

LEGISLATIVE UPDATES

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I. RECENT ADA & ADA CASES

- A. **Cancer in Remission Is Considered A Disability under the ADA.** In *Hoffman v. Carefirst of Fort Wayne, Inc.*, Hoffman had renal cancer, which was in remission. While Hoffman was able to work a 40-hour week, without restrictions, Carefirst, his employer, informed him that due to increased business he would need to work 65 to 70 hours per week and commute 40 miles a day. Hoffman was terminated despite providing a physician's certification that he could only work a 40-hour week, and so he sued Carefirst for disability discrimination under the ADA.

Carefirst argued that Hoffman wasn't disabled, as defined by the ADA, since Hoffman's cancer was in remission, did not substantially limit a major life activity, and Carefirst did not "regard him as disabled." It pointed out that Hoffman worked without any restrictions, he carried out his regular job duties of 40 hours a week as a service technician for a full year, and did not miss any significant time off work. Finally, it argued that Congress did not intend for "all cancer survivors in remission, with no medical evidence of active disease, to be considered disabled as a matter of law for the rest of their lives."

The Court disagreed, pointing out that the ADA, which applies since the alleged violation occurred after the ADA was passed, clearly provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Thus, the case survived summary judgment.

- B. **Hopkinson v. Peninsula Hospital Center.** Hopkinson recently sued her former employer, Peninsula Hospital Center, for disability discrimination, but because the alleged violation occurred before January 1, 2009, the ADA, rather than the ADA, applied which made all the difference in this case. Hopkinson had diabetes, for which her physician prescribed medications and dietary restrictions. Her employer terminated her for sleeping at her desk while on duty, and she claimed she was disabled under the ADA, since the fatigue was due to the diabetes. But while under the ADA she would have been considered disabled, the ADA only protects "qualified individuals" who can prove "substantial limitation" of a "major life activity."

The Court determined that Hopkinson's diabetes and resulting fatigue did not constitute a substantial limitation of a major life activity; Hopkinson wasn't restricted from performing any job duties, and as long as she followed her physician's instructions she wasn't likely to experience any adverse job-related symptoms. And the ADA, unlike the ADA, takes into account mitigating factors when determining whether a person is substantially limited in a major life activity. In this case, the diabetes was, or could have been, controlled by medication, and so she was not considered disabled within the meaning of the ADA.

II. THE RELATIONSHIP BETWEEN THE ADA, FMLA, & WORKERS' COMPENSATION

Employers must think of the ADA, FMLA, and Workers' Compensation at the same time. After all, these three laws overlap and intersect and are not always entirely consistent. For instance, when an injured employee is out on Workers' Compensation, the employer should consider running the clock on FMLA, and at the same time consider how the employee's injuries provide him or her protection under the ADA and any resulting reasonable accommodations the employer may have to make in bringing the employee back to work. Too often, employers view each law in a vacuum and as a result, end up in hot water.

III. GENETIC INFORMATION NONDISCRIMINATION ACT

A. **EEOC Final Regulations.** On November 9, 2010, the EEOC issued Final Regulations on the employment provisions of GINA. The Regulations clarify that an "employee" is defined as either an applicant or an employee. Further, an unlawful "request" for an employee's genetic information includes actively listening to third-party conversations and searching a person's personal affects if done for the purpose of obtaining genetic information. Making requests for information about an individual's current health status is also forbidden if it is done in a way that is likely to result in a covered entity obtaining genetic information. Inadvertent discoveries of genetic information, however, are not considered unlawful "requests" under most circumstances.

1. **The Internet.** While a "Request" includes Internet searches "likely to result in an employer obtaining genetic information," the Final Regulations exonerate employers who inadvertently discover an employee's genetic information online, whether in relation to a simple Internet search (e.g., Google) of an employee's name for legitimate, job-related purposes, or by accessing the employee's social networking webpage, (e.g., Facebook), as long as the employee gives the employer permission to access the webpage. But an employer cannot ask a question on a social networking website that is "likely to result in uncovering genetic information."
2. **Storage of GINA Information.** While genetic information must be kept separate from an individual's personal file, the Regulations clarify that the genetic information may be kept in the same file as medical information subject to the ADA.
3. **Safe Harbor Language for Medical Inquiries.** The EEOC encourages employers to use the following model language when requesting otherwise lawful health information on medical exam/inquiry forms: "**The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or**

family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

IV. THE TROUBLE WITH INDEPENDENT CONTRACTORS

- A. **The Crackdown.** Independent contractor misclassification is currently a hot issue for federal and state enforcement agencies. Why is this? Unemployment funds are in dire straits in Colorado, and so it is aggressively seeking premium payments for as many covered workers as possible. The federal government also has its own financial woes and the IRS is looking to lay its hands on every cent it can get. Meanwhile, the U.S. Department of Labor, armed with fresh stimulus money, is ready to take on the pervasive criticism that it has been soft on employers over the past few years. What does this mean for employers? Currently, they could be: 1) exposed to huge medical costs for misclassified employees who have on-the-job injuries, but are not covered by the employer’s workers’ compensation insurance; 2) ordered to pay all back taxes owed to the IRS, with interest, plus penalties of between 12 and 35 percent; 3) audited by federal and state agencies for back pay and back taxes, as well as possible fines and penalties; 4) they may find themselves in private or class-action litigation.
- B. **Steep Fines for Misclassifying Employees as Independent Contractors under Colorado Law.** HB09-1310, which became law on June 2, 2009, ups the ante for employers when it comes to not paying unemployment taxes on independent contractors who are really employees. The Department of Labor may impose a fine of up to \$5,000 per misclassified employee for the first misclassification with willful disregard, and for a second or subsequent misclassification with willful disregard, a fine of up to \$25,000 per misclassified employee. Additionally, upon a second violation, an order prohibiting the employer from contracting with the State, or receiving any funds from the performance of contracts with the State for up to two years after the date of the order may be imposed.
1. “Misclassification of employees” is defined in the new law as “erroneously classifying a person as an independent contractor, free from control and direction of the employer in the performance of services, when the employer cannot show an exception to the general rule under the unemployment statute that the service being performed for the employer is presumed to be employment.” Thus, the burden is on the employer to prove independence of the worker.
 2. The state legislature in enacting HB09-1310 explained that misclassified employees posed a “significant problem” in Colorado that leads to underpayment of employment taxes and gives businesses who misclassify an unfair competitive advantage over businesses that properly classify employees and pay appropriate taxes. The new Act encourages anyone who is aware of misclassifications (including your competitors) to file a complaint with the Division of Employment and Training. The Division will

investigate and take action. A new poster is coming out that all employers must post in a conspicuous place at work to ensure that everyone in the workplace is aware of this new law and how to file a complaint. The poster should be available soon on the Division's website at www.coworkforce.com.

3. In fact, the Colorado Division of Labor and Employment's Website advises that "any person may file a written complaint alleging that an employer has misclassified an individual, who is performing work, as an independent contractor." Further, the website provides contact information for reporting such alleged violations.
- C. **The 2011 Federal Budget.** As part of the 2011 Federal Budget, the DOL and Department of Treasury have teamed up on a joint proposal, the \$25-million-dollar "Misclassification Initiative," which eliminates incentives for employers to mis-classify employees; strengthens the ability of the agencies to penalize employers who mis-classify; and provides greater protection to employees who have been mis-classified. The initiative also provides grants to boost States' incentives to pursue the issue, as well as funds to hire 100 additional enforcement personnel who will pursue worker misclassification. The federal budget includes \$117 billion for the DOL, whose Wage and Hour Division will be allocated \$244 million under the proposed budget. It would use the money to hire 350+ new employees, to train investigators to detect worker misclassification and to focus its efforts on industries where misclassification is most rampant.
- D. **Taxpayer Responsibility, Accountability, and Consistency Act of 2009.** The 2011 federal budget increases the likelihood for passage of Taxpayer Responsibility, Accountability, and Consistency Act of 2009 (Senate bill S. 2882, and its companion House bill, H.R. 3408), which would all but eliminate the existing 530 Safe Harbor provisions allotted to employers, allowing safe harbor relief only if an independent contractor classification was based on a reasonable reliance on either a written determination from the IRS that the individual (or someone in a substantially similar position) was not an employee, or if an IRS employment tax examination determined as much. This would make it more difficult for employers to avoid a potentially large employment tax assessment after incorrectly classifying a worker as an independent contractor, and would increase information reporting penalties. It would also require employers to ask the IRS to determine whether a worker is an independent contractor or employee.

V. SOCIAL NETWORKING POLICIES

- A. **Facebook Postings = Protected Concerted Activity.** American Medical Response of Connecticut, Inc., a Connecticut ambulance company, is in trouble with the NLRB for allegedly firing a union employee who posted negative comments about her supervisor on her personal Facebook page and for maintaining an overly broad Internet policy. Evidently, when the employee's supervisor asked her to prepare an investigative report concerning a customer complaint about her work, she requested, but was denied, union representation. Later that day, from her home computer, the employee posted a negative comment about her

supervisor on her personal Facebook page, and received supportive responses from her coworkers, which led her to post further negative comments.

The NLRB alleges the employee was suspended and later terminated for her Facebook postings because they violated the company's Internet policies. It further determined the employee's Facebook postings constituted protected concerted activity and that parts of the company's Internet policy were unlawful, including one that prohibited employees from making disparaging remarks about the company or supervisors and another that prohibited employees from mentioning the company in any way over the Internet without company permission. According to NLRB, such provisions constitute interference with the employees' right to engage in protected concerted activity. A hearing on the case is scheduled for January 25, 2011.

VI. THE DREADED MEDICAL MARIJUANA UPDATE

- A. **Medical Marijuana & Unemployment Benefits.** Score one for the Colorado employer! In ICAO Docket No. 9428-2010 (July 21, 2010), an employee, who was a card-carrying medical marijuana user, was denied unemployment benefits for using medical marijuana off the job.

The employer's drug policy prohibited employees from using illegal drugs while off-duty. The employee in question tested positive for marijuana metabolites, and though he wasn't impaired at the time, he was terminated. He then applied for unemployment benefits. Now, in order for an employee to be disqualified for benefits under Colorado's unemployment statute, there must be a "presence in an individual's system, during working hours, of not medically prescribed controlled substances." During the hearing, the hearing officer determined that the former employee had a "prescription" for marijuana from a physician for back pain, and because Colorado law permits medical marijuana, and the medical marijuana in the employee's system stemmed from the marijuana "prescribed" by a physician, the employee was entitled to full unemployment benefits. The employer appealed to the Industrial Claim Appeals Office (ICAO).

ICAO unanimously reversed the hearing officer's decision, initially determining that marijuana is illegal under federal law. And, since marijuana is still a controlled substance under federal and state law, neither allowing marijuana to be prescribed by a licensed medical practitioner or to be dispensed by a licensed pharmacist, the employee *couldn't* have a legal prescription for marijuana (the physician's certification that the employee *did* have didn't pass muster). The ICAO further determined that the unemployment statute's provision, which disqualifies an employee from unemployment benefits if the employee has tested positive for non-prescribed drugs, does not conflict with the Colorado constitution, which decriminalizes the use of medical marijuana by registered cardholders, since the constitution specifically states that an employer does not have to accommodate the use of medical marijuana in the workplace. The former employee was thus denied unemployment benefits.

VII. THE EEOC, CREDIT CHECKS AND OTHER STUFF

- A. The EEOC conducted hearings on October 20, 2010 to determine the effect of employer credit checks as a screening method used in hiring employees. The result of those hearings is that the use of credit checks creates a disparate impact on women and minorities, since they're likely to have worse credit ratings than white males. So, because these two groups are protected under Title VII, employers who continue to screen employees via credit checks may find themselves fighting more and more disparate impact claims. Add to that the fact that the EEOC has publicly vowed to pursue systemic discrimination, and employers may well see the EEOC expanding its investigation of a single charge if it does detect an employer's systemic pattern of discrimination. If this happens, employers would have to hand over all new-hire files, so be sure to keep files current and complete.
- B. A couple of notes from a meeting with the EEOC.
1. The EEOC has taken renewed interest in the Fair Pay Act.
 2. EEOC has seen a rise in charges in age discrimination and pregnancy discrimination; in particular employers' claim that there was a "business reason" for adverse employment actions against pregnant applicants/employees.
 3. EEOC recommends that employers not consider conviction records outside of seven years and must be relevant to the position.
 4. EEOC trying to figure out what to do with medical marijuana.
 5. EEOC disagrees with Congress that the ADAAA only expands coverage by a million individuals.