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A Bulletin on Employment, Labor, Benefits and Immigration Law for Clients and Friends of Jackson Lewis P.C.

EEOC Releases Proposed Rule on Workplace Wellness Programs for Public Comment

The U.S. Equal Employment Opportunity Commission has released its Notice of Proposed Rulemaking (NPRM) on how Title I of the Americans with Disabilities Act applies to employer wellness programs that are part of group health plans. The NPRM was published in the *Federal Register* on April 20, 2015 (80 Fed. Reg. 21659) (available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08827.pdf). The public may offer comments on the NPRM until June 19, 2015.

The EEOC acknowledges that guidance is needed on how wellness programs offered as part of an employer's group health plan can comply with the ADA consistent with provisions governing such programs in the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act. The Commission also offers a Fact Sheet for Small Businesses and a Question and Answer document (both are available from the EEOC: www.eeoc.gov).

The proposed rule would amend the EEOC's ADA Title I regulations to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries or medical examinations. Related interpretive guidance would be changed also.

Although the ADA limits the circumstances in which employers may ask employees about their health or require them to undergo medical examinations, it allows such inquiries and examinations if they are voluntary and part of an employee health program.

The NPRM requires that if an employee health program seeks information about employee health or medical examinations, the program must be reasonably likely to promote health or prevent disease. Employees may not be required to participate in a wellness program, and they may not be denied health coverage or disciplined if they refuse to participate.

Wellness programs may not be used to discriminate based on disability. The proposed rule explains that under the ADA, companies may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs. This limit, the EEOC explains, is generally consistent with limits that HIPAA imposes on wellness programs. However, the ADA provides important safeguards to employees to protect against discrimination based on disability, the Commission notes. Therefore, medical information collected as a part of a wellness program may be disclosed to employers only in aggregate form that does not reveal the employee's identity, and that information must be kept confidential in accordance with ADA requirements.

Additionally, employers may not subject employees to interference with their ADA rights, threats, intimidation, or coercion for refusing to participate in a wellness program or for failing to achieve certain health outcomes. Finally, the NPRM states that individuals with disabilities must be provided with reasonable accommodations that allow them to participate in wellness programs and to earn whatever incentive an employer offers.

NPRM also requires that employers provide employees a notice describing what medical information will be collected, with whom it will be shared, how it will be used, and the means by which it will be kept confidential.

Meanwhile, a group of Republican Senators and Representatives, apparently not wanting to wait any longer, on March 3, 2015, introduced legislation (the "Preserving Employee Wellness Programs Act," H.R. 1189 and S. 620) that would harmonize the wellness program provisions in the Affordable Care Act with potentially conflicting provisions in the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act (GINA). The legislation would protect programs that meet the ACA wellness program requirements, which include the final regulations issued jointly by the Departments of Labor, Health and Human Services, and Treasury, from violating the ADA and GINA.

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The proposed legislation also clarifies that the collection of information about the manifested disease or disorder of a family member would not be considered an unlawful acquisition of genetic information with respect to another family member participating in the wellness program and, therefore, would not violate titles I or II of GINA. The measure, if enacted, also would permit employers to establish "a deadline of up to 180 days for employees to request and complete a reasonable alternative standard (or waiver of the otherwise applicable standard)."

Please contact your Jackson Lewis attorney if you have any questions about wellness programs or would like to submit comments to the EEOC.

Federal Appeals Court Endorses Tax-Offset Damages

A new damages theory under Title VII of the Civil Rights Act that in certain circumstances may increase lost-pay damages in employment discrimination matters by at least 10 percent has been endorses by the federal appeals court in Chicago.

Under the U.S. Court of Appeals for the Seventh Circuit's ruling, a successful employee-plaintiff in a discrimination matter is entitled to payment in an amount equaling the increased tax burden faced by the plaintiff receiving a lump-sum backpay award. *EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898 (7th Cir. 2015). The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

In *Northern Star*, the Equal Employment Opportunity Commission brought a lawsuit under Title VII on behalf of Dion Miller, who, according to the EEOC, while earning $14 an hour as a cook for Northern Star, was subjected to racial harassment and eventually was terminated in retaliation for complaining about the alleged racial harassment.

The trial court dismissed the EEOC's claim of racial harassment, but a jury found Northern Star unlawfully retaliated against Miller. The district court judge awarded Miller $43,300.50 in backpay and, at the EEOC's request, an additional $6,495 to offset the impending tax liability that will result from the lump-sum backpay award, estimated at 15 percent of the backpay award.

After the dissolution of Northern Star, its successors appealed the district court's tax offset award. The Seventh Circuit acknowledged that it had not previously addressed the permissibility of tax offset awards.

The Seventh Circuit first observed the remedial scheme of Title VII is offended when a successful plaintiff is not "made whole." According to the Court, because of the $43,300.50 lump-sum payment, Miller would be pushed into a higher tax bracket and be required to pay more taxes than he would have had to if he been paid on a regular, scheduled basis. Miller was receiving less take-home pay because of the discrimination, which forced the lawsuit and the lump-sum payment, reasoned the Court. Thus, it was appropriate to provide Miller with the tax offset, the Court determined. In this, the Seventh Circuit joins the Third and Tenth Circuits in affirming a tax-component award in the Title VII context. (The Third Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands. The Tenth Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.)

The Seventh Circuit then criticized the district court for not explaining how it arrived at a figure of $6,495 as the offset. However, it found the award was within the district court's discretion in granting the offset.

Implications

Following this ruling, the cost for employers of losing a discrimination lawsuit, in many circumstances, will be higher. Modestly paid employees such as Miller will be in a good position to claim damages for tax offsets, since an individual's first $9,075 in income is taxed at a rate of 10 percent, and income between $9,075 and $36,900 is taxed at 15 percent, jumping to 25 percent for taxable income over $36,900, and climbing to 39.6 percent for individuals earning $406,751.

Northern Star also underscores how a slow-moving lawsuit poses risks of increased liability for employers. Courts already routinely provide plaintiffs with prejudgment interest at the Internal Revenue Service prime rate, typically compounded quarterly. An employee can wait 300 days before filing a charge, and it is not unusual for an EEOC investigation to last a year or more, which means an employee can have accumulated two years of backpay even before filing the lawsuit, and that lawsuit may not come to trial for a year or more. Such cases are ripe for windfall backpay awards, increased tax rates for the lump-sum backpay award, and a corresponding significant tax offset payment.

Jackson Lewis attorneys are available to assist employers in lowering the risk of employment lawsuits. If an employer is sued, our attorneys provide early assessments of potential liability and damages, as well as avoidance of enhanced damages. Please contact Shareholder Paul Patten (PattenP@jacksonlewis.com) if you have any questions.

Chicago's Ban-the-Box Ordinance: What Employers Need to Know

Chicago has begun to restrict the ability of employers with fewer than 15 employees to use applicants' criminal background information early in the application process. The restriction began on January 1, 2015. An Illinois law on the same subject, but applicable to employers with at least 15 employees, also went into effect the same day. (For details of the Illinois law, see our article, Illinois Passes Ban-the-Box Legislation Limiting Employers' Criminal Background Checks on Applicants (http://www.jacksonlewis.com/resources.php?NewsID=4909) or the Fall 2014 issue of *The Midwest Employer* (http://www.jacksonlewis.com/resources.php?NewsID=4990).)

Chicago employers should ensure compliance with the new ordinance, as penalties can be stiff and steps taken to comply with the state law may not be enough.

Background

Chicago's ban-the-box ordinance works in tandem with the state law, the Job Opportunities for Qualified Applicant Act. The ordinance extends the state's restrictions to employers not otherwise covered, namely, those that maintain a Chicago facility or are licensed by the city but have fewer than 15 employees, and the City of Chicago itself. The ordinance does not override the Illinois law, but expands on it.

Common Requirements

Both the Illinois law and the Chicago ordinance prohibit employers from inquiring about or into, considering, or requiring that an applicant disclose his or her criminal record until after either:

- the applicant is determined qualified and notified of selection for an interview, or
- if there is no interview, a conditional offer is extended.

The Illinois law and the Chicago ordinance do not apply where:

- employers are required to exclude applicants with certain convictions under state or federal law,
- a standard fidelity bond or equivalent is required and an applicant's conviction would be disqualifying, in which case the employer may inquire whether an applicant has been convicted of a relevant offense, and
- a license under the Emergency Medical Services Systems Act is required.

Finally, both laws permit employers to inform applicants early in the process of specific offenses that would disqualify the applicant from a particular position.

Key Differences

Key provisions of the Chicago ordinance that differ from the Illinois law and are important to Chicago employers include:

- A requirement that all employers, *including those with at least 15 employees who otherwise would be subject to the Illinois law*, inform applicants of decisions not to hire based entirely or partially on applicants' criminal records when applicants are told of decisions not to hire.
- A penalty structure that can lead to significant liability for small employers on even the first violation. While the Illinois law provides a warning for a first violation, even a first violation of the Chicago ordinance leads to fines of between $100 and $1,000 for each violation and/or the possible suspension or revocation of the employer's city business license. Thus, a small employer could incur significant economic consequences from violations, particularly if its offending actions are recurring in its recruitment efforts.

Recommendations

In addition to complying with Illinois law, Chicago employers must take the additional step of complying with the requirement that applicants be informed of decisions not to hire based entirely or partially on a criminal record when applicants are told of decisions not to hire. A Chicago employer may consider whether it ever informs applicants of application results and whether communications sent pursuant to other laws, such as the Fair Credit Reporting Act, already may be sufficient.

A growing list of municipalities and states has passed ban-the-box laws. Employers, particularly those that operate in more than one jurisdiction, must ensure they are in compliance.

For more information on the Illinois and Chicago mandates, please contact Shareholder Paul Patten (PattenP@jacksonlewis.com) or Associate Jason Selvey (SelveyJ@jacksonlewis.com).

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Facts in Stats

The U.S. Equal Employment Opportunity Commission received 88,778 new charges of workplace discrimination in fiscal year 2014 (ending September 30, 2014). Allegations of retaliation under all statutes enforced by the EEOC — such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act — reached their highest ever, at 42.8 percent of all charges filed, while charges alleging race discrimination came in second, at approximately 35 percent. (Individuals often file charges claiming retaliation and multiple types of discrimination.)

The agency in FY 2014 obtained $296.1 million in total monetary relief in cases that settled prior to its filing a lawsuit against the employer. Monetary relief from cases the EEOC litigated, including settlements, totaled $22.5 million. While these numbers are lower than in recent fiscal years, EEOC general counsel P. David Lopez said, "[I]t's … important to obtain strong nonmonetary relief, to make sure the conduct does not reoccur, and to bring cases that have impact — that clarify areas of the law where there's not a lot of case law."

The agency filed 167 lawsuits during FY 2014, 133 of them on the merits. "We've filed some pretty large cases that are national in scope and are more work," Lopez said. "More resources are being devoted to litigating some of these large systemic cases," he continued. Lopez said the agency is on track for stronger FY 2015 results and noted the Commission had won four out of five jury trials by February of the fiscal year. The EEOC found "reasonable cause" that discrimination occurred in 118 of 260 systemic investigations in FY 2014. At the end of FY 2014, the agency had 228 active cases, 57 of which involved systemic discrimination. Some of these pending cases, such as one against a national retailer for failing to hire black and Hispanic workers, could result in heavy damages.

Minimum Wage Rates

Minnesota (as of 8/1/15)

"Large" employers: $9.00 an hour
"Small" employers: $7.25 an hour

Chicago (as of 7/1/15)

Non-tipped employees: $10.00 an hour
Tipped employees: $5.45 an hour

The number of total charges the EEOC received originating from states covered by this Bulletin in FY 2014 is as follows:

Illinois: **4,487**
Indiana: **2,700**
Kansas: **681**
Michigan: **2,624**
Missouri: **1,808**
Nebraska: **56**
Ohio: **2,893**
South Dakota: **72**
Tennessee: **3,221**
Wisconsin: **968**

In addition to cases brought by the EEOC, employers must contend with private litigants. A single plaintiff received an eye-popping jury verdict of more than $185.8 million in 2014 for workplace discrimination in violation of federal law. This is reported by VerdictSearch as a record for a single plaintiff.

According to the 2014 Edition of *Employment Practice Liability: Jury Award Trends and Statistics*, which reports on suits for discrimination, retaliation, wrongful termination, and violations of whistleblower laws against employers, from 2007-2013, the median compensatory award for federal cases overall was $104,000, while the mean for the same period was $437,566. The state verdict average for 2007-2013 was, and has been, about 1.5 times the average federal court verdict award: a median of $241,119, and a mean of $652,422.

Jackson Lewis attorneys are available to discuss preventive strategies to reduce the risk of being the target of a potentially costly employment lawsuit, where damages may include back pay and benefits, front pay, punitive or exemplary damages, reinstatement, and promotion. The business case for implementing worker training on harassment and discrimination, among others types of workplace strategies, is worth considering.

UNUSUAL STATE LAWS

Employment laws can vary drastically from state to state. Jackson Lewis recently surveyed its more than 50 offices around the country to get the attorneys' views on unusual employment law in their jurisdictions that multi-state employers should know about. The following indicates some of these laws in Midwestern states:

Illinois

The Illinois Wage Payment and Collection Act provides for a 10-year statute of limitations and penalties of 2 percent per month for unpaid wages (820 I.L.C.S. 115/14).

Indiana

Indiana's wage deduction statute permits deductions from an employee's wages only pursuant to a written agreement (i) signed by the employee; (ii) that, by its terms, is revocable at any time by the employee; and (iii) that provides for a deduction only for one of the limited number of reasons specifically provided for in the statute. A violation of the statute permits an employee to recover treble damages and attorneys' fees (Ind. Code Sec. 22-2-6-2).

Iowa

Veterans in Iowa are allowed Veteran's Day off as a holiday (Iowa Code Sec. 91A.5A).

Kansas

Kansas requires employers to provide employees an unpaid "reasonable leave" (usually six weeks) to return from pregnancy — even if the employee is not eligible for Family and Medical Leave Act (FMLA) or other leave (Kan. Admin. Regs. Sec. 21-32-6).

Michigan

Discrimination or harassment based on one's height or weight is prohibited (MCL Sec. 37.2202).

Minnesota

Employees who test positive for drugs or alcohol the first time must be allowed to participate in and complete a treatment program and return to work (Minn. Stat. Sec. 181.953).

Missouri

Employers are required to respond to a former employee's written request for a description of his or her employment and a true statement of the cause, if any, for the employee's separation. Failure to comply with this mandate can subject an employer to punitive, in addition to actual, damages (Mo. Rev. Stat. Sec. 290.140.1).

Nebraska

Noncompete agreements are enforceable in Nebraska only if they are limited to restricting a former employee from contacting customers with whom the employee actually did business and had personal contact (*Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121 (Neb. 2014)).

Ohio

Managers and Human Resources personnel can be named individually as defendants and held jointly and severally liable with the employer in employment discrimination claims (Ohio Rev. Code Sec. 4112.01; *Genaro v. Central Transport, Inc.*, 703 N.E.2d 782 (Ohio 1999)).

South Dakota

The Sioux Falls and Rapid City Human Relations Commissions have jurisdiction over charges of discrimination arising in those cities (S.D. Code Sec. 20-12-5).

Tennessee

The Volunteer State has adopted statutory caps for employment civil rights and whistleblower claims (Tenn. Code Ann. Sec. 4-21-313).

Wisconsin

Wisconsin's Fair Employment Act prohibits discrimination based on "creed," marital status, conviction record, honesty testing, and use of lawful products during nonworking hours (Wis. Stat. Sec. 111.31). Also, the city of Madison has adopted an ordinance prohibiting discrimination based on "non-religion" (ORD-15-00039).

If you have any questions about these, please contact V. John Ella, (EllaJ@jacksonlewis.com), Beverly W. Garofalo (GarofalB@jacksonlewis.com), or the Jackson Lewis attorney with whom you regularly work.

(A longer version of this article was published in Wolters Kluwer's *Employment Law Daily*.)

JACKSON LEWIS NEWS

We are pleased to announce Shareholder **Natalie Nathanson** has joined our **Chicago** office. She brings more than a decade of experience in the field of employee benefits and executive compensation. Ms. Nathanson has experience providing complex legal services to parent and subsidiary companies in connection with employee benefits plans, ensuring compliance with applicable federal laws and regulations, including ERISA, and designing and drafting employee benefit plans. She has developed strategies for benefit plans to manage Internal Revenue Service and Department of Labor audits and investigations successfully.

We welcome **Richard L. Connors** to our **Kansas City Region** office as Shareholder. Mr. Connors has more than 25 years of experience representing management in a wide variety of employment and labor law matters. Mr. Connors is listed in *The Best Lawyers in America*© and has been included in *Chambers USA* and Missouri and Kansas *Super Lawyers*.

We welcome Shareholder **Craig A. Cowart** and Of Counsel **Sally F. Barron** to the **Memphis** office. Mr. Cowart has represented clients in labor and employment law cases of all types, including collective actions and multi-party lawsuits. Mr. Cowart frequently counsels and represents clients in wage and hour related matters and regularly handles lawsuits, arbitrations, and administrative claims involving allegations of discrimination, harassment, retaliation, as well as disability accommodation issues. Mr. Cowart spent a portion of his career as an in-house counsel responsible for all employment-related legal matters. He regularly assists clients in establishing and implementing effective policies and procedures and counsels clients regarding issues in the workplace.

Ms. Barron practices in all areas of employment law, representing employers in state and federal courts and before administrative agencies. She is experienced in handling claims brought before the EEOC and lawsuits arising under the ADA, the ADEA, the FLSA, Title VII, and the Tennessee Human Rights Act. Ms. Barron regularly advises clients on a variety of employment matters, including employee handbooks and policies, severance agreements and other employee contracts.

Also joining Jackson Lewis are Associates **Melanie I. Stewart**, in the **Chicago** office, **Janelle L. Williams**, in the **Kansas City Region** office, **Jessica C. Källström-Schreckengost**, in the **Omaha** office, and **Alyssa M. Toft** and **Elizabeth S. Gerling**, in the **Minneapolis** office.

Welcome to all!

JACKSON LEWIS WEBINARS

Available 24/7, Jackson Lewis Webinars highlight our attorneys' insights on critical employment law issues. Some recently posted webinars include:

- Strategies for Handling Workplace Violence Concerns
- Conducting Workplace Drug and Alcohol Testing Lawfully and Effectively
- Data at Risk: How to Assess and Address Data Security, and Implement Your Information Security Plan
- Key Trends in Employee Whistleblower Litigation
- PERM Labor Certification 101
- North of the Border: What Multinationals Need to Know About Canadian Labor Employment Law
- How to Handle an OSHA Inspection

Visit www.jacksonlewis.com/webinars for these and other resources.

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Complexities of the Workplace: Critical Issues – Creative Solutions

May 20, 2015

Great American Ball Park
100 Joe Nuxhall Way
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TOPICS INCLUDE:

- Equal Employment Opportunity Commission and Verdict Update
- New Department of Labor Overtime Regulations
- Labor Board Activism
- When Does Blowing the Whistle Give Rise to Whistleblower Status?
- Dealing with an Employee's Unlawful Conduct
- Corporate Wellness Plans and Compliance with New Regulations

What Every Employer Needs to Know About the National Labor Relations Board's Expedited Election Rules, Changing Joint Employer Rules, Social Media, and Other Recent Developments

May 21, 2015

Office of Jackson Lewis P.C.
Park Center Plaza 1
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(Lower Level Conference Center)
Independence, Ohio 44131

Presented by Jackson Lewis attorneys James M. Stone, Jeffrey B. Keiper Kathi Portman Tinerello, and Allen Binstock, Cleveland Regional Director, National Labor Relations Board.

(Part of the Cleveland Spring 2015 Workplace Law Seminar Series.)

2015 Chicago Half-Day Program – Minimizing Risk and Moving Toward Greater Certainty: How Recent Changes in Labor and Employment Law Can Provide Roadmaps for Employers to Reduce Risks

May 21, 2015

Hamburger University at the McDonald's Campus
2715 Jorie Boulevard
Oak Brook, Illinois 60523

Join the Jackson Lewis Chicago Office for an informative afternoon, followed by a networking cocktail hour.

TOPICS INCLUDE:

- Starting at the End
- She's the Perfect Candidate, But She Has a Noncompete — Now What?
- The NLRB Continues to Pave the Way for Unions
- Top Ten Ways to Get Yourself into a Class Action or DOL Investigation
- Can We Talk? Strategies for Mastering the ADA's "Interactive Dialogue" Requirement for Reasonable Accommodations and Illinois' New Pregnancy Law
- Class Action Waivers for Employment Law Disputes: Where Are We and Where Do We Want to Be?

Question? Contact Meghann Eff at meghann.eff@jacksonlewis.com.

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The firm has more than 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters. Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies. The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities.

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