Barley Snyder

# Employment Law Update  August 2012

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## The ADA Interactive Process: The Foundation Of ADA Compliance

By: Jennifer Craighead Carey

John suffers from panic disorder and anxiety. He tells his supervisor that he wants to temporarily work a reduced schedule so he can attend therapy sessions and until his medication is adjusted to sufficient levels to bring his condition under control. John has only worked for your company nine months and doesn't qualify for intermittent leave under the Family and Medical Leave Act (FMLA). John's supervisor tells him he is going to have to let him go because he is not eligible for FMLA and his job requires him to work full-time.

Jane is out on FMLA undergoing chemotherapy for breast cancer. She exhausts her 12 weeks of FMLA. She produces a doctor's note stating that she needs to be off an additional 12 weeks. Your policy states that if employees are unable to return to work at the conclusion of FMLA, the company can fill their job. You tell Jane that she can remain off work for 12 more weeks and  continue on your benefit plans, but you are going to fill her job. If she is released to return to work at the conclusion of the 12 week extension and there are no other jobs available she will be terminated.

In the scenarios above, both employers failed to comply with their obligation to engage in the good faith interactive process and consequently, may have violated the Americans with Disabilities Act(ADA).

The ADA requires employers to engage in a cooperative process with eligible employees. To trigger this process, the employee need only indicate that s/he is having a work-related problem because of a medical condition. Once the employer is on notice of a potentially disabling physical or mental impairment and need for accommodation, the employer must undertake an interactive process that includes:

- An analysis of the particular job to determine its purpose and essential functions;
- Consultation with the employee to ascertain the nature and precise limitations of the claimed disability; and
- Identification of any potential accommodations, considering the employee's preference and any other effective accommodations.

In this process, both the employer and employee must participate in good faith.

Examples of reasonable accommodations include, among others, making facilities accessible to individuals with disabilities, reassigning marginal or non-essential job functions to others, modifying work schedules or leave policies (including switching shift assignments) to accommodate treatments or symptoms, granting temporary leave, acquiring or modifying equipment, providing reserved parking spaces, providing qualified readers or interpreters, and transfer to a bona fide job vacancy the individual is qualified to perform.

In the scenarios above, neither employer engaged in the good faith interactive process. What should these employers have done?

In John's case, he was requesting a reduced work schedule for what appears to be a bona fide disability. The company should have met with John to discuss and consider his request. The employer could request that John provide verification from his doctor of his medical condition and need for accommodation. The fact that John was not eligible for FMLA was not relevant to the employer's obligation under the ADA to consider a reduced work schedule as an accommodation. Unless the employer could show that John's request posed an undue burden,  John's request was likely reasonable, particularly since it appeared to be a temporary need until his condition could be brought under control. Assuming the request was unduly burdensome, the employer needed to consider whether it could transfer John to another position that he was qualified to perform that better accommodated his request for a reduced work schedule.

And, what about Jane's request to extend her leave beyond company policy? Again the employer should have consider Jane's request as a request for reasonable accommodation under the ADA and considered whether it could make an exception for her and hold her job open for an additional 12 weeks until she completed her treatment for cancer. Summarily filling her job and potentially terminating her at the end of the 12 weeks did not comply with the company's ADA obligations.

Employers who fail to engage in the interactive process when confronted with an employee's request for accommodation do so at their peril under the ADA, impacting their ability to defend against a failure to accommodate claim. The process is as important as the end result as underscored by the Third Circuit Court of Appeal's in Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315-16 (3d Cir. 1999), where the court cautioned:

"The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's comparative lack of information about what accommodations the employer might allow."

Members of our employment law group frequently counsel employers on ADA compliance, including the interactive process. We also offer training to managers and human resources professionals on this topic. Please feel free to contact a member of our group if you would like assistance.

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**A Supplemental Update Regarding the EEOC's Enforcement Guidance Regarding Criminal History Informati**

By: David J. Freedman

As reported previously, the United States Equal Employment Opportunity Commission (EEOC) recently issued an enforcement guidance regarding the use of criminal history information in employment decisions. Although not necessarily indicative of how a court would rule, an EEOC enforcement guidance is based on legal precedent and suggests how the EEOC intends to exercise its enforcement powers under Title VII, the federal law that bans discrimination based on race and national origin, among other protected classifications.

The EEOC's most recent enforcement guidance makes clear that Title VII does not bar employers from using criminal history information in hiring decisions. Nevertheless, reckless use of such information during the hiring process can expose an employer to significant liability. This includes claims of intentional discrimination, otherwise known as "disparate treatment," which occurs when an employer treats applicants who have similar criminal history differently. For example, an employer would be liable if it rejected an African-American applicant based on criminal history, but hired a White applicant with a similar record. Using criminal history in hiring decisions can also expose employers to allegations of unintentional discrimination, what the EEOC calls "disparate impact." Under the "disparate impact" theory, an employer can be held liable if it has a facially-neutral policy that results in a statistically significant negative impact on members of a protected classification.

While disparate impact claims have been around for decades, employers have traditionally faced few claims. Plaintiffs avoided alleging disparate impact because getting those cases through the proverbial courthouse doors required that the plaintiff provide expensive statistical analysis demonstrating that an employer's specific practice had a significant negative impact on a racial minority group. As a result, employers faced relatively few disparate impact claims, but such claims, when successful, resulted in huge--sometimes crippling--class action liability judgments and attorneys' fee awards.

The EEOC's recent guidance regarding criminal history information suggests that it will be taking a dramatically different approach to disparate impact claims. Now the EEOC will presume that an employer's use of criminal history information during the application process has a disparate impact, at least with respect to African-American and Hispanic male candidates. The EEOC has taken this position because incarceration rates are especially high for African-American and Hispanic men. While roughly 6% of White men are expected to be incarcerated in their lifetime, one in six Hispanic men and one in three African American men are expected to serve prison time.

According to the EEOC, this data gives it reason to investigate any use of criminal history information that eliminates African-American and/or Hispanic applicants from consideration. The employer will have an opportunity to provide evidence that the policy does not cause a disparate impact, such as local data demonstrating that African Americans and Hispanics are not convicted at disproportionately higher rates in the employer's geographic area. Evidence of a racially balanced workforce, however, is insufficient.

If an employer cannot disprove the EEOC's disparate impact presumption--which could prove expensive and difficult--then an employer must demonstrate that disqualifying applicants based on criminal history is related to the job and consistent with business necessity. This requires that the employer effectively link specific

criminal conduct and its dangers with the risks inherent in particular position's functions. Three factors are relevant to determining if an exclusion is job related and consistent with business necessity: (1) the nature and gravity of the offense; (2) the time that has passed since the conviction or the applicant's release from punishment; and (3) the nature of the job in question.

Also, an important distinction is made between arrest and conviction records. An arrest does not establish the presence of criminal conduct, and therefore, an exclusion based on a mere arrest is not job related and consistent with business necessity. Although a conviction is a sufficient basis to conclude that a person engaged in criminal conduct, the EEOC does not want employers using criminal convictions as a means of winnowing down an applicant pool. Accordingly, the EEOC discourages employers from asking about convictions on job applications. Instead, the EEOC prefers that employers make a conditional hiring decision, then request criminal history only from the potential hire and limit that inquiry only to a pre-identified list of convictions for which exclusion would be job related and consistent with business necessity.

One way for an employer to meet the business necessity requirement is to develop a targeted screening program which considers the three factors and also provides for an individualized assessment of applicants with disqualifying criminal convictions. This individualized assessment should provide notice to the individual that he was eliminated because of a criminal conviction and allowing him to demonstrate that he should not be excluded due to his particular circumstances. Relevant factors include the facts and circumstances surrounding the conviction, the number of offenses, length and consistency of the applicant's employment history, evidence of rehabilitation, and employment or character references. An employer must then consider if this additional information justifies an exception to its policy.

The following are best practices the EEOC is encouraging employers to take:

- Eliminate policies that exclude candidates based on mere arrests;
- Train managers and officials about Title VII and its prohibitions on discrimination
- Develop narrowly-tailored written policies regarding how criminal history information is to be used in hiring decisions;
- Identify essential job requirements and the actual circumstances under which the jobs are performed;
- Determine the specific offenses that demonstrate unfitness for performing a job;
- Determine the duration of exclusions for criminal convictions;
- Conduct an individualized assessment of the applicant's record and circumstances;
- Record the justification for the policy, including consultations and research considered in crafting the policy;
- Limit inquiries to convictions for which exclusion would be job related and consistent with business necessity; and
- Keep information about applicants' and employees' criminal records confidential and only use it for the purpose for which it was intended.

Adopting these approaches does not immunize an employer from disparate impact liability. Even if an employer successfully proves that its policy is job related and consistent with business necessity, an

employer may still be liable under Title VII if an applicant can point to a less discriminatory approach that would serve the same purpose as effectively as the challenged practice. A demonstration of business necessity, however, puts the burden back on the excluded applicant.

Keep in mind, though, that even if an employer is successful in defending against a Title VII claim, there are other federal and state laws-- like the Fair Credit Reporting Act and the Pennsylvania Criminal History Information Act--that impose other burdens on employers who utilize criminal information in hiring decisions.

*Camille Howlett assisted in writing this article. She is a rising second year law student at Widener University School of Law. She worked at Barley Snyder in June of 2012 through the Dauphin and Lancaster County Bar Associations' Capital Area Managing Partners ("CAMP") 1L program.*

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**Employer Compliance Obligations And Decision Points Following U.S. Supreme Court Health Care Ruling**

By: Mark A. Smith

A little more than two years after the enactment of the Patient Protection and Affordable Care Act ("ACA"), the United States Supreme Court on June 28, 2012 upheld nearly all of the massive and controversial health care reform legislation that was signed into law on March 23, 2010. Most surprising to many observers was the Court's approval of the individual mandate requiring that certain individuals pay a penalty for failing to obtain health insurance. Under the majority opinion penned by Chief Justice John Roberts, the individual mandate was held to be a permissible exercise of the congressional taxing authority under the constitution. The Court, however, found unconstitutional the ACA's Medicaid expansion provisions to the extent that they would penalize states by taking away their existing Medicaid funding for failing to expand Medicaid eligibility as promoted under the ACA.

The Supreme Court decision removes the cloud of uncertainty over the immediate fate of the ACA, and employers must now ensure that they are compliant with the law's existing requirements and that they are adequately prepared for the changes to come. While future political developments may result in significant modifications to the ACA, including a partial or even complete repeal, these possibilities are entirely speculative and are unlikely to occur anytime soon. Meanwhile, the federal agencies charged with implementing the ACA are proceeding to issue guidance that will have both short- and long-term impacts on employers sponsoring group health care plans.

As most employers realize, many of the ACA's requirements for group health plans are already in force, including the prohibition against lifetime dollar limits and restrictions on annual dollar limits on benefits; provision of dependent coverage up to age 26; and impermissibility of pre-existing condition exclusions for otherwise eligible participants under age 19. Additional requirements apply to non-grandfathered health plans (i.e., plans not in place as of the ACA's enactment date or that have undergone specified changes since). These include a requirement for first-dollar coverage of preventive services; both internal and external claims review processes meeting specified criteria; prohibitions against requiring prior authorization or increased cost sharing for out-of-network emergency services; and allowing participants to select an in-network primary care provider and pediatrician of their choice.

Going forward, certain of these rules are scheduled to be expanded upon. For example, dollar limits on annual benefits will be completely banned as of 2014, as will pre-existing condition exclusions for those age 19 and over. Numerous new requirements are scheduled to take effect, while others await further agency guidance concerning their effective dates. Effective January 1, 2013, employers must withhold from any employee earning more than $200,000 annually from the employer an employee-only additional Medicare tax of 0.9% on the employee's wages. Beginning in 2014, waiting periods of longer than 90 days for health plan eligibility will be prohibited. As of a date to be determined, employers having more than 200 full-time employees will be required to automatically enroll employees in their health plans. Centerpiece provisions of the ACA, including the state health insurance exchanges and the "pay or play" rules applicable to employers having at least 50 full-time equivalent employees, become effective in 2014.

A significant issue for many employers concerns the ACA's nondiscrimination provisions, intended to effectively extend to insured group health plans rules currently applicable only to self-insured plans. Under the ACA, discrimination in the provision of health coverage or benefits in favor of highly compensated employees will subject the employer to significant excise taxes. The nondiscrimination rule will become effective at a date to be announced once regulations concerning its implementation are issued. It is likely that the regulations will end, or at least severely restrict, many common arrangements under which highly compensated individuals receive preferential treatment, from more generous employer premium contributions to the provision of post-separation executive health care coverage. Significantly, grandfathered health plans are not subject to the ACA's nondiscrimination requirements.

A number of pending requirements under the ACA should be noted. A summary of benefits and coverage must be provided to all group health plan participants, as well as to potential enrollees, beginning generally by the time of the first open enrollment period after September 23, 2012 and at specified times thereafter. Effective for 2012 (for provision to employees by January 31, 2013), employers filing at least 250 Forms W-2 must report on each employee's Form W-2 the aggregate cost of employer-sponsored health coverage provided to the employee. The regulatory agencies have issued detailed guidance on these requirements, including the contents and permitted delivery methods for the summary of benefits and coverage, and how to calculate the aggregate cost of coverage for completing the Forms W-2.

Also imminent is a reduction, to $2,500, as the maximum amount employees may contribute to a flexible spending account. The limit is effective for plan years beginning after December 31, 2012, though employers have until the end of calendar year 2014 to amend their plan documents to reflect the new limit. Operational compliance for most plans, however, will typically entail modifying informational materials and administrative documents in time for the next open enrollment period.

Related to these and to other provisions under the ACA, employers face a number of important decisions concerning the provision of health care coverage to their employees. For sponsors of grandfathered plans, the benefits of maintaining grandfathered status may become more significant, as nondiscrimination rules and certain health care quality reporting requirements from which these plans are exempt, come into effect. Certain ACA provisions impacting the health care insurance market may induce some smaller employers with insured plans to transition into self-insured arrangements. Employers will also evaluate whether to offer, or to continue to offer, group health insurance coverage in light of the pay or play rules.

Notwithstanding the possibility that the ACA or certain of its principal components may not survive long-term, employer sponsors of group health plans must actively manage their current compliance obligations and prepare for those requirements that will soon become effective. Certain of these requirements will involve communication and coordination with insurance carriers, stop loss providers and third party administrators, such that an appropriate amount of lead time should be permitted. In many cases, group health plan sponsors will benefit from consulting a professional advisor concerning their compliance obligations and their decision-making processes relative to the ACA's many requirements and the law's effects given the employer's particular circumstances.

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