTING SOCIAL MEDIA POLICIES

Along with reviewing employment decisions that are based on employee social media activity, the National Labor Relations Board has also spent considerable time in 2013 addressing the do's and don'ts of employer policies and handbooks that attempt to regulate such social media activity. The key for companies moving forward is to strike the appropriate balance between simply ignoring social media and doing nothing and over-regulating social media activity with overbroad and otherwise impermissible prohibitions.

To that end, it is critical that companies develop social media policies that appropriately toe the line between terms that are unlawfully broad and vague (e.g., "disparage" or "confidential") and terms that are properly tailored to valid business interests. Other workplace policies, such as anti-discrimination and anti-harassment policies, should also account for the impact of social media use by employees.

Questions to Consider Heading Into 2014:

- (i) Does your company have a social media policy and, if so, has it been updated to reflect recent legal developments?
- (ii) Do you have bring-your-own device (BYOD) policies and protocols to minimize exposure to the very cyber-attacks and data breaches that you have been hearing and reading about in other companies?
- (iii) Are you in the best position to defend claims brought against your company in this area?

ISSUE #5 – CONFIRMING OWNERSHIP OF SOCIAL MEDIA ACCOUNTS

It is imperative that your company address the issue of social media account ownership before your employee leaves the company, or otherwise becomes adversarial to your interests and, thus, less likely to voluntarily enter into an appropriate agreement.

Many companies have employees who use social media accounts — in whole or in part — to perform services on behalf of the company. Some employees may have Twitter accounts to tout products or services to followers, while others may create a blog or utilize LinkedIn or Facebook to discuss business issues. It is imperative that your company address the issue of social media account ownership **before** your employee leaves the company, or otherwise becomes adversarial to your interests and, thus, less likely to voluntarily enter into an appropriate agreement.

Questions to Consider Heading Into 2014:

- (i) Does your company have agreements or policies defining who owns the social media account?
- (ii) Do you have agreements or policies setting forth what happens to accounts and company social media property when the employee separates from the company?
- (iii) Are you in the best position to defend claims brought against your company in this area?

Unpaid Internships: Training Ground or Legal Landmine?



Jason A. Cabrera
215.665.7267
jcabrera@cozen.com



Sarah A. Kelly
215.665.5536
skelly@cozen.com

In the last 10 to 15 years, unpaid interns have become a mainstay of the working world, supposedly giving students or industry initiates a chance to prove their mettle in a real-world

atmosphere. But unpaid internship programs are necessarily limited only to those financially able to accept them and, either intentionally or not, some companies have allowed their unpaid interns to displace paid workers. A series of lawsuits brought under the Fair Labor Standards Act (FLSA), the federal law establishing minimum wage and maximum hours requirements, are now threatening the use of unpaid internships. In the typical suit, former interns allege that their former employer failed to adhere to the minimum wage and overtime requirements of the FLSA (and related state laws) over the course of their internships and seek back pay and penalties. This legal theory has led to dozens of suits across the country, thrown the use of unpaid interns into flux, and demonstrates the considerable risk to private employers and many nonprofits who use unpaid interns. (The FLSA contains exemptions for volunteers in state and local government agencies and those who volunteer “solely for humanitarian purposes” at private, nonprofit food banks. The Department of Labor also exempts volunteers who donate their time, freely and without expectation of compensation, for religious, charitable, civil or humanitarian purposes to nonprofit organizations.)

Employers are at substantial risk if their interns or former interns file suit under the FLSA and the internship is held to be employment, because rights guaranteed under the FLSA generally cannot be waived.

Employers and employees alike are well-aware of the main FLSA requirements: non-exempt employees must earn at least \$7.25/hour and time-and-a-half for all time worked over 40 hours in a workweek. The FLSA defines “employ” very broadly and it covers all whom an employer “suffer[s] or permit[s] to work.” Although the Supreme Court limited the scope of the definition to prevent those who serve only his or her **own** interest from being considered an employee of someone who provides aid and instruction, the exclusion is narrowly drawn and dependent upon facts and circumstances. Employers are at substantial risk if their interns or former interns file suit under the FLSA and the internship is held to be employment, because rights guaranteed under the FLSA generally cannot be waived.

Two high-profile FLSA lawsuits brought by interns were both filed in New York City: one in 2010 by former interns who worked on the movie “Black Swan” and another filed in 2013 by former interns who worked at two magazines owned by Condé Nast. In the first case, two interns sued Fox Searchlight Pictures, Inc. and claimed that they were

given menial tasks — running errands, photocopying, making coffee — that provided an immediate advantage to the employer and did not provide them with any training. Although Fox Searchlight is defending the case, it began paying its interns more than minimum wage after the suit was filed.

In the latter case, two former interns at *W Magazine* and *The New Yorker* sued Condé Nast and claimed they earned about \$1 per hour during their summer internships, were trained only by other interns, and performed menial work that provided immediate benefits to their respective magazine employers. Condé Nast later made news by announcing that it would be ending its internship program completely.

The 2nd Circuit recently agreed to hear an immediate, consolidated appeal filed by the employers in the *Black Swan* case and another similar case filed by former interns for publishing giant Hearst Corporation to provide clarity within the 2nd Circuit on the determination of intern status under the FLSA.

DEPARTMENT OF LABOR TEST FAILS TO PROVIDE SECURITY FOR EMPLOYERS

The Department of Labor generally considers internships in the for-profit sector to be employment within the meaning of the FLSA unless its six-part test is passed. But the test is confusing and contradictory — and some courts disregard it entirely when assessing whether an employment relationship existed.

The Department of Labor looks to six criteria to determine whether an internship or training program is excluded from FLSA requirements. If all of the factors below are met, the Department of Labor will not consider an intern to be “employed” within the meaning of the FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The test itself is internally inconsistent and difficult to apply. To the extent an employer gives an intern meaningful work, it runs the risk of deriving an immediate advantage from the activity of the intern. To the extent it assigns the intern only menial tasks, it runs the risk of not providing training similar to what would be given in an educational environment and of displacing regular employees. Furthermore, whether the intern understands that he or she will not receive wages has little bearing on the *actual* right to wages.

Courts take mixed approaches to the Department of Labor test. In *Solis v. Laurelbrook Sanitarium and School, Inc.*, the 6th Circuit called the test “a poor method for determining employee status in a training or educational setting.” In the more recent case of *Kaplan v. Code Blue Billing & Coding, Inc.*, the 11th Circuit applied the test in determining whether an unpaid intern was an “employee,” but only after first considering the “economic realities” of the relationship and concluding that the economic realities test did not support an employee relationship. Notably, *Kaplan* involved interns who were receiving academic credit for their externship and would not have received a degree without completing an externship — a distinction not found in many of the other situations that are now the subject of lawsuits. In a trainee case, *Reich v. Parker Fire Protection District*, the 10th Circuit considered the test as part of a list of factors in its effort to judge the totality of the circumstances.

RISK TO EMPLOYERS IS HIGH

The Fair Labor Standards Act imposes significant penalties on employers that are found to have failed to pay minimum wage and overtime to their employees, including back pay, liquidated damages equal to the amount of back pay, attorney’s fees and costs. Courts differ on whether punitive damages are available for these claims. The FLSA statute of limitations is two to three years, depending upon whether the violation was willful. For employers with many interns, the potential cost of an FLSA suit could be substantial.

BEST PRACTICES FOR UNPAID INTERNSHIPS

For-profit employers who want to continue to engage unpaid interns can take steps to reduce the risks they face. First, employers should ensure their internship program satisfies the training requirements of the six-factor test. The training provided to interns must not be specific to the employer’s own operations but rather provide an introduction to a larger industry or be of a general nature. Second, employers should avoid assigning interns any work that takes work

away from a regular employee — especially clerical, janitorial or similar work that would otherwise have to be performed by an employee. Third, evidence that actual operation of the business is sometimes impeded by the interns is beneficial. Employers should keep records of the time spent by their regular employees who, in addition to their other assignments, provide training or supervision of the interns. Finally, employers should require an intern to sign a document acknowledging that he or she is not an employee, that the internship is unpaid, and that the intern is not entitled to a job at the conclusion of the internship. These acknowledgements may prove helpful if the intern later files suit, even though they would not provide an exemption or constitute an effective waiver of an intern's FLSA rights.

Employers should be aware that the award of academic credit to interns is not itself sufficient to qualify for an exemption to the FLSA.

Employers whose unpaid interns earn academic credit can still be liable under the FLSA if those interns displaced regular workers, provided immediate benefits to the employer, and/or did not obtain training similar to that found in an educational environment. All employers should follow the best practices above, whether or not its unpaid interns earn academic credit from a school for their internship experience.

WHAT TO LOOK FOR IN 2014

Employers should be on the lookout for court decisions in a number of different intern FLSA suits currently pending around the country. Unless and until the Supreme Court offers guidance on the subject (it recently declined to review the 11th Circuit's decision in *Kaplan*), employers must be aware of and follow the law of the courts of appeal in each circuit where they have employees. The 2nd Circuit decision in the Fox Searchlight case will be closely watched by many because it will provide another avenue for potential Supreme Court involvement and its decision will apply to employers in New York, Connecticut and Vermont. While we all wait for clarity from the courts, employers should determine if having an unpaid internship program is worth the potential FLSA liability, and should ensure that any existing programs conform to the best practices above.

Supreme Court's *Nassar* Decision Sets Higher Causation Standard for a Variety of Claims



Leila Clewis
713.750.3147
lclewis@cozen.com

On June 24, 2013, in a closely decided five-to-four decision, the U.S. Supreme Court dealt a win for employers when it held that Title VII retaliation claims are subject to a stricter causation standard than other forms of Title VII discrimination. In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court clarified that moving forward, Title VII retaliation claims are not to be analyzed through the more lenient "motivating factor" lens; rather, such claims are to be analyzed using a "but-for" causation inquiry. Although *Nassar* specifically addressed Title VII retaliation claims, the Court's analysis opens the door for a broader application to retaliation and discrimination claims pursued under other federal discrimination statutes, such as the Americans with Disabilities Act, where courts are still grappling to apply a uniform causation standard.

In *Nassar*, the employee, a former faculty member of the University of Texas Southwestern Medical Center (UTSW), alleged he was constructively discharged because of his supervisor's racially and religiously motivated harassment, and that he was later prevented from retaining employment at an affiliated hospital because he complained about such harassment.

Justice Kennedy, delivering the majority opinion for the Court, framed the causation issue with an analogy to tort law. As a general rule, the proper standard for causation is "but-for" causation — that is, the plaintiff must prove his injury would not have occurred in the absence of the illegal act. In status-based discrimination cases under Title VII — discrimination "because of" an individual's "race, color, religion, sex, or national origin" — Congress did not intend to require employees to prove causation under the "but-for" standard. The precise issue in *Nassar* was whether Congress had also evidenced an intent to depart from the ordinary "but-for" standard in Title VII retaliation claims. Ultimately, the Court decided Congress did not intend such a departure.

Congress enacted the Civil Rights Act of 1991, which provides that liability in status-based discrimination is established when the plaintiff proves that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” Prior to enactment of this statute, employers were permitted to escape liability if they could prove that the adverse employment decision would have been made without regard to the employee’s protected status. In the wake of the Civil Rights Act of 1991, however, employers could only use this defense to insulate themselves from damages, but not injunctive relief or attorney’s fees.

Nassar turned on the textual differences of § 2000e-2(m) and § 2000e-3(a). The Court emphasized that the plain language of the retaliation provision, unlike the status-based discrimination provision, did not, in and of itself, evidence a congressional intent to depart from the ordinary “but-for” standard. The Court went on to conclude that the “motivating factor” provision did not extend to retaliation claims for three reasons:

1. The 1991 provision explicitly enumerated only five of the seven protected classes — that is, discrimination claims on the basis of “race, color, religion, sex, or national origin.” Had Congress wanted to include retaliation within this list, it could have done so.
2. The 1991 provision amended only the status-based discrimination provision, not the retaliation provision. Congress did not intend for the 1991 provision to extend to retaliation claims because Congress could have, but did not, include similar “motivating factor” language in the provision pertaining to retaliation.
3. Title VII was not written in broad and general terms, and it would be inappropriate to conclude that Congress meant anything other than what the text says with respect to retaliation.

To drive home its position on the question presented before the Court, the majority looked to Congress’s approach to the Americans with Disabilities Act of 1990, wherein Congress provided not only a general prohibition on discrimination “because of [an individual’s disability],” but also a specific anti-retaliation provision. According to the majority, the clear articulation of a separate anti-retaliation provision invalidated the respondent’s claim that Congress intended to use the phrase “race, color, religion, sex, or national origin” as the textual equivalent of “retaliation.” In other words, the ADA

showed that “when Congress elected to address retaliation as part of a detailed statutory scheme, it did so in clear textual terms.”

For further guidance into its textual analysis, the Court looked to *Gross v. FBL Financial Services, Inc.*, which analyzed and interpreted the similarly worded ADEA statute. Much like Title VII, the relevant portion of the ADEA stated that “[it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” (Emphasis added). The *Gross* Court, focusing on the meaning of the “because of” language, explained that the “requirement that an employer [take] adverse action ‘because of’ age [meant] that age was the ‘reason’ that the employer decided to act,” or, in other words, that “age was the ‘but-for’ cause of the employer’s adverse decision.”

RETALIATION CLAIMS GOING FORWARD

The *Nassar* decision is noteworthy because it put to rest the question of whether the lessened “motivating factor” standard could be applied to retaliation claims under Title VII. However, this decision is most valuable because of its implications for discrimination and retaliation claims outside of Title VII.

By applying the reasoning in *Gross* and relying on the structure of the ADA to decide *Nassar*, the Supreme Court set forth a new test for assigning standards of causation to federal and state retaliation statutes as well as discrimination laws utilizing “because of” language. It appears that the higher “but for” causation will be applied to interpret discrimination and retaliation cases, unless a clear intent to deviate from the traditional causation standard can be shown. The ADA, for example, contains an anti-retaliation provision that provides that “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter.” The ADA also contains a discrimination provision parallel to that found in the ADEA: “... excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual ...” There is no corresponding “motivating factor” language. Therefore, under the *Nassar* paradigm, courts should apply the higher “but for” causation standard to interpret both discrimination and retaliation claims under the ADA. As another illustration, the Fair Labor Standards Act makes it unlawful:

[T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 USC § 215. Similarly, section 21.055 of the Texas Labor Code states that:

An employer, labor union, or employment agency commits an unlawful employment practice if the employer, labor union, or employment agency retaliates or discriminates against a person who, under this chapter: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.

Neither the FLSA provision nor the Texas Labor code contains language demonstrating congressional intent to deviate from the traditional causation rules. Therefore, applying *Nassar*, the higher “but for” standard would apply to claims under these two provisions as well.

Overall, *Nassar* carries positive implications for employers defending against retaliation and non-Title VII discrimination actions as plaintiffs seeking to use the lessened “motivating factor” causation standard now face the added obstacle of proving congressional intent to depart from the traditional “but for” standard.

It must be emphasized that although the more stringent “but-for” causation standard may enable employers to defeat retaliation claims at the summary judgment stage, *Nassar* has little impact on employers’ need to guard against retaliation claims through robust anti-retaliation/anti-discrimination policies, thorough supervisory training, and prompt and effective investigations.

New Year, New Wage Rates: State and Local Minimum Wage Rates Continue to Eclipse the Federal Minimum Wage



George A. Voegele
215.665.5595
gvoegele@cozen.com

The federal minimum wage has been set at \$7.25 per hour (and at \$2.13 an hour in direct wages for tipped employees) since 2009. In the years since then, many state and local governments have passed laws or ordinances setting their minimum wage rates higher than the federal minimum. While there are many industry or job-specific exemptions to the minimum wage requirements, generally where federal, state or local law have differing minimum wage rates, the highest applicable rate must be paid to covered employees.

Many states and municipalities will raise their minimum wage rates even further in 2014. For example, New York state’s minimum wage will increase to \$8.00 an hour on December 31, 2013. On January 1, 2014, Arizona will increase its minimum wage to \$7.90 an hour, and to \$4.90 an hour for tipped employees. Missouri and Vermont also will increase their rates, however the amount has not yet been determined. A number of other states’ minimum wage rates are scheduled to increase on January 1, 2014. They include:

Colorado	\$8.00		
Connecticut	\$8.75	Ohio	\$7.95
Florida	\$7.93	Oregon	\$9.10
Montana	\$7.90	Rhode Island	\$8.00
New Jersey	\$8.25	Washington	\$9.32

California’s minimum wage will increase to \$9.00 an hour on July 1, 2014.

In addition, a number of other states will continue to keep their minimum wage rates set higher than the federal minimum. Some examples are: Illinois and Washington, DC: \$8.25; and New Mexico: \$7.50.

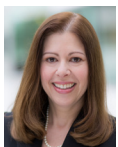
More and more municipalities have also passed ordinances setting minimum or “living wage” standards. An example that recently received significant press coverage was the city of SeaTac, Wash., when it increased the local minimum wage, which is primarily applicable to businesses connected with the Seattle-Tacoma International Airport, to \$15.00 per hour and mandated paid sick leave. Bernalillo County, N.M., which includes the city of Albuquerque and is the most populous county in New Mexico, will increase its minimum wage to \$8.50 an hour January 4, 2014. There are many other similar ordinances across the country.

While employers must familiarize themselves with federal minimum wage standards, it is just as important that they be aware of and comply with their state and local minimum wage requirements as well.

It should be clear that while employers must familiarize themselves with federal minimum wage standards, it is just as important that they be aware of and comply with their state and local minimum wage requirements as well.

It is also important to note that state and local minimum wage increases apply to employees covered by collective bargaining agreements, so that if a company has an agreement that calls for wages below federal, state or local minimums, those wage rates will need to be adjusted.

OFCCP Update: Focus on Increased Employment Opportunities for Veterans and Individuals with Disabilities Comes with New Regulatory Requirements



Debra Steiner Friedman
215.665.3719
dfriedman@cozen.com



Feyi Obafemi
215.665.5510
oobafemi@cozen.com

This year, the Office of Federal Contract Compliance Programs (OFCCP) issued new regulations, effective March 24, 2014, that are aimed at increasing employment

opportunities for veterans and individuals with disabilities. According to OFCCP, the unemployment rate for veterans who served at any time since September 2001 was 9.9 percent in 2012, and the unemployment rate for all veterans was 7 percent. Similarly, the unemployment rate for working-age individuals with disabilities was a soaring 15 percent in 2012, compared to 8 percent for working-age individuals without disabilities. The new regulations require contractors to make additional, significant recruitment and outreach efforts to these groups.

WHAT EMPLOYERS ARE AFFECTED BY THESE NEW REGULATIONS?

OFCCP has jurisdiction over an estimated 200,000 federal contractor establishments. Employers with a single federal government contract for \$100,000 or more are covered under the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (VEVRAA). Federal contractors who meet this dollar threshold and employ 50 or more employees also must develop a written affirmative action program for protected veterans. Similarly, under Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), federal contractors with contracts in excess of \$10,000 must take affirmative action to employ and advance qualified individuals with disabilities. Federal contractors who employ 50 or more employees and have a government contract for \$50,000 or more, or bills of lading totaling \$50,000 or more, also are required to develop a written affirmative action plan for individuals with disabilities.

HOW DOES THE OFCCP DEFINE VETERANS AND INDIVIDUALS WITH DISABILITIES?

The VEVRAA regulations cover “protected veterans.” Protected veteran is defined in the regulations to include: “disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans.” The regulations further define these sub-categories of protected veterans.

Section 503 regulations adopt the expansive definition of “disability” set forth in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) by revising the definition of key terms, such as “major life activities,” “mitigating measures,” “substantially limits,” and who is “regarded as” having a disability. Accordingly, Section 503 now covers a broader range of disabilities than before.

WHAT DO THE NEW REGULATIONS REQUIRE?

The new OFCCP regulations revise and expand existing affirmative action requirements under VEVRAA and Section 503 in multiple ways. Covered contractors must: (1) establish

annual hiring benchmarks for veterans and annual utilization goals for individuals with disabilities; (2) invite applicants to self-identify as protected veterans and/or individuals with disabilities at both the pre-offer and post-offer phases of the hiring process; (3) collect and analyze veteran and disabled recruitment and hiring data; (4) utilize specific language in contracts advising subcontractors of their obligations as federal contractors; and (5) take other steps to inform employees, subcontractors and unions of their rights and roles in affirmative action compliance. Additionally, contractors subject to VEVRAA must provide information for job openings to state or local job services in a manner and format permitted by the applicable job service.

Contractors with an affirmative action program (AAP) in place on March 14, 2014 may maintain that AAP until the end of the AAP year. Those contractors may delay implementation of hiring benchmarks, utilization goals, pre-offer invitations to self-identify, revised post-offer invitations to self-identify and the new forms of data collection, until the start of their next AAP cycle. Nevertheless, all contractors should begin reviewing the new requirements, particularly because implementation will require modifications to current practices and processes.

HOW ARE HIRING BENCHMARKS AND UTILIZATION GOALS ESTABLISHED AND MEASURED?

Every contractor subject to VEVRAA must establish a hiring benchmark for protected veterans each AAP year. The benchmark is not a quota, which would be unlawful. Rather, it is a tool that allows contractors to measure their success at recruiting and employing protected veterans.

Contractors may set their hiring benchmark in one of two ways. One option is utilizing a benchmark equal to the national percentage of veterans in the civilian labor force (currently 8 percent), which will be posted in a Benchmark Database on OFCCP's website. The other option is designing a custom benchmark that takes into account the following five factors: (1) the average percentage of veterans in the civilian labor force in the state where the contractor is located over the preceding three years, using data on OFCCP's website; (2) the number of veterans, over the previous four quarters, who participated in the employment service delivery system in the state where the contractor is located, as posted on OFCCP's website; (3) the applicant and hiring ratios for the previous year; (4) the contractor's recent assessments of the effectiveness of its outreach and recruitment efforts; and (5) any other factors, such as the nature of the job or its location, that would affect the availability of qualified protected veterans. Contractors may not be penalized for failure to reach the benchmark they establish.

OFCCP has set a national 7 percent utilization goal for the employment of qualified individuals with disabilities.

Contractors required to develop an AAP also must establish a utilization goal for individuals with disabilities. Contractors are not given options on how to meet this goal. Rather, OFCCP has set a national 7 percent utilization goal for the employment of qualified individuals with disabilities. OFCCP has stated that the goal should be attainable by complying with the regulations. The goal is not a quota, however, and there is no penalty for failure to attain it.

Contractors with 100 or fewer employees may apply the utilization goal across the entire workforce. Contractors with more than 100 employees must apply the utilization goal to each of the contractor's job groups. If the contractor does not meet the 7 percent utilization goal for a particular job group, the contractor must assess whether impediments to equal employment exist. If impediments exist, the contractor must implement action-oriented programs to address the issue, such as engaging in additional and/or alternative outreach efforts and/or modifying personnel processes to ensure equal employment opportunities for individuals with disabilities.

HOW MUST CONTRACTORS HANDLE INVITATIONS TO SELF-IDENTIFY?

Currently, once an offer of employment is made, the contractor must invite the individual to voluntarily self-identify as a veteran and/or individual with a disability. The new regulations require contractors to invite applicants to self-identify as protected veterans and individuals with disabilities at two points in the hiring process: pre-offer and post-offer.

The contractor community was concerned that pre-offer invitations to self-identify as a disabled individual violates the Americans with Disabilities Act (ADA). The OFCCP responded to this concern by posting an August 8, 2013 letter from the Equal Employment Opportunity Commission's (EEOC) Office of Legal Counsel on its website. In that letter, the EEOC states pre-offer invitations to self-identify required by a Department of Labor rule for the purpose of benefitting from potential affirmative action in a hiring decision do not violate the ADA.

Notably, the new pre-offer invitation to self-identify as veterans and/or individuals with disabilities may be requested at the same time contractors collect demographic data on an applicant's race, gender and ethnicity, which typically is done with application materials (but must be separate from the application) or, in some circumstances, after the applicant meets a basic qualification screen. Collection of

this information should permit contractors, as well as OFCCP, to better track the number of applicants who are protected veterans and/or individuals with disabilities and to assess outreach and recruitment efforts.

The new regulations also require contractors to determine how many individuals with disabilities are currently in their workforce, and further, how many of these individuals are in each of the contractor's job groups. Accordingly, OFCCP is requiring contractors to survey their current workforce to allow individuals with disabilities to voluntarily self-identify.

The survey must be conducted during the first year the contractor becomes subject to the new regulations and then every five years thereafter. Contractors must advise their workforce at least once during the years in between invitations that employees may voluntarily update their disability status at any time. Furthermore, if the disability is obvious or known to the contractor, contractors may identify employees as having disabilities even if those employees do not self-identify. All disability self-identification information must be kept confidential, in a separate data analysis file.

OFCCP is mandating that contractors use its specific pre-offer and post-offer invitations to self-identify as an individual with a disability.

OFCCP is mandating that contractors use its specific pre-offer and post-offer invitations to self-identify as an individual with a disability, as well as the invitation surveying the workforce for individuals with disabilities every five years. These documents will be posted on OFCCP's website when they are available.

Finally, OFCCP has provided sample pre-offer and post-offer invitations to self-identify for veterans at Appendix B to the revised VEVRAA regulations. Contractors may, but are not required to, use OFCCP forms for this purpose.

WHAT ADDITIONAL DATA COLLECTION AND ANALYSIS MUST CONTRACTORS UNDERTAKE?

The new regulations require contractors to collect and document, on an annual basis, the following data on job applicants: (1) the number of protected veteran applicants and applicants with known disabilities; (2) the total number of job openings and number of jobs filled; (3) the total number of applicants for all jobs; (4) the total number of protected veteran applicants and applicants with known disabilities hired; and (5) the total number of applicants hired. This data should allow the contractor, and OFCCP, to evaluate recruitment and outreach efforts.

Additionally, contractors must do annual self-assessments of their veteran and individuals with disabilities outreach and recruitment efforts, noting the criteria used for the assessments. If the contractor concludes that the totality of its efforts have not been effective in identifying and recruiting qualified protected veterans and/or individuals with disabilities, the contractor must identify and implement alternative efforts for that group.

WHAT STEPS MUST CONTRACTORS TAKE TO COMPLY WITH THEIR NOTIFICATION OBLIGATIONS?

Contractors already are required to include language in their subcontracts advising subcontractors of their affirmative action obligations. Until now, OFCCP has permitted contractors to incorporate the required language, generally referred to as the Equal Opportunity Clause, by reference, with phrases such as "The parties hereby incorporate the requirements of [citation to regulation], if applicable."

Under the new regulations, contractors may incorporate the Equal Opportunity Clause by reference only if they include the following sentences, as applicable, in bold text immediately after citing to the appropriate new regulations, 41 C.F.R. § 60-300.5(a) and/or 41 C.F.R. § 60-741.5(a):

This contractor and subcontractor shall abide by the requirements of 41 C.F.R. 60-300.5(a) and 41 C.F.R. § 60-741.5(a). This regulation prohibits discrimination against qualified protected veterans and qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and qualified individuals with disabilities.

Accordingly, contractors generally will need to change their form contracts and purchase orders to reflect this new language requirement.

The new regulations also require contractors, in their solicitations and advertisements for applicants, to state that they are equal employment opportunity employers of veterans and individuals with disabilities. A typical statement might be phrased as follows: "EOE/AE: Applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, veteran or disability status or any other protected class" or "EOE/AE: M/F/D/V."

Contractors further will be required to include their affirmative action policy in any policy manual they distribute, or otherwise make the policy available to employees. If the contractor is a party to a collective bargaining agreement, the contractor also must notify union officials of the affirmative action policy and request their cooperation. Moreover,

contractors must send written notification of their affirmative action policy to all subcontractors and request their cooperation.

HOW HAVE THE VEVRAA JOB LISTING REQUIREMENTS BEEN EXPANDED?

Contractors subject to VEVRAA now must specifically include the following information in all required job listings to state and local employment service delivery systems: (1) the term “VEVRAA Federal Contractor”; (2) the contractor’s desire to receive priority referrals of protected veterans for its job openings; and (3) contact information for the hiring official at each hiring location who can verify the job listing information. The job listing requirement does not apply to executive and senior management positions meeting the Fair Labor Standards Act (FLSA) executive exemption test, positions that will be filled from within the contractor’s organization and positions lasting three days or less.

The job listings must be submitted in a format accepted by the employment service. For example, if the applicable employment service only accepts web-based listings, then the contractor must submit all required job listings in that format.

HOW DO THE NEW REGULATIONS IMPACT RECORDKEEPING AND OFCCP ACCESS?

Contractors now will be required to retain the following records for three years: (1) veteran hiring benchmarks used; (2) documentation and assessment of outreach and recruitment efforts for veterans and individuals with disabilities; (3) responses to self-identification for veterans and individuals with disabilities; (4) data on veterans/disabled individuals who applied for jobs compared to the total pool of applicants; and (5) data on the numbers of veterans/disabled individuals hired compared to all applicants hired.

OFCCP’s current requirement that contractors retain personnel and other employment records for two years from the date the record was made or the date of the personnel action, whichever is later, continues to apply. Likewise, contractors with fewer than 150 employees or a contract of less than \$150,000 still are only required to retain personnel and other employment records for one year.

Contractors must allow OFCCP access to data, onsite or offsite, at OFCCP’s option during a compliance check or focused review. Contractors further must advise OFCCP of all formats that data is maintained and provide the data in the format that OFCCP requests.

WHAT STEPS SHOULD CONTRACTORS TAKE TO ADDRESS THESE NEW COMPLIANCE CHALLENGES?

Due to their expansive nature, compliance with the new regulations will require considerable time and resources. Contractors should ensure that human resources personnel understand the new regulatory requirements, identify the forms, policies and processes that need modification and implement the necessary changes. Human resources also must work with IT staff, and possibly third-party vendors, to roll out these new processes and track data. Furthermore, human resources personnel should consider equal employment training that highlights the rights of veterans and individuals with disabilities in the workplace.

Counsel also can play a crucial role in compliance. The new data tracking, analysis and recordkeeping requirements provide a multitude of data for the government and potentially, plaintiffs’ lawyers. Not only can the data (or absence thereof) be used to determine VEVRAA and Section 503 violations, but it also may be discoverable in certain cases asserting violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, the ADA, and/or other fair employment practices laws. Therefore, contractors should have their counsel evaluate and address the potential legal exposure associated with the newly required data collection and analysis. This may involve implementing internal and external communication strategies, enhancing existing confidentiality and recordkeeping systems, conducting self-audits pursuant to the attorney-client privilege and the attorney work product doctrine, and training management on ways to minimize legal risks.

In Sickness and In Health: What Employers Should Know About FMLA Leave Post-Windsor



Emily S. Miller
215.665.2142
esmiller@cozen.com

Section 3 of the Defense of Marriage Act (DOMA), which limited marriage for federal purposes to a union between one man and one woman, has been struck down as unconstitutional. In *United States v. Windsor*, the U.S. Supreme Court held that the Fifth Amendment’s equal protection clause bars the federal government from refusing to recognize same-sex marriages that are legally entered into under state law. At the heart of the June 2013 decision was the fact that states, rather than the federal government,

historically have defined marriage. Therefore, the *Windsor* Court held, a same-sex marriage that is lawful under state law must be recognized for federal purposes. The *Windsor* holding has significant implications for employers both in terms of employee benefit plans (which is beyond the scope of this article) and leave granted pursuant to federal law.

Complicating the issue is that the *Windsor* Court did not specify **which** state law applies when considering the validity of a same-sex marriage for federal purposes, and a distinction has been drawn between the “state of celebration” (i.e., where the marriage was entered into) and the state in which the couple resides. Some federal agencies recognize any marriage that is valid in the state of celebration, while others look to the law of the state of residency. Thus, a same-sex couple who got married in Delaware (which recognizes same-sex marriage) but lives in Pennsylvania (which does not) is considered married for some federal purposes, but not for others.

According to the DOL's most recent regulatory agenda, issued November 26, the Department expects to revise its definition of spouse for FMLA purposes in March 2014.

In the months following *Windsor*, the Department of Labor and the Internal Revenue Service addressed the question the Supreme Court left open; i.e., which state's law applies when determining whether a same-sex couple's marriage will be recognized for federal purposes. The Department of Labor issued a memorandum in August 2013 to its staff members regarding compliance with *Windsor*, which directed attention to DOL Fact Sheet #28F. That fact sheet, titled “Qualifying Reasons for Leave Under the Family and Medical Leave Act” (FMLA), defines “spouse” as “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including ‘common law’ marriage and same-sex marriage.” Then, taking the opposite approach, the Internal Revenue Service announced that it will use the state of celebration test to determine spousal status. The Department of Labor then issued Technical Release No. 2013-04, stating that the DOL will use the state of celebration test for purposes of those provisions of the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 (ERISA) that the DOL interprets. The DOL has not, however, changed its course on the recognition of same-sex marriages for FMLA purposes, and still looks to the state of residency. According to the DOL's most recent regulatory agenda, issued November 26, the Department expects to revise its definition of spouse for FMLA purposes in March 2014.

Unless and until the DOL changes its current definition of spouse, employers must offer FMLA leave to allow employees to care for a same-sex spouse with a serious medical condition, or to handle a qualifying exigency relating to a same-sex spouse's military service, so long as the marriage is recognized under the law of the state in which the employee resides. (Employers should note that the **employee's** state of residence controls, not the state of the employer's incorporation or principal place of business.) This “state of residence” standard raises significant issues for employers that operate in multiple states. Imagine, for example, that two employees request FMLA leave on the same day to care for spouses with the same qualifying condition. Both employees got married to their same-sex spouse in New York, but one employee lives in Pennsylvania, while the other lives in New Jersey. Under the law as currently interpreted by the DOL, the Pennsylvania employee would not be entitled to leave, while the New Jersey employee would. To avoid this discrepancy in administration, some employers are simply recognizing all legally married same-sex spouses for FMLA purposes.

Another issue employers face is whether to request verification that the employee requesting leave is, in fact, married to the person he or she claims to be his or her spouse. Some employers might be tempted to request documentation of the same-sex marriage, but to do so without also requesting documentation of opposite-sex marriages could invite a discrimination claim under state or local laws prohibiting discrimination on the basis of sexual orientation.

While the *Windsor* holding does qualify more employees for FMLA leave than were eligible previously, there are instances in which it will reduce the amount of leave to which an employee is entitled. When spouses are employed by the same employer, the FMLA aggregates the leave allotment between the spouses. Thus, under the law before *Windsor*, both same-sex spouses working for a single employer would be entitled to 12 weeks of leave if, for example, they were to adopt a child, because their marriage was not recognized under DOMA. Now, if the couple resides in a state that recognizes their marriage, those spouses would be entitled to only 12 weeks of leave between the two of them.

Finally, employers should bear in mind that the *Windsor* holding addresses only marriages, and not civil unions or domestic partnerships. In 2014 and beyond, employers should be on the lookout for cases seeking to extend *Windsor* to those types of unions. Similarly, employers should monitor the DOL for any changes in its “state of celebration” position, and those operating in multiple states should be aware of any changes in states' laws on same-sex marriage.

As of December 2, 2013, the District of Columbia and the following states recognize same-sex marriage: California, Connecticut, Delaware, Hawaii, Illinois (effective June 1, 2014), Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington.

Getting Your Employees Fit for the New Year: ACA Regulations for Employer Wellness Plans Go into Effect January 1, 2014



Victoria L. Zellers
215.665.4707
vzellers@cozen.com

Employer-sponsored wellness plans have been popular for several years. Wellness programs are generally seen as a valuable tool to improve employee health leading to decreases in employee absenteeism, increased productivity and lower health care costs. In a prior Observer, we provided employer do's and don'ts for wellness programs, noting that employers must be careful to comply with all of the non-discrimination and privacy laws including, but not limited to, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act as Amended by the ADA Amendments Act of 2008 (ADA and ADAAA), the Genetic Information and Nondiscrimination Act (GINA), the Employee Retirement Income and Security Act (ERISA), the Health Insurance Portability Accountability Act (HIPAA), state employee privacy laws and state laws against lifestyle discrimination. Previously, the most detailed regulations applicable to wellness programs were included in the 2006 HIPAA regulations.

The Affordable Care Act (ACA) amended HIPAA and **increased** the permissible incentives for wellness programs. Consistent with the ACA amendment to HIPAA, the Departments of Treasury, Labor, and Health and Human Services issued final regulations on June 3, 2013 that go into effect for group health plans and group health insurance issuers for plan years beginning on or after January 1, 2014. They also apply to individual health insurance issuers for policy years beginning on or after January 1, 2014. (See 78 Fed. Reg. 33158 (June 3, 2013); www.gpo.gov/fdsys/pkg/FR-2013-06-03/pdf/2013-12916.pdf.)

The final regulations increase the maximum permissible reward under a health contingent wellness program offered

in connection with a group health plan and any related health insurance coverage from 20 percent to 30 percent of the cost of coverage. The final regulations further increase the maximum permissible reward to 50 percent for wellness programs designed to prevent or reduce tobacco use. The regulations also include more rules, however, regarding the "reasonable design" of health-contingent wellness programs and the "reasonable alternatives" for these programs that are required to avoid prohibited discrimination.

To understand and comply with the new regulations, employers first need to determine which category its wellness plan falls into: (1) participatory wellness programs; or (2) health-contingent wellness programs.

To understand and comply with the new regulations, employers first need to determine which category its wellness plan falls into: (1) participatory wellness programs; or (2) health-contingent wellness programs. Health-contingent wellness programs are then further divided into (a) activity-only wellness programs; and (b) outcome-based programs.

Participatory wellness programs are programs that either do not provide a reward or do not include any conditions for obtaining a reward based on an individual satisfying a standard that is related to a health factor. Examples in the regulations include: (1) a program that reimburses employees for all or part of the cost of membership in a fitness program; (2) a diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes; and (3) a program that provides a reward to employees for attending a monthly, no-cost health education seminar. Participatory wellness programs are generally permissible and comply with non-discrimination laws under the ACA and HIPAA, so long as participation is available to all similarly situated individuals without regard to health status. There is no limit on the financial incentives for participatory wellness programs. Additionally, they do not have to meet all of the requirements for health-contingent wellness programs.

Because participatory wellness programs do not have to meet all of the requirements for health-contingent wellness programs, they are easier for employers to administer. However, they may not be as effective in achieving the desired results of a wellness program — healthier employees with lower employer health care costs.

Health-contingent wellness programs are programs that require an individual to satisfy a standard related to a health factor to obtain a reward or require an individual to undertake

more than a similarly situated individual based on a health factor in order to obtain the same reward. These health-contingent wellness programs are divided into: (a) activity-only wellness programs; and (b) outcome-based wellness programs. In order to be permissible, these programs must comply with the reasonable design and reasonable alternative rules detailed in the final regulations.

Activity-only wellness programs require an individual to perform or complete an activity related to a health factor in order to obtain a reward. Activity-only wellness programs do not, however, require an individual to attain or maintain a specific health outcome. Examples of activity-only programs in the regulations include walking, diet or exercise programs that do not require specific results.

Outcome-based wellness programs require an individual to attain or maintain a specific health outcome in order to qualify for a reward. Examples include not smoking or attaining certain results on biometric health screen. Under the regulations, outcome-based wellness programs have two tiers: (1) a measurement, test or screening as part of an initial standard; and (2) a larger program that then targets individuals who do not meet the initial standard for wellness activities.

Both activity-only and outcome-based wellness programs have five requirements. These five requirements appeared in the 2006 HIPAA regulations for health-contingent programs, but they now have several new details.

1. Frequency of Opportunity to Qualify. For both activity-only and outcome-based wellness programs, an individual must be able to qualify for the reward at least once per year.

2. Size of Reward. The total reward for activity-only wellness programs cannot exceed 30 percent of the employee-only coverage under the plan. However, if, in addition to employees, any class of dependents (such as spouses, or spouses and dependent children) may participate in the wellness program, the reward must not exceed 30 percent of the total cost of the coverage that an employee and any dependents are enrolled. For outcome-based wellness programs, the reward cannot exceed 30 percent of the employee-only gross cost (or employee and dependent cost if dependents can participate), unless the program is a tobacco cessation program designed to prevent or reduce tobacco usage. If the program is a tobacco cessation program, the reward can be increased to 50 percent.

3. Reasonable Design. For both activity-only and outcome-based wellness plans, the plan must be reasonably designed to promote health or prevent disease. A program satisfies this standard if it has a reasonable chance of improving the health of, or preventing disease in, participating individuals, and it is not overly burdensome, is not a subterfuge for discrimination, and is not highly suspect in the method chosen to promote health or prevent disease. To ensure that an outcome-based wellness program is reasonably designed to improve health and does not act as a subterfuge for underwriting or reducing benefits based on a health factor, a reasonable alternative standard to qualify for the reward must be provided to any individual who does not meet the initial standard based on a measurement, test or screening that is related to a health factor.

4. Uniform Availability and Reasonable Alternative Standard. For activity-only wellness programs, the full reward must be available to all similarly situated individuals. A program is not considered to be available to all similarly situated individuals unless the program meets both of the following requirements: (a) the program allows a reasonable alternative standard or waiver of the otherwise applicable standard for obtaining the reward for any individual, for whom, for that period, it is unreasonably difficult *due to a medical condition* to satisfy the otherwise applicable standard; and (b) the program allows a reasonable alternative standard or waiver of the otherwise applicable standard for obtaining the reward for any individual for whom, for that period, it is *medically inadvisable* to attempt to satisfy the otherwise applicable award. Thus, for activity-only programs, the reasonable alternative standard only needs to be made available based on a medical-related issue that makes it unreasonably difficult or inadvisable to satisfy the activity standard in the program.

For outcome-based wellness programs, the full reward must also be available to all similarly situated individuals. For an outcome-based program to be considered to be available to all similarly situated individuals, the program must allow a reasonable alternative standard or waiver of the otherwise applicable standard for obtaining the reward for any individual who does not meet the initial standard based on the measurement, test or screening. Importantly, for outcome-based wellness programs, the reasonable alternative standard is *not* limited to those for whom it is unreasonable to meet the standard due to a medical condition or otherwise medically inadvisable, and it must be offered to anyone who does not meet the initial standard. If the reasonable alternative standard is completing an education program

or diet program, the plan or issuer is required to pay for the education plan or diet program. Additionally, the time commitment required must be reasonable. If a plan standard is not medically advisable for someone, then an alternative that accommodates the recommendations of the individual's physician must be permitted. If a standard is a specific BMI, a reasonable alternative standard could allow for a person to reduce his/her BMI by a small percentage over a realistic time period. For outcome-based programs, it is not considered reasonable to require physician verification that a health-factor makes it advisable to meet a standard, but an employee can choose to involve his or her physician to help provide and set a standard for a reasonable alternative if the employee so desires.

5. Notice of Availability of Reasonable Alternative Standard. For both activity-only and outcome-based wellness programs, the regulations require an employer to notify participants that a reasonable alternative standard is available and, if applicable, the possibility of a waiver of the otherwise applicable standards.

The final regulations provide a sample notice for employers to give to their employees: "Your health plan is committed to helping you achieve your best health. Rewards for participating in a wellness program are available to all employees. If you think you might be unable to meet a standard for reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with your (and if you wish, with your doctor) to find a wellness program with the same reward that is right for you in light of your health status."

This notice should be provided with all communications (including forms) that reference wellness programs.

While the health-contingent wellness programs require more effort by your employees and are more likely to lead to the desired results of a wellness plan, the administration of such programs is more burdensome than participatory wellness programs. If creating and monitoring the reasonable alternatives required for health-contingent plans are seen as or become too burdensome, an employer can always choose to waive the standard. Waiving the standards, however, may be seen to undermine the purpose and intent of the whole program.

Many illustrative examples of wellness programs and alternatives are provided in the final regulations, available at www.gpo.gov/fdsys/pkg/FR-2013-06-03/pdf/2013-12916.pdf.

Recent Updates Regarding Background Checks in Hiring Decisions



Carrie B. Rosen
215.665.6919
crosen@cozen.com

This past year has seen changes to the myriad employment laws that affect employers, especially laws regulating the use of background checks in hiring decisions. More states and municipalities are passing laws limiting the use of background checks in private employment, and the EEOC has indicated that employers conducting background checks will face increased scrutiny.

CRIMINAL BACKGROUND CHECKS

Employment Applications/Ban the Box Movement

Many employers are familiar with the typical check box question on employment applications asking whether the applicant has ever been convicted of a felony or misdemeanor. Recently, a new movement dubbed "Ban the Box" has sought to eliminate the use of this question on employment applications. The theory is that ex-offenders are being rejected from job prospects once they check that box on an employment application, regardless of their qualifications for the position or rehabilitation status. By banning the box, the hope is that ex-offenders will at least be able to get their foot in the door and begin the interview process before their criminal background is disclosed.

This Ban the Box movement has seen a renewed resurgence over the past few years, and 2013 was no different. More states, and even some municipalities, are beginning to legislate what information a private employer may lawfully seek or require from an applicant on an employment application and during the hiring process. Massachusetts and Hawaii previously passed Ban the Box laws prohibiting private employers from inquiring about an applicant's criminal history on a written employment application or seeking disclosure of such information prior to the first interview, with limited exceptions. The city of Philadelphia followed suit in 2011. Recently, the states of Rhode Island and Minnesota and the cities of Newark, N.J., Buffalo, N.Y. and Seattle have passed similar Ban the Box laws applicable to private employers (many more states and cities have Ban the Box laws that are applicable to public employers). Rhode Island and Minnesota's laws go into effect on January 1, 2014.

Rhode Island's law prohibits employers from asking in a job application whether the applicant has ever been arrested or convicted of a crime. The employer is precluded from seeking such information before the job interview. Similarly, Minnesota's Ban the Box law requires private employers to wait until a job applicant has been selected for a job interview or a conditional offer of employment has been extended before asking an applicant about their criminal record. Several other states and cities have pending Ban the Box legislation that would be applicable to private employers.

EEOC Guidance

As many employers are aware, in April 2012, the EEOC published updated guidance on the use of conviction and arrest information in employment decisions. While it does not prohibit employers from conducting criminal background checks, the EEOC's guidance sets forth its belief that blanket policies excluding those with convictions from employment are not job related and/or consistent with business necessity and that employers should develop a targeted screen considering at least (1) the nature of the crime, (2) the time elapsed since the crime was committed, and (3) the nature of the job, as well as an opportunity for individualized assessment.

Since issuing its guidance in 2012, the EEOC has announced in its Strategic Enforcement Plan that it intends to increase the number of systemic cases in its litigation docket. As evidence of its plan, in June 2013 the EEOC filed two lawsuits against two large private employers regarding their use of criminal background checks in the hiring process. The EEOC filed suit against a BMW manufacturing facility alleging the company disproportionately screened out African-Americans from jobs by denying facility access to employees with certain criminal convictions, without conducting any individualized assessment of the nature and gravity of the crimes, the ages of the convictions, and the nature of the positions. The EEOC also filed suit against Dollar General, alleging the company conditions all of its job offers on criminal background checks, which results in a disparate impact against African-American applicants.

CREDIT CHECKS

2013 has also seen an increase in state laws limiting the use of credit checks in employment decisions. As of September 2013, 10 states have laws precluding/limiting the use of credit data for employment purposes: California, Colorado,

Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. Approximately half of the remaining states are considering similar legislation. Most of these laws would prohibit employers from relying on credit histories to deny employment or make decisions regarding promotion and termination, although most provide exceptions if the information is substantially related to the job position or if otherwise required by law.

2014 OUTLOOK

Given the EEOC's stated position on systemic litigation and its 2013 litigation tactics, employers should review and analyze their current background check policies and procedures to ensure that they are in compliance with the EEOC's guidance.

Based upon these recent developments regarding the use of background checks in hiring decisions, what should a well-informed employer do in 2014? First, given the EEOC's stated position on systemic litigation and its 2013 litigation tactics, employers should review and analyze their current background check policies and procedures to ensure that they are in compliance with the EEOC's guidance. Second, all employers, especially multi-state employers, should review their existing employment applications and think long and hard about whether to retain questions regarding an applicant's criminal history. Employers may wish to consider removing those questions from the application and instead wait until after the initial interview or after a conditional offer of employment (depending on applicable state law) before seeking information pertaining to the applicant's criminal history. Multi-state companies that use a single employment application for all office locations and who wish to retain the questions should place a disclaimer above any problematic questions, directing employees in particular states not to respond to the question. Companies that routinely conduct credit checks of all applicants should verify that their use of such information comports with state law, especially those multi-state employers who desire a uniform policy or practice. Finally, remember to contact your labor and employment attorney for guidance on these or other hiring issues.

ENDA and Beyond: Addressing Discrimination Against LGBT Employees in the Workplace



Jessica A. Corbett
215.665.2108
jcorbett@cozen.com

In November 2013, for the first time since it was introduced in 1994, the Senate passed the Employment Non-Discrimination Act (ENDA). ENDA, which would prohibit employment discrimination on the basis of sexual orientation or gender identity, gained bi-partisan support in the Senate. ENDA would contain an exemption for religious institutions. The bill is crucial to the LGBT community because Title VII does not explicitly prohibit discrimination on the basis of sexual orientation or gender identity.

ENDA must proceed to the House of Representatives before it becomes law. Many doubt that Speaker of the House, John Boehner (R-Ohio), will even permit the bill to be brought to the House floor, let alone that the bill would be passed. Yet given the trend in 2013 toward the expansion and protection of gay rights, employers would benefit from being proactive in ensuring that their workplace policies protect against discrimination or harassment on the basis of sexual orientation or gender identity. This is particularly so in light of the current protections for LGBT plaintiffs already in existence.

First, even absent ENDA, some courts already have found that the claims of LGBT plaintiffs are still covered by Title VII, even if not explicitly mentioned in its provisions. One Supreme Court case in particular opened the door for such an expansion. In 1989, the Court held in *Price Waterhouse v. Hopkins* that sex discrimination encompassed bias based upon gender stereotypes. In *Price Waterhouse*, a female plaintiff sued after being denied a promotion to partner in her accounting firm because she did not meet her employer's stereotype of feminine behavior. For example, partners at plaintiff's firm described her as "macho" and suggested she walk and talk more femininely.

Several federal courts have relied upon this "gender stereotyping" theory to permit LGBT plaintiffs to proceed with sex discrimination claims. In these cases, LGBT plaintiffs allege they are discriminated against because they do not conform to gender stereotypes, i.e., they do not act the way their employer thinks a man or woman should act.

As several courts have noted, the line between sexual orientation/gender identity discrimination and discrimination based upon gender stereotyping is a difficult one to draw. Thus, the gender stereotyping claims of LGBT plaintiffs sometimes fail as an impermissible effort to "boot strap" a claim for sexual orientation/gender identity discrimination into Title VII. Notably, however, if a plaintiff is discriminated against on the basis of a failure to conform with gender stereotypes, it is no defense for the employer that the discrimination may also have been motivated by anti-gay animus.

Another noteworthy case for LGBT plaintiffs is *Oncale v. Sundowner Offshore Services*, which the Supreme Court decided in 1998. In *Oncale*, the Supreme Court held that Title VII prohibits same-sex discrimination. *Oncale* is particularly relevant when LGBT plaintiffs claim that they were harassed or discriminated against by individuals of the same sex for their failure to conform to gender stereotypes.

Although federal courts have protected LGBT plaintiffs against discrimination on the basis of gender stereotyping, the Equal Employment Opportunity Commission (EEOC) and the executive branch have gone further in protecting the employment rights of the LGBT community. For example, Executive Order No. 13,087 was issued by President Clinton to amend Executive Order No. 11,478 to bar federal agencies from discriminating against civilian employees on the basis of sexual orientation.

The EEOC's 2013-2016 Strategic Enforcement Plan explicitly sets as one of its priorities ensuring that LGBT plaintiffs are covered by Title VII's sex discrimination provisions.

Additionally, the EEOC's 2013-2016 Strategic Enforcement Plan explicitly sets as one of its priorities ensuring that LGBT plaintiffs are covered by Title VII's sex discrimination provisions. Moreover, in 2012, the EEOC decided in *Macy v. Holder* that discrimination against individuals because they are transgender constitutes sex discrimination in violation of Title VII. Although the employer in the case was a federal agency, the EEOC's decision serves as a predictor of how the EEOC would decide a similar issue in dealing with a private employer.

LGBT plaintiffs may also find protection under other federal laws. For example, some plaintiffs have successfully challenged a public employer's discrimination based

upon sexual orientation using 42 U.S.C. § 1983 (part of the Civil Rights Act) and the equal protection clause of the Constitution.

Finally, many states have stepped in to fill the void of Title VII when it comes to LGBT protection. As of December 2, 2013, 21 states and the District of Columbia have enacted laws prohibiting private employers from discriminating on the basis of sexual orientation. Seventeen states and the District of Columbia prohibit private employers from discriminating on the basis of gender identity. Thus, many employees alleging discrimination based upon sexual orientation or gender identity choose to pursue state rather than federal remedies.

Overall, 2013 has been a monumental year for gay rights. The Supreme Court's Defense of Marriage Act (DOMA) decision required employers to treat employees in same-sex marriages the same as any other married employee in administering their health and retirement plans. On the same day, the Supreme Court refused to exercise jurisdiction over a case involving California's Proposition 8, leading the way for the recognition of same-sex marriage in California. This is not to mention the seven states in which same-sex marriage became legal in 2013 alone.

In light of the recent evolution of state and federal laws regarding the rights of the LGBT community, and with the enactment of ENDA possibly on the horizon, employers should review their workplace discrimination and harassment policies now to ensure they prohibit discrimination or harassment on the basis of sexual orientation, gender identity or gender stereotypes, and that they also prohibit same-sex harassment.

Big Brother in the Workplace



David L. Barron
713.750.3132
dbarron@cozen.com

This year, we learned that Big Brother really is watching us — all of us. Parents are monitoring their children; companies are monitoring their employees; governments are monitoring the companies; and, to come full circle, hackers and whistleblowers like Edward Snowden are now monitoring governments.

In the workplace, things are more complicated than ever before. Technology has created an opportunity for every cell phone to become a surreptitious surveillance device, and any workplace discussion to become Exhibit A in a potential

lawsuit. The conflict between technology and privacy rights is now much more than a trend, it is a dynamic area of the law.

SOCIAL MEDIA

The rise of social media use by employees has brought increased employer monitoring of social media. Not surprisingly, employees and social media providers have banded together to push for legislation protecting employee privacy on social media sites. As of December 2, 2013, 10 states have passed laws prohibiting employers from requiring employees or applicants to provide passwords for social media accounts (or access) as a condition of employment. Similar legislation has been proposed in scores of other states and the U.S. Congress. Public opinion is clearly on the side of some regulation in this area, and it is likely that more states will be added to the list in 2014 and beyond.

BACKGROUND CHECKS

Another trend picking up steam is the growing push back against employer background checks and the refusal to hire applicants with criminal records. In 2012, the Equal Employment Opportunity Commission (EEOC) issued a controversial enforcement guidance concluding that blanket policies excluding applicants with convictions that were not job-related and/or consistent with business necessity would violate federal anti-discrimination laws.

Many employers and even states, however, contend that the EEOC has gone too far. For example, the state of Texas has sued the EEOC, seeking a declaration that the EEOC's guidelines are invalid and cannot be used to restrict state agency hiring decisions.

On the opposite side of states like Texas are those that have implemented even stricter protections than those required by the EEOC. States like Massachusetts and Minnesota (and even some cities) have got into the act by enacting "Ban the Box" laws, which restrict inquiries regarding criminal convictions. The name of the law is derived from banning the typical box on the application asking about criminal history, and restricting any inquiry into criminal history until after a conditional offer has been made. For more information on background checks and Ban the Box laws, see Carrie B. Rosen's article on page 17.

WORKPLACE SURVEILLANCE

Employers have long been monitoring employees in the workplace, and the law is well-established that employers have the right to do so as long as employees have no expectation of privacy. For example, employers can monitor company email and phone lines as long as employees are

informed that the monitoring may occur. An employer may use cameras to record the workplace (even hidden ones) as long as the surveillance is conducted in a work area where employees have no reasonable expectation of privacy. Obviously, cameras in a bathroom or locker room would likely pose a legal problem because of the expectation that such areas are private.

But what if the shoe is on the other foot? Should employees be allowed to use their cell phones to record disciplinary meetings or take pictures of the workplace? Most employers would answer no, but few have strict policies that would prohibit such behavior. After all, with virtually every employee having a cell phone, and using them regularly, it is almost impossible to tell who is using a phone for an illicit purpose.

The best practice is to have a policy that prohibits "unauthorized recording or picture taking." No employer wants to be the phone police, but if an employee attempts to use such recordings or pictures as evidence, there is legal support for excluding such evidence, or even cutting off damages if the employee obtained the evidence by breaking a policy punishable by termination.

It is important to note that there are legal risks to such policies. In 2013, The National Labor Relations Board (NLRB) found that Giant Food LLC's policy prohibiting picture-taking was overly broad because it prevented employees from taking pictures in support of protected concerted activity, like striking. Employers should therefore be careful applying such policies in a union setting, or where the actions could be argued as being in support of protected concerted activity.

GUNS AT WORK

In many states, gun rights are almost sacred, and a part of normal life. Many companies operating in such states have a substantial percentage of their employees who are permitted to carry a concealed handgun, and would prefer to keep a gun on their person at work, or at least in their parked vehicle. Understandably, most employers are not comfortable with guns in the workplace and desire strict policies to restrict concealed weapons.

Many states (nearly half) have passed laws aimed at balancing these conflicting rights. For example, in Texas, an employer cannot discipline an employee for keeping his or her licensed gun in a parked car in the company lot (although there are exceptions based on industry and safety issues). In Texas, however, property rights trump gun rights, and a property owner can always post a sign forbidding anyone from bringing a gun onto the property.

As a final note, some states have gone further and actually made it unlawful to ask applicants whether they have a gun or a concealed carry permit. With the highly publicized battle between gun control and gun rights advocates, many states are actively considering new legislation, and employers should keep a close eye on this subject in 2014.

Review and Update of Immigration-Related Worksite Enforcement



Elena Park
610.941.2359
epark@cozen.com

Throughout fiscal year 2012 and into 2013, the government has continued its aggressive campaign to weed out unauthorized employment, increasing employer investigations and audits, levying millions of dollars in fines, and campaigning employers to sign onto the IMAGE program and E-Verify automated employment verification system. With stakeholder meetings and increased transparency, the government has made attempts to work together with employers to stop unauthorized employment, rather than treat employers as adversaries. Nevertheless, it is clear that going into 2014, potentially any employer may be targeted for immigration-related audit and investigation.

ICE AUDITS AND INVESTIGATIONS

Given the proliferation of recent I-9 audits, on June 26, 2013 Immigration and Customs Enforcement (ICE), the police arm of the Department of Homeland Security (DHS), issued a fact sheet regarding the procedure for employer I-9 investigations. After receiving a Notice of Inspection (NOI), employers generally have three business days to produce I-9 forms and other supporting documentation. Extensions may be requested, but ICE is reportedly stingy about granting extra time. It is thus essential that employers properly maintain their electronic or paper I-9 documents in a complete, correct and organized manner at all times. Fines for uncorrected violations can be hefty, from \$375-\$16,000 for each violation of knowingly hiring and continuing to employ unauthorized workers, to \$110-\$1,100 for each substantive I-9 violation. The employer may also face criminal prosecution. ICE has relatively wide discretion in the amount of the penalties imposed, and takes five factors into consideration: the size of the business, good faith effort to comply, the seriousness of the violation, whether the violation involved unauthorized workers, and history of previous violations.

ICE has clearly beefed up all types of interior enforcement in past years, and 2013 was no exception. However, there was less of an emphasis on rounding up unauthorized workers themselves, such as in large scale busts, and more on document audits. In fiscal year (FY) 2012, there were no reports of Wal-Mart and Swift size raids. Instead, employer audits of immigration related documents increased 300 percent from prior years. ICE touted its FY 2012 accomplishments as follows:

- 520 criminal arrests tied to worksite enforcement investigations.
- Of the individuals criminally arrested, 240 were owners, managers, supervisors or human resources employees. They face charges such as harboring or knowingly hiring illegal aliens. The remaining workers who were criminally arrested face charges such as aggravated identity theft and Social Security fraud.
- Served 3,004 Notices of Inspection (compared to 2,196 in FY 2010) and 495 Final Orders, totaling \$12,475,575.00 in administrative fines (compared to \$6,956,026 in fines in FY 2010).
- ICE debarred 376 business and individuals for administrative and criminal violations.

I-9 EMPLOYMENT VERIFICATION

Employers are not shielded from liability for immigration law violations by simply claiming that they did not know that their employees were unauthorized to work.

Employers are not shielded from liability for immigration law violations by simply claiming that they did not know that their employees were unauthorized to work. Section 274a of the Immigration and Nationality Act (INA) states that employers may be liable for hiring, recruiting or referring for a fee an alien for employment in the United States, knowing the alien is unauthorized. "Knowing" includes constructive, as well as actual, knowledge. Employers may receive letters stating that there is a Social Security Number mismatch for a particular employee from other federal government agencies, such as the Social Security Administration, or even private entities such as insurance companies. It is ICE's position that these letters can add up to constructive knowledge of unauthorized

employment. Therefore, even with no direct information that an employee is an illegal alien, an employer must stay alert for evidence that the employee is not authorized to work.

The employer's best defense against liability, and best tool to determine an employee's work authorization, is the I-9 Employment Verification Form. Employers should be using the revised Employment Eligibility Verification Form I-9 that was released on March 8, 2013. All previous versions are no longer valid. According to the U.S. Citizenship and Immigration Service (USCIS), the new I-9 was designed to make the form easier for both employees and employers to navigate. The I-9 form is now two pages, with expanded instructions, more examples, and additional optional fields such as employee email and telephone number. The I-9 form must be properly completed within three days of the start of employment, and maintained for three years after the date of hire, or one year after termination, whichever is later. On the other hand, employers must be careful not to be overly zealous in checking employment authorization: employers are prohibited from requesting particular I-9 verification documents, not accepting permitted documents, or discriminating against certain nationalities.

While the new I-9 form and revised Employer Handbook are helpful resources for employers, questions can arise that are not easily answered in those documents. For instance, within the past fiscal year, the DHS made the decision to stop paper entry forms at the border, the I-94 card. Instead, visa holders receive a stamp in their passport. For purposes of the I-9, a copy of the employee's visa stamp and entry stamp should be evidence of employment authorization issued by the DHS (List C). However, the Employer Handbook makes no mention of this discrepancy.

E-VERIFY AND IMAGE EMPLOYMENT VERIFICATION SYSTEMS

In the last year, ICE has continued to place significant resources to encourage employers to partner with ICE via its IMAGE program or E-Verify system.

Initiated in July of 2006 and administered by Immigration and Customs Enforcement (ICE), IMAGE is a voluntary partnership between ICE and private sector employers. IMAGE, or ICE Mutual Agreement between Government and Employers, is a program in which employers self-police their hiring practices and share pertinent information with ICE. ICE extols IMAGE on its website, stating that "[IMAGE] is designed to foster cooperative relationships and to strengthen overall hiring practices." According to the ICE, IMAGE was developed as an initiative to ensure employer self-compliance and prevent

or reduce any hiring or retention of unauthorized workers. While IMAGE does not promise 100 percent accuracy in preventing unauthorized employment, ICE touts the program as enhancing fraudulent document awareness through education and training. The government conducted 2,421 IMAGE outreach presentations to 15,906 employers in fiscal year 2012.

In addition to the I-9 form, E-Verify is an employment verification tool for employers. Signing onto E-Verify currently is voluntary, although the system is certain to become mandatory in the near future. E-Verify is an Internet-based system set up by the DHS to confirm legal employment of newly hired employees. The system determines whether the credentials inputted line up with DHS and Social Security Administration databases as “confirmed” or “non-confirmed” for employment authorization. Non-confirmations must be addressed by the employer and subject employee within a certain period of time. If “permanent non-confirmation” results, the new hire must be terminated, or the employer may face potential liability for continuing to employ the worker.

E-Verify does not provide any other information independently, such as the person’s immigration status. Moreover, the system is not to be a pre-screening device for job candidates, and verification of current employees — except for federal contractor workers — is prohibited. Complaints about the system include the time it takes to clear up non-confirmations, high error rates, and costs in human resource hours to administer the system. Moreover, both E-Verify and IMAGE are not safe harbors for employers: participation in the systems does not excuse or mitigate failure to properly fill out I-9 forms or the knowing hire of unauthorized workers. Despite the kinks and restrictions, E-Verify is being used in increasing numbers. The system technology is constantly being improved; the latest feature allows E-Verify to lock out suspect social security numbers. A large number of employers are also signing up for the benefit of employees on F-1 student status. Certain F-1 workers can extend their work authorization for 17 months if they work for an E-Verify employer and the employee graduated with a science, technology, engineering or math degree. With these positive incentives, many employers view E-Verify as a carrot rather than a stick.

FUTURE OUTLOOK ON WORKSITE ENFORCEMENT

The year 2014 and beyond will likely be a continuation of the same trend in immigration-related worksite enforcement: increased audits, more fines and tougher prosecution of employers who violate immigration laws. Along the same vein, the government will continue to push IMAGE and E-Verify on employers, and seek to have them made mandatory.

Given these realities, employers are wise to maintain comprehensive immigration law compliance programs. This can include signing up to E-Verify or IMAGE. More importantly, employers must ensure I-9 compliance, which can include self-audits, forming document retention policies, providing training to hiring officials, and staying abreast of latest enforcement trends.

Immigration Legislation Update



Marcy Stras¹
202.912.4875
mstras@cozen.com

Immigration legislation is a perennial point of interest for employers, and 2013 was no exception. In 2012, the major impact Latino voters had on the re-election of President Obama was very evident to the Republican Party. As a result, the Republican Party faced increasing pressure to start courting the Latino voters by supporting immigration reform. The anticipated Republican support, along with the Obama administration’s continued support for the reform, raised the hopes of reform advocates that immigration reform would actually occur in 2013. The mood was hopeful and optimistic, but as it turns out unrealistic. As the end of the legislative year approaches, the prospect of any immigration reform seems unlikely. Other domestic issues, such as health care reform and the debt ceiling, have shifted the focus away from immigration. However, President Obama’s recent statement that he would support immigration reform in a step-by-step approach, rather than the system overhaul that he previously advocated for, has again raised the hopes of reform advocates that immigration reform may actually occur in 2014.

Reform seemed possible in June, when the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act, a comprehensive reform bill that aimed to give citizenship to some of the estimated 11 million undocumented immigrants living in the United States. It also significantly strengthened border security through the deployment of 40,000 border patrols and enhanced border surveillance. The comprehensive bill met strong opposition from the House of Representatives, in particular House Speaker John Boehner, who refused to bring the bill to the floor for a vote without majority GOP support, which it did not have.

¹ The author wishes to thank Jenna Baranko for assisting with this article.

Now, as the movement to reform the nation's immigration laws seems to have stalled after months of inactivity, President Obama has announced that he would be open to reform in a piecemeal approach rather than the comprehensive overhaul that he originally sought. Speaker Boehner praised the president's proposal, responding that his colleagues are also pursuing single-issue immigration bills. Through this small-scale approach, House committees are working on bills that aim to tighten border controls and give undocumented immigrants limited rights that do not include any path to citizenship. Although supported by the Senate, many House Republicans strongly oppose any measure that will allow undocumented immigrants to become U.S. citizens.

Even Senator Marco Rubio (R-Fla.) who tried to convince fellow Republicans to support comprehensive immigration reform, now rarely mentions immigration. After spending months arguing for the passage of the comprehensive bill, which he helped to write, Senator Rubio now says that he favors the piecemeal approach of House leaders, who have focused primarily on border security and enforcement. Most recently, Senator Rubio responded that he is just being realistic about the prospects of far-reaching changes in the Republican-dominated House.

As the debate over reform continues, the Obama administration announced on November 15, 2013 a new policy that will allow undocumented immigrants who are close relatives of active military troops and veterans to apply to stay in the United States without the threat of deportation. Under the new policy guidelines, spouses, children and parents of troops and veterans who have no criminal records and pose no national threat will be able to file a petition with U.S. Citizenship and Immigration Services (USCIS) for parole, a status that will allow them to stay in the United States for renewable one-year increments. It also allows certain relatives to adjust to permanent legal status. While federal authorities have long had the power to stop deportations for relatives of military members and veterans, the new memo explains how and when it can be used.

This memo is the latest in a series of immigration policy changes released by the Obama administration that focuses on deporting high-priority criminal immigrants, rather than low-priority non-criminal immigrants. These policy changes have included a directive that advised immigration authorities to exercise "prosecutorial discretion" when they detain undocumented immigrants. The Obama administration also created the Deferred Action for Childhood Arrivals program, which stopped the deportation of young illegal immigrants and allows them to work in in the United States in two-year increments.

While the consensus remains that the immigration system is broken and needs to be fixed, immigration legislation is not a priority in the Senate or Congress, nor is there any agreement on how to fix the system, leaving employers in a seemingly perpetual wait-and-see mode. The administrative changes made by the president are only slowly chipping away at the problems. Perhaps with the upcoming 2014 elections, the Republican-led Congress will again focus on the growing population of minority voters and their desire for immigration reform. What is clear is that with so few workdays left in the legislative year for Congress, the controversial issue of immigration reform will have to wait until 2014.

Retail-Sector Employers Beware: Abercrombie & Fitch Rocked with Religious Discrimination Suits over "Look Policy"



Shaan A. Rizvi
713.750.3105
srizvi@cozen.com

In 2004, Abercrombie & Fitch made headlines when it paid \$50 million to settle two class actions and an EEOC suit alleging the company disproportionately placed minority employees in back-room positions such as stockroom clerk, where they would be invisible to customers. This past year, Abercrombie made legal headlines for a different, albeit related reason: religious discrimination suits by Muslim women who observe the hijab, or headscarf. Muslim women wear the hijab to cover their hair in public settings, signifying modesty. Many Muslim women consider the hijab a religious obligation, and with several million Muslims now living in America, employers are increasingly wondering about their rights to restrict employee religious attire for business purposes.

In September 2013, Abercrombie agreed to settle two religious discrimination cases in the Northern District of California brought by the EEOC on behalf of Muslim women. In one case, Umme-Hani Khan wore the hijab while working at an Abercrombie store for several months. However, a human resources manager later noticed Khan in the hijab and directed her to remove it, stating that the hijab conflicted with the company's "Look Policy," which requires employees to wear clothes similar to those sold in Abercrombie stores and prohibits headwear. Khan refused, citing religious reasons, and was terminated. In litigation, Abercrombie argued that Khan's observance of the hijab constituted an

“undue burden” on its operations. The court rejected this argument and granted Khan summary judgment, holding that Abercrombie failed to demonstrate any evidence of financial harm due to Khan’s observance of the hijab. In the second case, Halla Banafa applied for a stockroom position and wore her hijab during an interview. The company decided not to hire Banafa, citing again that it would be an “undue hardship” on the company to grant Banafa an exception to the Look Policy by allowing her to wear the hijab at work. To settle the cases, Abercrombie paid Khan and Banafa \$48,000 and \$23,000, respectively, in back pay and compensatory damages. Abercrombie also agreed to train managers on handling requests for religious accommodation and to update its Look Policy to allow for accommodations for employees with sincerely held religious beliefs.

In a different case, Samantha Elauf applied for a sales position in an Abercrombie store in Tulsa, Okla. During her interview, Elauf wore the hijab, though she did not inform the interviewer that she wore it for religious reasons or that she needed an accommodation for it. Although the company thought Elauf was a good candidate, it decided not to hire her because the hijab conflicted with the Look Policy. Ultimately, the EEOC filed suit on behalf of Elauf in federal court. The U.S. District Court for the District of Oklahoma granted summary judgment and \$20,000 in compensatory damages to Elauf. Interestingly, however, in October 2013, in a 2-1 panel decision, the 10th Circuit Court of Appeals overturned the federal court’s judgment, finding that to succeed in a failure to accommodate case, a plaintiff must prove she informed her employer that she engaged in a practice for religious reasons and that she needed an accommodation due to a conflict between the religious practice and the employer’s rules. Elauf, the 10th Circuit maintained, failed to so explicitly inform Abercrombie. Not to be outdone, on December 3, 2013, the EEOC filed a petition for an *en banc* rehearing. The case will be an interesting one to watch going forward, with ramifications far beyond Muslim women who observe the hijab.

Employers should be very wary of restricting or prohibiting an employee’s religious dress.

Muslim women are not the only demographic group that frequently observes religious attire in the workplace. Many Sikh men wear turbans out of religious obligation, and some Jewish men wear yarmulkes, or small skull-caps, as well. However, our country’s religious diversity and the prominence of religious attire does not mean that an employer never has a reason to restrict or prohibit an employee from wearing

religious attire at work. For example, where an employee’s attire poses a serious safety risk to the employee or his or her co-workers, employers can arguably restrict the employee’s right to wear the attire. Outside of that limited circumstance, however, employers should be very wary of restricting or prohibiting an employee’s religious dress. Given the spate of recent hijab lawsuits, this is especially true in the retail sector, where an employer’s look or dress policy may conflict with sincerely held religious beliefs.

In 2014 and beyond, employers should look for more cases that will bring the intersection of religious observance and business necessity into sharper focus, and should remain vigilant in training managers to be appropriately sensitive to employees’ and potential employees’ religious observances.

Big Data: Should Employers Care?



David J. Walton
610.832.7455
dwalton@cozen.com

Yahoo’s Chief Executive Officer Marissa Mayer said that “big data” will have a bigger impact than the Internet. That is quite a statement. But since it comes from one of the top leaders in the technology industry, you should not treat it as mere hyperbole. Big data is everywhere.

What is big data? It’s generally accepted that big data “refers to data sets whose size is beyond the ability of typical database software tools to capture, store, manage, and analyze.” And big data is already having a huge impact on discovery of electronically stored information (ESI), which has changed the face of employment litigation. There are at least seven key areas that illustrate the interplay between ESI and big data:

- Understanding the difference between structured and unstructured data;
- Balancing the desire to keep large stores of data for big data analytics versus document retention and destruction policies;
- The importance of centralizing data sources;
- Finding big data tools that have litigation hold and ESI functionality “baked into” the application;
- Technology-assisted review and predictive coding;

- Managing ESI created real-time by big data analytics; and
- Big data's impact on proportionality principles.

This section addresses each of these areas and the best practices for managing ESI in a big data world.

MAKING SENSE OF ALL THIS DATA: STRUCTURED AND UNSTRUCTURED DATA

Understanding the differences between structured and unstructured data is not just for the IT department anymore. Because such a large percentage of evidence used in employment litigation is electronic in nature, it is crucial to understand the differences between structured and unstructured data, and to understand how your company stores and retains data. A better understanding of data storage upfront will enable a more prompt and effective reaction when litigation arises.

A great example of this is finding the right “system of record.” At the beginning of an action, when you are trying to figure out the right custodians and the key data sources, you need to figure out what data sources are the system of record. This is the main, or central, data source for certain types of data that might be stored in other places as well, such as mobile phones, archive storage, or tablets. It is usually the key data source that you are going to use to preserve and collect the data. By locating the right system of record, you can centralize your preservation and collection efforts by focusing on the right system and ignoring truly redundant data sources. For example, a cell phone might not be a system of record for a work email account because the email account is maintained on a centralized email server. The same phone, however, could be the system of record for text messages if they are not available through another source.

The same concept affects big-data analytics. As discussed above, big-data analytics uses huge amounts of data (both historical and real-time) to predict what may occur in the future. It can be very expensive to preserve and collect this volume of data. The structure of a big-data analytics application may make it even harder, if not impossible, to preserve correctly. But understanding the types of data at issue is useful when trying to figure out if there are other systems of record that can be preserved and collected rather than an entire big-data database.

BALANCING THE DESIRE TO KEEP DATA WITH THE LEGAL ADVANTAGES OF DELETING UNNECESSARY DATA

Perhaps the most significant impact of the big data revolution right now is the interplay between big data proponents,

who want to keep and analyze everything, and those responsible for discovery in litigation, who are focused on the preservation, collection and production obligations, and the mammoth costs that are associated with ever-increasing amounts of data.

By over-saving data to use for big-data analytics, companies also may be unintentionally creating a new e-discovery challenge: how to keep costs manageable as companies are preserving more data than ever.

By over-saving data to use for big-data analytics, companies also may be unintentionally creating a new e-discovery challenge: how to keep costs manageable as companies are preserving more data than ever. In addition to companies themselves storing more data, more cost efficient tools have been developed to collect data like voicemails, text messages and metadata, that previously were difficult and costly to access, thus further increasing the amount of available data. The more data that exists, the more time-consuming and therefore more expensive it is to preserve, collect, and review when litigation arises.

Further, the existence of more data increases the probability that “smoking-gun” evidence will be located during discovery. But, on the other hand, a greater amount of available data increases the probability that a party will discover evidence that eventually assists in the defense or prosecution of its case. Accordingly, companies need to reach a balance in how much data they retain.

Smart employers delete data when they can, in order to decrease their e-discovery burdens in the event of litigation. However, deletion of data must be undertaken carefully under the advice and instruction of counsel in order to avoid pitfalls. Potentially relevant data cannot be deleted if litigation has become reasonably foreseeable because of a triggering event such as receipt of a demand letter, the occurrence of industry-wide litigation, or transactions with a litigious plaintiff.

CENTRALIZE NON-REDUNDANT DATA SOURCES

A key strategy to effectively and efficiently preserve data, and target the collection of that data, is to centralize the data sources as much as possible. This means that the data is, in theory, in one place so that it is easier to find, identify, preserve and collect in a strategic manner should litigation arise. This centralization is especially helpful in asymmetrical situations where the employer has a disproportionate share of the ESI burden.

LOOK FOR BIG-DATA APPLICATIONS THAT HAVE “BAKED-IN” LITIGATION HOLD AND ESI COMPONENTS

Many newer relational database tools have started including (baked-in) litigation hold and ESI capabilities. This, of course, makes it much easier to preserve and manage the data in these databases when in the middle of a lawsuit. The creators of big-data applications are very likely to do the same. But that may not always be the case. People who develop big-data applications are not necessarily concerned with having to produce the same data in a lawsuit. Their focus is on getting as much value as they can from analyzing the data, and doing it in the right interface as quickly and inexpensively as possible. Thus, as when adopting big-data analytics across an enterprise level, always look out for tools that have litigation hold and ESI capabilities baked into the application.

TECHNOLOGY-ASSISTED REVIEW AND PREDICTIVE CODING

Big data analytics already are being employed in technology-assisted review (TAR) tools, otherwise known as predictive coding. When using TAR, an attorney or team codes a “seed set” of documents. The TAR program then uses the seed set to predict how a reviewer would classify the document (e.g., responsive/nonresponsive, or privileged/non-privileged). As the seed set is developed, the TAR program improves its accuracy.

In the past year, prominent courts have approved the use of predictive coding to conduct discovery. See, e.g., *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC) (AJP), 287 F.R.D. 182 (S.D. N.Y. 2013) (Peck, J.), adopted by, 2012 U.S. Dist. Lexis 58742 (S.D. N.Y. Apr. 25, 2012) (Cater, J.). One court even *sua sponte* ordered the parties to show cause why they should not use TAR during discovery. *EROHB, Inc. v. HOA Holdings, LLC*, No. 1409 (Del. Ch. Oct. 15, 2012).

TAR applications are not just for data collection and production in litigation. One major TAR vendor is launching a new TAR product that can be used for document retention and management. A seed set is created for the type of documents that an enterprise wants to retain, and the system goes out into the enterprise’s data set and finds the right documents to retain. While this system will not be perfect, it is likely much more accurate than relying on the individual employees to retain and destroy the right documents.

IF BIG-DATA ANALYTIC WORKS IN REAL-TIME, HOW WILL IT IMPACT ONGOING ESI OBLIGATIONS?

One of the most difficult things to do when managing ESI during an active case is preserving, collecting and reviewing the new data that is created after the litigation hold is issued.

This will become even more difficult when trying to manage a database that is constantly fed new data and analyzes it in real time. When confronted with this issue, it will be vital to understand exactly what data is being fed into the system, the sources of this data, its format, and the changes that occur to this data once it is fed into the database. It is also important to know if the big-data database is the system of record (discussed above) and if there are redundant, easier forms of the same data that are cheaper to preserve and collect. It is equally important to understand exactly what type of analytics and reports the database can create. In some circumstances, a report from a database can be used instead of preserving and producing a huge amount of raw data, which can save a lot of time, money and aggravation.

PROPORTIONALITY: WILL IT CONTINUE TO SAVE US FROM AN EVER-INCREASING INFLUX OF DATA?

Proportionality is an issue that remains hot in the ESI world. Currently the federal rules address proportionality in Rule 26(b)(2)(c), which addresses the production of potentially relevant information in response to specific discovery requests. New amendments to Rule 26 may expand the principle of proportionality to the preservation of potentially relevant ESI.

But what is the potential impact of big-data analytics on proportionality? Will litigants, especially ones who are faced with an asymmetrical ESI burden, be able to use proportionality principles to prevent the preservation and production of data from big data sources? The answer, of course, is not all of the time. But it is not difficult to imagine certain litigants trying to leverage the cost of preserving and producing big data to force early, unjustified settlements.

In this vein, it is vital to understand the interplay of proportionality and big data. Employers need to be ready to challenge discovery of big data by arguing that the cost of producing this information is disproportionate to the nature of the case, the amount in controversy, and the issues at stake in the litigation.

In this vein, it is vital to understand the interplay of proportionality and big data. Employers need to be ready to challenge discovery of big data by arguing that the cost of producing this information is disproportionate to the nature of the case, the amount in controversy, and the issues at stake in the litigation. In fact, when you are faced with an

asymmetrical ESI burden and dealing with big data at the same time, it is vital to be proactive and approach the court with a specific plan to limit your ESI burden. The use of proportionality principles is the key for implementing this strategy.

MOVING FORWARD

Employers cannot put their heads in the sand and ignore big data. With each and every credit card swipe, Facebook post and downloaded song, we are creating a data trail of who we are, what we do, where we go, and our likes and dislikes. These ever-growing data trails will unquestionably continue to grow as companies and individuals become more attune to the role of big data and begin to save more data in more accessible ways.

Fifth Circuit Hands Employers a Major Victory in *D.R. Horton* Decision



Kenya Harrold
713.750.3172
kharrold@cozen.com

On December 3, 2013, a divided panel of the U.S. Court of Appeals for the 5th Circuit held that an employer does not violate the National Labor Relations Act (NLRA) by requiring its employees to sign an arbitration agreement prohibiting them from bringing class or collective employment claims in any forum. This is a major victory for many employers who have turned to arbitration class waivers as a means to dodge class action lawsuits.

In *D.R. Horton, Inc. v. National Labor Relations Board*, the employer (a home builder) required all new and existing employees to sign a Mutual Arbitration Agreement as a condition of employment. As part of the agreement, employees agreed not to consolidate their claims with other employees — or proceed as a class or collective action. Plaintiff, Michael Cuda, signed the Mutual Arbitration Agreement and worked for Horton as a superintendent from July 2005 to April 2006. In 2008, Cuda and a nationwide class of similarly situated superintendents sought to initiate arbitration of their claims that Horton had misclassified them as exempt from statutory overtime protections in violation of the Fair Labor Standards Act. D.R. Horton responded

that the Mutual Arbitration Agreement barred pursuit of collective claims, and invited each claimant to initiate individual arbitration proceedings. Cuda then filed an unfair labor practice charge, alleging that the Mutual Arbitration Agreement violated the National Labor Relations Act (NLRA). On January 3, 2011, an administrative law judge held that D.R. Horton's Mutual Arbitration Agreement violated Sections 8(a)(1) and (4) of the NLRA, because the language of the arbitration agreement caused employees to reasonably believe they could not file charges with the Board. Thus, D.R. Horton was ordered to rescind or revise the agreement to clarify that employees were not prohibited from filing charges with the Board, nor were they prohibited from resolving employment-related claims collectively or as a class. D.R. Horton filed a petition for review of the panel's decision.

The 5th Circuit reversed the NLRB's previous decision, noting the use of class or collective action procedures are not a substantive right, but rather a procedural device. Therefore, while a class action may lead to certain types of remedies or relief, it is not in itself a remedy; thus, the NLRA is the source of the right to the relevant collective action, rather than Rule 23. Further, the court found that the Board did not give proper credence to the Federal Arbitration Act (FAA), which requires that arbitration agreements, like the one at issue in this case, be enforced by their terms. Thus, the class action waiver should be enforced because there is simply no congressional command to the contrary. Nevertheless, D.R. Horton was required to clarify its Mutual Arbitration Agreement with its employees, because the agreement could reasonably be interpreted as eliminating an employee's rights to pursue claims of unfair labor practices with the Board.

WHAT THE DECISION MEANS FOR EMPLOYERS MOVING FORWARD

Despite having to revise its arbitration agreement, D.R. Horton (and employers everywhere) viewed this ruling as a significant victory for employers. Simply stated, carefully crafted arbitration agreements, containing class waivers, continue to be a viable option for combating class action lawsuits. However, the 5th Circuit's ruling is unlikely to be the last word on this issue — notably, the NLRB may request that the Supreme Court review the 5th Circuit's decision. Moreover, there are plenty of cases in the pipeline that will allow the Board to revisit this issue, which will have a huge impact on the 5th Circuit's ruling and on employers operating beyond that court's jurisdiction.

Employers May Find a Belated Wedding Present from Supreme Court's Same-Sex Marriage Ruling



Jeffrey I. Pasek
215.665.2072
jpasek@cozen.com



Jay A. Dorsch
215.665.4685
jdorsch@cozen.com

Ever since the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA) this past June, employers have been struggling to understand and cope with all of the ramifications of that ruling. One bright spot is that there may be a tax refund in their future.

DOMA prohibited the IRS from recognizing same-sex marriages for tax purposes. Employers therefore were required to treat a variety of employee benefits as taxable income to employees with same-sex spouses, even though the same benefits were not taxable for those with opposite-sex spouses. For example, companies routinely withheld taxes from employees and paid the employer's share of Social Security and Medicare tax (FICA) on imputed income for health benefits provided to same-sex spouses.

For companies with a large number of affected employees, these taxes were considerable. In 2013, the employer's share of the Social Security tax was 6.2 percent on income under \$113,700. The Medicare tax rate was 1.45 percent of all income, with an additional tax of 0.9 percent on earned income of more than \$200,000 (\$250,000 for married couple filing jointly).

Employers who previously treated certain benefits for same-sex spouses as taxable income may no longer do so where the marriage will be recognized for federal tax purposes.

After the decision in *United States v. Windsor*, the IRS announced it would recognize same-sex marriages for federal tax purposes provided the individuals were lawfully married under state or foreign law. Employers who previously treated certain benefits for same-sex spouses as taxable income may no longer do so where the marriage will be recognized for federal tax purposes.

This change in the tax treatment provides an opportunity for employers to claim a refund of employment taxes that were paid because of DOMA. The IRS has provided an optional procedure that employers can use that is intended to reduce some of the administrative burdens of filing for a refund (Rev. Rul. 2013-17). The following optional methods are available to employers, but employers can choose to use the regular procedures.

1) For 2013, if the employer refunds to the employee the employment and income taxes withheld that were "over collected" in the first three quarters, the employer can adjust its fourth quarter Form 941 to reflect the refunds and adjust the employer share of FICA tax attributable to the FICA tax reimbursed to the employee.

2) If reimbursements are not made to employees by December 31, 2013 the employer can file one Form 941-X (writing "WINDSOR" across the first page) for the fourth quarter of 2013 and use that form to make corrections for all of 2013. To apply for a refund the employer must first either reimburse the employee, or obtain the employee's consent to claim a refund. If the employee declines or cannot be found after a reasonable search, the employer can still file for a refund of the FICA taxes it paid.

3) For years prior to 2013, the employer can file one Form 941-X (writing "WINDSOR" across the first page) for the last quarter of each year in which a refund is being sought. Unless a protective claim was filed previously, the open years in which a claim might be filed are 2010, 2011 and 2012. The procedure for filing for a refund requires the filing of Forms W-2c for each affected employee for each year in which a refund is being sought, repaying employees for over-withheld taxes and obtaining written statements and consents if applicable. If the employee declines or cannot be found after a reasonable search, the employer can still file for a refund of the FICA taxes it paid. Employees will have to file an amended return (Form 1040X) to receive a credit; the employees will have to file as married, however, which may increase their tax liability. Furthermore, if an employee's income exceeded the taxable wage base it may limit any recovery.

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