Barley Snyder

Employment Law Update December 2009

PUBLISHED ON
December 1, 2009

TABLE OF CONTENTS

Genetic Information Non-Discrimination Act Now in Effect

By: David J. Freedman

On November 21, 2009, the Genetic Information Non-Discrimination Act (GINA) became effective. Enacted in the summer of 2008, Title II of GINA prohibits all employers in the United States with 15 or more employees from using "genetic information" in employment decisions and permits aggrieved employees to sue for money damages, like other federal non-discrimination statutes such as Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA). Like these laws, GINA also features an "anti-retaliation" provision that prohibits employers from taking materially adverse action against employees who engage in activity protected under GINA, such as filing a GINA complaint with the United States Equal Employment Opportunity Commission (EEOC), filing a lawsuit alleging a GINA violation, or lodging internal GINA-related complaints.

GINA also prohibits employers from requesting or inquiring regarding an employee's "genetic information," which is defined broadly as an individual's "genetic tests . . . the genetic tests of family members of such individual; and . . . the manifestation of a disease or disorder in family members of such individual." In turn, the term "family member" is defined as a dependent or a first, second, third, or fourth degree relative of an employee or his/her dependent.

GINA, however, features the following six major exceptions, which when applicable relieve an employer of liability for requesting or obtaining "genetic information":

- Information obtained during the Family and Medical Leave Act (FMLA) certification process;
- Information obtained as part of an employer-sponsored voluntary wellness program;
- The acquisition of genetic information through publicly-available information;
- Information obtained when the employer conducts genetic monitoring of the biological effects of toxic substances in the workplace;
- Requiring employees to provide genetic information as a quality control marker, but only for those employers

engaged in conducting genetic testing for law enforcement purposes; and

- Inadvertently obtaining genetic information.

Under the inadvertent or "water cooler" exception, an employer will not be liable for obtaining genetic information by overhearing a conversation, by receiving unsolicited genetic information, or by obtaining genetic information in support of a disability accommodation request or an employee request for leave (whether that leave is legally protected or not).
An employer, however, may not use any obtained genetic information in employment decisions, even if the manner of its acquisition falls within one of the exceptions.

GINA also imposes restrictions on employers who obtain genetic information, inadvertently or otherwise. That information should be kept confidential and any documentation of genetic information should be stored in a separate, confidential medical file, which is already required under the ADA and the Family and Medical Leave Act.

Perhaps most importantly for employers, the EEOC's proposed GINA regulations make clear that a test for the presence of drugs and/or alcohol is not a prohibited "genetic test" under GINA. Similarly, tests to detect the presence of viruses not composed of DNA, RNA, chromosomes, proteins or metabolites fall outside of GINA's prohibitions.

One area in which employers may have to adjust their current practices involves post-offer employee health inquiries. Previous ADA regulations suggested that in certain circumstances an employer could obtain a family medical history or conduct genetic tests of job applicants after making an employment offer.

A recent EEOC publication, however, indicates that such requests will be illegal under GINA. This does not mean that employers cannot make post-offer requests for medical information. Covered employers, however, cannot request that the employee divulge his/her family medical history or undergo genetic testing during that process.

If they have not done so yet, employers should consider how to incorporate GINA's prohibitions and requirements into their current employment policies, handbooks, and applications. Likewise, employers should consider re-evaluating their post-offer medical examination process to ensure that it is GINA-compliant.

Members of Barley Snyder's Employment Law Group can assist employers in revising policies and forms, providing compliance training, and implementing GINA's requirements.

View PDF of Entire Publication: Genetic Information Non-Discrimination Act Now in Effect

Back To Top

New EEOC Poster Available On-Line

The Equal Employment Opportunity Commission (EEOC) has revised the required notice that employers must post in the workplace to reflect the requirements of the new Genetic Information Nondiscrimination Act (GINA) and the recent amendments to the Americans with Disabilities Act (ADA).

Employers can either download, print, and post the "EEO is the Law" supplement to be posted next to the existing September 2002 edition of the notice, or download, print and post the November 2009 version of the notice. Both are provided on the EEOC's website at www.eeoc.gov in the "Information in Print" area.

View PDF of Entire Publication: New EEOC Poster Available On-Line

Back To Top

Mental Health Parity and Addiction Equity Act Compliance Date for Group Health Plans Approaches

By: Katherine Betz Kravitz and Mark A. Smith

Parity means equality, and a new law seeks to create equality in the way group health plans cover mental health and addiction treatment as compared to traditional medical and surgical benefits. The Paul G. Wellstone and Pete Dominici Mental Health Parity and Addiction Equity Act was passed in October 2008 as a part of the Emergency Economic Stabilization Act. For most health plans, the effective date for compliance with the Act is January 1, 2010. Regulations offering guidance for implementation were to have been promulgated by October 3, 2009. However, representatives of the federal government have now suggested that the target date for publication of regulations is the end of this year. With many questions unanswered and incomplete compliance details, implementation without regulatory guidance could be difficult.

It is important to note that the Act does not require an employer to offer mental health and addiction treatment coverage as a part of its health benefits plan. However, if an employer chooses to provide coverage for mental health and addiction treatment, it must ensure that the "financial requirements" (for example, co-payments, deductibles, out-of-pockets expenses) for coverage of such treatment are the same as the financial requirements for medical/surgical care.
Parity must also be evident in out-of-network benefits. In other words, out-of-network care for mental health and addiction treatment must be covered at the same level as out-of-network medical/surgical care. Treatment limitations on mental health and substance abuse treatment, such as limits on the number of office visits allowed per year, or the number of inpatient hospital days allowed per year, also cannot be more restrictive than "substantially all" medical/surgical benefits covered by the plan.

The Act applies to all insured or self insured group health plans with more than 50 employees, including plans using a separate vendor to manage mental health and substance abuse benefits. It also applies to Medicaid managed care plans. The new law does not apply to plans with 50 or fewer employees, disability and long-term supplemental care plans,or indemnity plans. Some government sponsored plans may also be exempt.

Employers that believe compliance with the Act will increase their costs by more than 2% will have an opportunity to apply for a cost exemption. However, the employer must still comply with the law the first year, and perform a cost assessment after the first six months.

A request for a cost increase exemption must be supported by a qualified actuarial determination and report. Exemptions, when granted, are effective for one year.

Look for the implementing regulations to be released in early January 2010. Until then, if you have questions concerning the Act and compliance, feel free to contact Kathy Kravitz or Mark Smith.

View PDF of Entire Publication: Mental Health Parity and Addiction Equity Act Compliance Date for Group Health Plans Approaches

Back To Top

Third Circuit Opens Door to Race Discrimination Claims By Independent Contractor

By: Joshua L. Schwartz

A recent decision by the United States Court of Appeals for the Third Circuit has broadened the pool of race discrimination plaintiffs beyond traditional "employees." In *Brown v. J. Kaz, Inc.,* the Appeals Court held that independent contractors-those for whom the hiring party does not have the "right to control the manner and means" of accomplishing product goals-have standing to pursue race discrimination claims under 42 U.S.C. 1981 ("Section 1981" claims). Generally, independent contractors have not been able to bring discrimination claims under Title VII of the Civil Rights Act of 1964 because they are not considered "employees." And while employees have filed lawsuits under Section 1981, which prohibits race discrimination in the making and enforcing of contracts, it has been unclear whether independent contractors could do the same. According to the Third Circuit, they can. Businesses that rely on such contractors should thus ensure that policies are in place to promote nondiscriminatory hiring, training, and termination practices with respect to these independent contractors.

Brown involved Craftmatic, a distributor of adjustable beds that sells its product through sales representatives. In the summer of 2006, Kimberly Brown, an African-American female, responded to a Craftmatic advertisement seeking sales representatives and then registered for a three-day training and interview session with the company. Brown attended the training with two male applicants, neither of whom was African-American, and signed an "Independent Contractor Agreement" on the final day, although Craftmatic's recruiting manager, Jay Morris, later stated that he knew Brown was "going to be a problem" because "she asks a lot of questions."

The source of the ultimate dispute occurred later that day. At some point during a break in the training session, Morris approached the trainees and extended his hand to all three; however, for reasons that are unclear, Brown refused to shake Morris's hand. Brown and Morris then had a heated argument. According to Brown, Morris used a racial slur, while Morris contends that he was equating Brown's refusal to shake his hand with the hypothetical use of that slur. Morris ultimately reported the incident to Craftmatic's owner, who decided not to use Brown as a sales representative. Brown sued Craftmatic, alleging race discrimination under Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Relations Act (PHRA), and Section 1981. The trial court dismissed the Title VII and PHRA claims because Brown was not an "employee" of Craftmatic, and the Court of Appeals agreed.

Importantly, however, the Court of Appeals also held that Brown's independent contractor status did not preclude her Section 1981 race discrimination claims. The Court focused on the text of that statute, which provides that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Since Section 1981 refers to "all persons" and does not limit itself to employment contracts, the Court reasoned that an independent contractor may sue for race discrimination that occurs within the scope of the independent contractor relationship.

Businesses that rely on independent contractors should be aware that, in contrast to employees who wish to sue under Title VII or the PHRA, a Section 1981 claimant need not file a charge of discrimination with the U.S. Equal Employment Opportunity Commission prior to filing suit in federal court. Accordingly, litigation may commence relatively quickly where a claimant believes that race has been a factor in an adverse decision or hostile work environment. In addition, Section 1981 claims are not subject to a cap on damages as are Title VII claims, so it is

imperative that companies extend the same protections against race discrimination to the independent contractor relationship.

Employers should also keep in mind that an individual's status as an "employee" or "independent contractor" is not dependent on the label assigned by the parties alone. Indeed, the EEOC has long held the position that workers from a staffing agency qualify as "employees" of the company where they are staffed "in the great majority of circumstances." The Supreme Court has held that courts should examine multiple factors to determine an individual's status, including "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." If an individual is deemed an "employee" rather than an "independent contractor," he or she may sue under Title VII, the PHRA, and, in the case of race discrimination, also under Section 1981.

The Court of Appeals for the Third Circuit is not the only court to hold that independent contractors may sue under Section 1981. Its decision follows that of the First, Eleventh, and Seventh Circuits. Companies that have a national presence and local businesses who rely on independent contractors should take steps to ensure that their independent contractor agreements and the practices conducted thereunder conform to nondiscrimination laws.

View PDF of Entire Publication: Third Circuit Opens Door to Race Discrimination Claims By Independent Contractor

Back To Top

OSHA Reveals New Mission and Enforcement Targets: Manufacturers and Nursing Homes

By: Richard L. Hackman

Addressing the AFL-CIO national convention on September 14, 2009, U.S. Department of Labor (DOL) Secretary Solis proclaimed that "the Department of Labor is back in the enforcement business," calling job safety "our moral obligation." To that end, the DOL is adding 670 investigators, and since July 2009, the Occupational Safety and Health Administration (OSHA) has conducted approximately 700 investigations, and assessed nearly $2 million in fines.

As part of its investigatory focus, OSHA intends to increase its safety inspections of "high-hazard" employers, which include manufacturers and nursing homes. The facilities selected for inspection will be determined by those sites with injury and illness rates considerably higher than the national average. This Site-Specific Targeting program establishes primary and secondary lists using rates calculated from the number of days away from work, restricted work activity of job transfer, or days away from work due to injury and illness.

Hazard Communication Standard

In furtherance of the DOL's new mission, the Obama administration has moved forward with several ambitious proposals. First, OSHA intends to align its own hazard communication standard with that of "the United Nations Globally Harmonized System (GHS) of Classification and Labeling of Chemicals."

According to OSHA's Assistant Secretary of Labor, Jordan Barab, "[t]he proposal to align the hazard communication standard with the GHS will improve the consistency and effectiveness of hazard communications and reduce chemical-related injuries, illnesses and fatalities." Pursuant to the recent notice of a proposed rule in the Federal Register, this proposal would require employers to train workers regarding new labels and safety data sheets within two years of the effective date of the final rule, and would mandate that manufacturers comply with the rule within three years.

The proposed rule also sets forth new "hazard categories." Specifically, there are nine health hazard categories for chemicals based on their effects and sixteen physical hazards. The health hazard categories include acute toxicity, skin corrosion or irritation, serious eye damage or eye irritation, respiratory or skin sensitization, germ cell mutagenicity, carcinogenicity, reproductive toxicity, specific target organ toxicity through single or repeated exposure, and aspiration hazards.

The physical hazard categories are explosives; flammable gases; flammable aerosols; oxidizing gases; gases under pressure; flammable liquids; flammable solids; self-reactive chemicals; pyrophoric liquids; pyrophoric solids; self-heating chemicals; chemicals, in contact with water, that emit flammable gases; oxidizing liquids; oxidizing solids; organic peroxides; and corrosive to metals.

According to the notice, OSHA will hold an informal public hearing on the proposal, but has yet to announce a date. Although OSHA has apparently determined that the proposal would not have a significant impact on small businesses, it has nonetheless also requested comments on the potential economic impact of the rule. However, it seems clear that the new rule would require employers to incur additional costs for employee training and the testing of chemical mixtures.

Combustible Dust

OSHA is currently in the midst of an ongoing combustible dust national emphasis program. Under the emphasis program, OSHA has found approximately 5,000 violations, but most of these citations were for violation of the general duty clause. Accordingly, OSHA is seeking comments on a standard designed to prevent combustible dust fires in all industries. To date, OSHA has never established one, comprehensive standard that addresses combustible dust hazards encompassing all industries. OSHA is asking for comments on a number of issues related to combustible dust, including, but not limited to, the definition of combustible dust, and hazard assessments, communications, and training. OSHA is also taking comments on whether the standard should cover different types of dusts separately, and whether site-specific dust plans should be required.

Comments on these proposals are due Jan. 19, 2010, and may be submitted electronically at http://www.regulations.gov.

View PDF of Entire Publication: OSHA Reveals New Mission and Enforcement Targets: Manufacturers and Nursing Homes

Back To Top