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In this Issue

The Inexplicit Requirement and Definitive Necessity for Employers to Implement Privacy Policies

In the face of seemingly daily news reports of company data breaches, mounting legislative concern, and efforts to legislate safeguards for personal information maintained by companies, employers may wonder whether they should implement privacy policies to protect personal information they maintain on their employees.

To date, there is no all-encompassing federal privacy law. Rather, several federal laws touch upon an aspect of protecting personal or private information collected from individuals. These include the Children's Online Privacy Protection Act (giving parents control over the information collected from their children online), Federal Trade Commission Act (pursuant to which the FTC has sought enforcement against companies who failed to follow their own privacy policies relating to consumers), Gramm-Leach-Bliley Act (requiring financial institutions, such as banks, to protect consumer financial information), Health Insurance Portability and Accountability Act of 1996 (requiring covered entities to protect individually identifiable health information), and the Americans with Disabilities Act and Family and Medical Leave Act (requiring confidentiality of employee medical information obtained by employers).

Likewise, state legislatures have attacked the problem with a piecemeal approach by mandating the protection of social security numbers, credit card information, consumer financial information, and the security of personally identifiable information (usually aimed at preventing identity theft). Additionally, 47 states, including Florida, have laws addressing notification and other requirements when a data breach occurs. While only a handful of states explicitly require a written privacy policy, Florida is among the overwhelming majority of states that inexplicitly requires privacy policies by mandating security of personal information and notification when a breach of personal information has occurred. Where companies are required to notify affected individuals of a breach, they are implicitly required to protect the information to prevent such a breach. The first step in assembling that protective armor is to institute a privacy policy.

Employers maintain various types of personally identifiable information on their employees, including dates of birth, social security numbers, and bank account and driver license numbers, to name a few.

Employer privacy policies should address, at a minimum:

1. the types of personal information (such as the above), whether in electronic or paper format, obtained and maintained regarding employees and their family members;
2. where the information is maintained or stored;
3. how the information is protected while being maintained and when being communicated;
4. who has access to the information;
5. the effective date of the policy; and
6. the identity of the individual within the organization responsible for compliance with the policy.

Additionally, employers should consider training all of their employees on the policy, not just those who directly handle the private information.

If your company wants to explore implementing or training on a privacy policy, please contact the Jackson Lewis attorney with whom you usually work, or Lilly Moon, at MoonL@jacksonlewis.com.

Changes Coming for Florida's Workers' Comp Law

A decision from Florida's Supreme Court signals a possible increase in litigation under Florida's Workers' Compensation law, even while the Court has essentially upheld the bulk of the law's validity.

In *Castellanos v. Next Door Company, et al.*, No. SC13-2082 (Apr. 28, 2016), the Court held that restrictions on the recovery of attorneys' fees are unconstitutional. In 2009, Florida's legislature amended Section 440.34, *Florida Statutes*, to impose a sliding scale of attorneys' fees awards strictly limiting the amount fees a worker's attorney could obtain. The Court held these restrictions are an unconstitutional denial of due process because they could lead to "manifestly unjust" fee awards (such as the $1.53 per hour fee in *Castellanos*). Such unjust fee awards, the Court reasoned, could act as an economic disincentive impeding workers from obtaining necessary legal representation. Instead, the Court concluded the sliding scale fee schedule is merely a starting point and that workers' attorneys can receive larger fee awards if they can show the fee schedule would result in an unreasonable fee.

The Court also declined to hear two cases that had the potential to overturn the entire Workers' Compensation law. In *Stahl v. Hialeah Hospital*, the plaintiff challenged the law's constitutionality because, the plaintiff claimed, a history of amendments allegedly chiseled away benefits and rendered the law an inadequate remedy. In *Florida Workers' Advocates (FWA), et al. v. State of Florida*, the plaintiff challenged the "exclusiveness of liability" provision of the Workers' Compensation law. The Court's decision not to hear either of these cases essentially upholds the law's validity.

The case of *Westphal v. City of St. Petersburg* (SC13-1930), which involves a gap in the workers' compensation law between the end of total disability benefits at 104 weeks and the start of permanent benefits, remains pending before the Court.

If you have any questions about these cases, please contact the Jackson Lewis attorney with whom you usually work, or Michael Kantor, at michael.kantor@jacksonlewis.com.

Court Permits Discrimination Claims on Behalf of Deceased Employees

Can a personal representative of a decedent's estate file a discrimination charge under the Florida Civil Rights Act ("FCRA") on behalf of a deceased employee?

A Florida court has answered this question in the affirmative. *Cimino, Personal Representative of the Estate of Michael Cimino, et al. v. American Airlines*, No. 4D14-2445 (Fla. 4th DCA 2016).

Kim Cimino, as the personal representative of Michael Cimino's estate, and, as the surviving spouse of Michael Cimino and natural guardian of their son, filed a discrimination charge on behalf of her deceased husband. The Florida Commission on Human Rights (FCHR) dismissed the charge, stating that it lacked the authority to investigate since Mr. Cimino had not initiated the Charge before his death. Ms. Cimino appealed.

The legislature modeled the FCRA after the federal anti-discrimination law, Title VII of the Civil Rights Act of 1964, and federal court interpretations of Title VII largely have applied to the FCRA, the Fourth District Court of Appeals (DCA) observed. However, although the federal courts have interpreted Title VII to prohibit the personal representative of an employee's estate from initiating a charge of discrimination, the Fourth DCA stated that the interpretation of Title VII by a federal court is merely persuasive authority when it came to construing state law, and found that statutory interpretation of the FCRA was necessary.

The FCRA's purpose is "to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status." § 760.01(2), Fla. Stat. (2014). "Any person aggrieved by a violation of [the statute] may file a complaint with the commission within 365 days of the alleged violation ...." § 760.11(1). An "'[a]ggrieved person' means any person who files a complaint with the [FCHR]." § 760.02(10). Under the statute, "'[p]erson' includes an individual, ... or legal representative ...." § 760.02(6).

Holding the FCRA "'shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated [in chapter 760] and the special purposes of the particular provision involved,'" the Fourth DCA ruled that the FCRA's plain and obvious meaning allows for a personal representative to initiate a FCRA complaint on behalf of the deceased former employee. This means that an FCRA complaint for discrimination may be brought against a Florida employer by a personal representative of the estate of a deceased employee.

If you have any questions about this ruling, please contact the Jackson Lewis attorney with whom you usually work, or Samantha Dunton-Gallagher, at duntons@jacksonlewis.com.

Federal Court Requires Hardship Analysis in Non-Compete Enforcement

The federal appeals court in Atlanta recently has added what could be a significant hurdle for Florida employers seeking to enforce restrictive covenants or non-compete agreements in federal court. The U.S. Court of Appeals for the Eleventh Circuit, covering Alabama, Florida, and Georgia,

vacated a preliminary injunction entered against a former employee because the trial court failed to consider the potential harm the injunction posed to the former employee. *Transunion Risk and Alt. Data Solutions v. MacLachlan*. The decision will come as a surprise to many, as it appears to contradict Florida's restrictive covenant and non-compete statute, Fla. Stat. § 542.335, which states that a court *"[s]hall not consider any individualized economic or other hardship"* that might be caused to a former employee.

The full effect of the decision is not yet clear, but it presents a dramatic change in the way federal courts must approach Florida restrictive covenant and non-compete cases.

If you have any questions about restrictive covenant agreements for your company, please contact the Jackson Lewis attorney with whom you usually work, or Sean Walsh, at Sean.Walsh@jacksonlewis.com.

Medical Marijuana Laws and the Employer-Employee Relationship

Florida Governor Rick Scott has signed a bill that permits physicians to prescribe low-THC medical marijuana to terminally ill patients, expanding on a 2014 law which permitted limited use by individuals with seizure-like conditions, and moving toward broader legal medical marijuana use in Florida. This may further expand on November 8, 2016, when Florida residents will vote on an amendment to the Florida Constitution that would permit medical marijuana use by patients with "debilitating medical conditions."

The amendment broadly defines "debilitating medical condition" to include specific conditions — cancer, epilepsy, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis — along with "other debilitating medical conditions of the same kind or class as or comparable" to these conditions. Employers should pay close attention because a similar amendment fell short by only three percent of the necessary 60 percent of votes needed during the last election cycle.

At the federal level, marijuana has been criminalized for decades. In 2005, the U.S. Supreme Court reaffirmed its illegal status in *Raich v. Gonzalez*, stating that under the Commerce Clause, Congress can criminalize the production and use of marijuana, even in states that have legalized its use for medical purposes or otherwise. Florida employers can expect to look to the developing to case law in other states to determine how to handle marijuana use in the workplace if broadly legalized here.

At this time, because marijuana is still criminalized at the federal level, employers can prohibit its use or possession by employees. Moreover, workers in positions regulated by the Department of Transportation are prohibited from using marijuana. In fact, the DOT recently said that it wants "to make it perfectly clear that the state initiatives [legalizing marijuana] will have no bearing on [the DOT's] regulated drug testing program."

Beyond the clear bar to marijuana use for DOT-regulated positions, employers can take comfort in recent decisions in which employees unsuccessfully brought disability claims after being terminated for marijuana use, even where legalized. In the Americans with Disabilities Act context, in *James v. City of Costa Mesa*, a federal appeals court in San Francisco explained that the ADA defines "illegal drug use" by reference to federal law, which

prohibits marijuana use, rendering such use unprotected by the ADA. In *Roe v. Teletech*, the Washington Supreme Court explained that the state law permitting marijuana use did not require employers to accommodate an employee's use of medical marijuana in a drug-free workplace. Similarly, in *Coats v. Dish Network, LLC*, the Colorado Supreme Court held that employers can terminate employees for off-duty use of medical marijuana because it is still illegal under federal law.

Florida employers should keep in mind that marijuana use and possession still is illegal under federal law, regardless of whether its use for medical purposes is legal, even though the Department of Justice may not prosecute users of medical marijuana under state law and Congress has expressed some ambiguity toward it. Beyond the clear ban as it relates to DOT-regulated positions, at this time, in jurisdictions where marijuana use has been legalized, employees terminated for its use have not been sheltered by state law *(e.g., Montana Cannabis Industry Ass'n v. The State of Montana,* 2016 Mont. LEXIS 168 (Feb. 25, 2016)). However, Florida employers should pay close attention to the upcoming November election and the after-effects if medical marijuana is legalized.

If you have any questions about this topic or accommodating medical marijuana in the workplace, please contact the Jackson Lewis attorney with whom you usually work, or Sean Walsh, at Sean.Walsh@jacksonlewis.com.

Jackson Lewis News

We are pleased to welcome **Gail Golman Holtzman** as a Principal in our Tampa office. Ms. Holtzman has more than three decades of experience representing employers in federal and state labor and employment matters. A member of the governing Council of the American Bar Association, Labor and Employment Law Section, since 2011, Ms. Holtzman was elected Section Chair-Elect and will become Section Chair in August 2016. Ms. Holtman may be contacted at (813) 512-3210 and Gail.Holtzman@jacksonlewis.com.

We are pleased to welcome **Jennifer S. Richardson** as an Associate in our Jacksonville office. Ms. Richardson may be contacted at (904) 638-2655 and Jennifer.Richardson@jacksonlewis.com.

Pedro J. Torres-Díaz, a Principal in our San Juan and Miami offices, has become the President of the Hispanic National Bar Association's Board of Governors. The HNBA is an incorporated, not-for-profit, national membership association that represents the interests of Hispanic attorneys, judges, law professors, legal assistants, law students and legal professionals in the United States and its territories. Mr. Torres-Díaz may be contacted at (305) 577-7600 or Pedro.Torres-Diaz@jacksonlewis.com.

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Matthew Klein is an Associate in the Orlando, Florida, office of Jackson Lewis P.C. Mr. Klein earned his Bachelor of Science in International Business Economics in 2004 and his Juris Doctor in 2007, both from the University of Florida. The majority of his practice is devoted to employment litigation, representing public and private employers in federal and state courts, and arbitration proceedings, as well as before the EEOC and other administrative agencies. He also provides clients with day-to-day advice and counseling on employer policies and various workplace issues. In addition, Mr. Klein serves on Orange County's 2016 Charter Review Commission, which is tasked with performing a comprehensive review of the county's Charter and proposing amendments to the county's voters in 2016. Mr. Klein is a member of the Florida Bar, licensed to practice in all federal and state courts in Florida and before the U.S. Court of Appeals Eleventh Circuit.