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Federal & Minnesota Employment Law Update - August 2014

FEDERAL

Americans With Disabilities Act (ADA)

Diabetes, Epilepsy, Cancer, and Intellectual Disabilities in the Workplace: These conditions have become a significant point of interest for the Equal Employment Opportunity Commission (EEOC) regarding how afflicted individuals are treated in the workplace. Universally, an employer may not ask questions about any applicant's medical condition or require an applicant to have a medical examination before it makes a conditional job offer. However, there are particular questions that may be asked with regard to an applicant or employee's disclosure of cancer, diabetes, epilepsy, or intellectual disabilities.

Mental Health Leave: Employees with mental health impairments may qualify for leave under the Family and Medical Leave Act (FMLA). Additionally, employees with mental health impairments may also qualify for reasonable accommodations under the ADA, the Minnesota Human Rights Act (MHRA), and the Wisconsin Fair Employment Act (WFEA). As will be seen in the case discussions below, any mental health impairment that substantially limits brain or neurological functioning would be considered the limitation of a major life activity, and would therefore qualify the employee for accommodation under the ADA. The following conditions are among the qualifying conditions for accommodation or leave: Major Depressive Disorder, Bipolar Disorder, Post Traumatic Stress Disorder (PTSD), Obsessive-Compulsive Disorder, Learning Disabilities, Dyslexia, Autism, Intellectual Disability, etc.

Pregnancy: Normal pregnancy is not a disability covered by the ADA but a condition resulting from pregnancy, such as gestational diabetes, can be a disability if it substantially limits a major life activity. However, the EEOC's recent emphasis on pregnant workers suggests that it will be taking the position that the ADA requires accommodation for normal pregnancies. Currently, the EEOC is working on a new guidance regarding leaves and other types of accommodations that apply to normal pregnancy, suggesting that it may announce that it considers normal pregnancy to be a disability under the ADA.

Eliminating Barriers in Recruitment and Hiring

Consideration of Arrest and Conviction Records: The EEOC has issued a guidance that discusses the use of an individual's criminal history in making employment decisions. Employers must remember that "any time [they] use an applicant's or employee's background information to make an employment decision, regardless of how [they] got the information; [they] must comply with federal laws that protect applicants and employees from discrimination." The EEOC has established two analytic frameworks for reviewing employment discrimination, and that is by looking for disparate treatment and disparate impact.

An example of disparate treatment would be an employer rejecting an African American applicant based on his criminal record, but hiring a similarly situated Caucasian applicant with a comparable criminal record. Disparate impact occurs when "an employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity." Hiring policies that have disparate impact on protected groups should be reviewed and removed if certain criminal records are not an accurate predictor of individuals who will be responsible, safe, or reliable employees.

Additionally, there are many complications with using consumer-reporting agencies (CRAs) to obtain background checks on employees or prospective employees. Criminal records gathered by CRAs may be inaccurate because they have not complied with court orders to seal and/or expunge arrest or conviction records. The EEOC Enforcement Guidance relating to the consideration of arrest and conviction records in employment decisions has a list of best practices and additional information.

Religious Garb and Grooming in the Workplace: Title VII prohibits disparate treatment based on religious belief or practice, or lack thereof. Additionally, employers are prohibited from segregating employees based on religion, grooming practices, or dress requirements. An example of this would be an employer forcing an employee, who is Muslim and wears a hijab, to work in a department where the employee would not have visual interaction with customers out of fear that customers would stop being patrons due to the employee's religious

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dress. Employers are required to make exceptions to their dress and grooming requirements once they are notified by the employee that an accommodation is needed for religious beliefs. Employers must honor requests for accommodation so long as it does not impose any undue hardship on the employer. Lastly, an employee need not use the phrase, "I need an accommodation," and in many instances no request is required as many religious dress requirements are open and obvious. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2010), *petition for certiorari pending*.

Whistleblower Law

OSHA issued regulations governing the procedures and time frames for whistleblower retaliation claims. This regulation was issued in response to the passage of the FDA's Food and Safety Modernization ACT (FSMA). OSHA's regulation provides protection to employees that: report violations of the Federal Food, Drug, and Cosmetic Act (FD&C), testify in a proceeding concerning a violation, assist or participate in a proceeding concerning a violation, or objections or refusals to participate in a violation of the FD&C.

Lastly, the Dodd-Frank Wall Street Reform and Consumer Protection Act and the False Claims Act will impact whistleblower suits as each provides monetary incentives for the reporting of wrongdoing. Under Dodd-Frank, a whistleblower may recover 10-30% of a recovery initiated under the act. Under the False Claims Act, individuals filing suit on behalf of the federal government for any observed wrongdoing are provided 15-30% of any recovery. These amendments and additions will impact the handling and frequency of whistleblower claims over the next several years.

Significant Cases

<u>Telecommuting</u>**:** The courts recently have been recognizing more frequently that the "workplace" is anywhere that an employee can perform their job duties. A plaintiff, who suffered from severe, intermittent, flare ups of irritable bowel syndrome (IBS), that caused the plaintiff to be physically absent from the workplace, contended that she was able to work remotely from home. She eventually requested that she be allowed to telecommute on days where she was unable to be physically present within the office due to the flare-ups. Ford denied her accommodation request and instead offered that her desk be relocated closer to the restroom or reassign her to a different job within the company that would be more suitable for telecommuting. The plaintiff rejected these options and eventually she was terminated. *E.E.O.C. v. Ford Motor Co.*, 12-2484, 2014 WL 1584674 (6th Cir. Apr. 22, 2014).

The Sixth Circuit Court of Appeals held that the plaintiff was disabled under the text of the ADA as her IBS "is a physical impairment that substantially limits the operation of her bowel, a major bodily function." The court of appeals elaborated that "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the 'workplace' is anywhere that an employee can perform her job duties."

<u>Episodic or Remission Recognized as Qualifying Impairment:</u> Gogos was a welder and pipefitter who alleged he was terminated in violation of the ADA when he sought leave for medical treatment of his high blood pressure. Plaintiff would occasionally suffer intermittent vision loss for a few minutes at a time when his blood pressure would spike "to 'very high.'" The trial court dismissed his claim, but the court of appeals reversed and held that the allegations in the complaint were sufficient to plead disability under the ADAA. In their opinion, the court of appeals cited 42 U.S.C. § 12101(4)(D), which states, "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Additionally, the court of appeals noted that the recently amended EEOC regulations list hypertension as an example of an impairment that may be episodic. *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170 (7th Cir. 2013).

There are three major takeaways for this case: (1) periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity; (2) major bodily functions (circulatory, endocrine, etc.) are major life activities; and, (3) someone who began taking medication for a major bodily function before experiencing substantial limitations related to the bodily function would still be an individual with a disability if, without the medication, he or she would now be substantially limited in terms of bodily functions.

<u>Severance Pay - Taxable Wages for Employer:</u> Quality Stores, a large employer, was forced to lay off nearly all of its employees as it was filing for bankruptcy. The employer agreed to pay severance to most of its former employees and attempted to claim that the payments were not taxable wages under the Federal Insurance Contribution Act (FICA). The IRS eventually rejected the employers attempts to avoid these taxes and the company filed suit. The supreme court held that all employers providing severance to former employees are required to pay payroll taxes under FICA. *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395 (2014).

STATE - MINNESOTA

Minnesota Human Rights Act Amendments

On May 13, 2014, Governor Dayton signed a bill to modify the Minnesota Human Rights, which will take effect on August 1, 2014. Previously, plaintiffs bringing claims under the MHRA were only entitled to a bench trial; however, the modified statute states, "A person bringing a civil action seeking redress for an unfair discriminatory practice, or a respondent, is entitled to a jury trial." This change will significantly impact the outcome of MHRA claims as a jury is far more unpredictable than a judge. Even though the statute has changed, employees are still barred from bringing a second claim under the Minnesota Whistleblower Act if they are already seeking redress for discriminatory practices on the same facts through MHRA procedures. This is because the MHRA provides that its procedure, while pending, shall be exclusive.

Women's Economic Security Act

The Women's economic security act seeks to close the gender pay gap, increase income for working women and their families, expand access to high quality childcare, protect women from discrimination in the workplace, encourage women in non-traditional high-wage jobs, etc.

<u>Sexual and Domestic Assault:</u> Unemployment compensation coverage has been expanded to include victims of domestic abuse, sexual assault, or stalking. This coverage includes the employee or immediate family member of the employee. Additionally, the definition of employment misconduct must now exclude employment misconduct that was a result of being a victim of sexual assault or stalking. (Effective October 5, 2014).

<u>Parental Leave Amendment:</u> The Minnesota Parental Leave Law has been amended to require a twelve-week unpaid leave for pregnancy, birth or adoption. This leave would be available to the biological or adoptive parent in conjunction with the birth or adoption of a child, or a female employee for prenatal care or incapacity due to pregnancy, child birth or related health conditions. Additionally, paid parental, disability, personal, medical, or sick leave or accrued vacation provided by the employer is included within the total twelve weeks unless otherwise agreed to by the employer. This leave can be taken anytime within 12 months after the child is adopted or leaves the hospital. (Effective August 1, 2014).

<u>Care of Relatives and Sick Leave:</u> Employees may now take sick leave to care for their mother-in-law, father-in-law, and grandchild in addition to the previously approved relative list. Sick leave may also be used as safety leave, whether or not the employer allows sick leave for that purpose, for such reasonable periods of time as may be necessary. Safety leave is defined as "leave for the purposes of providing or receiving assistance because of sexual assault, domestic abuse, or stalking." (Effective August 1, 2014).

<u>Pregnancy Accommodations:</u> Employers must provide reasonable accommodations to an employee for health conditions related to pregnancy or childbirth if she so requests, with the advice of her licensed health care provider, unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer's business.

A list of reasonable accommodations would include: temporary transfer to a less strenuous or hazardous position, seating, frequent restroom breaks, and limits to heavy lifting. The following accommodations would not require that the employee obtain advice from her licensed health care provider, nor may an employer claim undue hardship for: more frequent restroom, food, and water breaks; seating; and limits on lifting over 20 pounds. (Effective immediately).

<u>Nursing Mother Accommodations:</u> Employers must provide a nursing mother area, which must be someplace other than a bathroom. The nursing mother area must be "shielded from view and free from intrusion from co-workers and the public and include access to an electrical outlet." (Effective August 1, 2014).

<u>Government Contracts and Pay Equity:</u> Any private business with more than 40 employees and State of Minnesota contract[s] of, or in excess of, $500,000.00 must ensure compliance with equal pay laws. This requires that private businesses have an equal pay certificate or it has certified in writing that it is exempt. Equal pay certificates and exemptions can be acquired through the Minnesota Department of Human Rights. (Effective August 1, 2014).

Whistleblower Law

Last year, the Minnesota legislature amended the Minnesota Whistleblower ACT (MWA) such that the amendments may have a significant impact on how whistleblower claims are handled within the state. Most notably, statutory definitions were added to the act in order to define the words "good faith," "penalize," and "report." These definitions no longer allow for a strict interpretation of the words, allowing courts to maintain a suit for longer than was previously allowed as per the established case-law surrounding the MWA.

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Medical Marijuana

Minnesota's medical marijuana law will have major implications for employers regarding their drug and alcohol testing policies. An employer is not allowed discriminate against a person who is legally registered with the medical cannabis program, in hiring, termination, or any term or condition of employment for the employee's positive drug test for cannabis components or metabolites. This prohibition is excepted if a registered patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment. Employees required to undergo employer drug testing may present verification of enrollment in the patient registry as part of the employee's explanation of cannabis use.

Minimum Wage

New minimum wage standards will be in effect August 1, 2014. The new standards still draw a distinction between large and small employers, but the threshold defining the two categories has changed.

Large Employers: Large employers are enterprises whose annual gross volume of sales or business is not less than $500,000.00 exclusive of excise taxes at the retail level. This should be a major point of reference as the old law had a $625,000.00 threshold. For a large employer, the minimum wage pay rate will be $8.00 per hour beginning on August 1, 2014; $9.00 per hour beginning August 1, 2015; $9.50 per hour beginning August 1, 2016.

Small Employers: Small employers are defined as enterprises with gross sales or business less than $500,000.00. For small employers, the new minimum wage rate is $6.50 per hour beginning August 1, 2014; $7.25 per hour beginning August 1, 2015; $7.75 per hour on August 1, 2016.

Resources

- EEOC Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. (2012). **http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm**
- EEOC Publication: Religious Garb and Grooming in the Workplace: Rights and Responsibilities. **http://www.eeoc.gov/eeoc/publications/qa_religious_religious_garb_grooming.cfm**
- Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act. **http://www.eeoc.gov/laws/types/cancer.cfm**.
- Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act. **http://www.eeoc.gov/laws/types/diabetes.cfm**
- Questions & Answers about Epilepsy in the Workplace and the Americans with Disabilities Act. **http://www.eeoc.gov/laws/types/epilepsy.cfm**
- Questions & Answers about Intellectual Disabilities in the Workplace and the Americans with Disabilities Act. **http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm**

If you have any questions regarding any employment law topic provided here or elsewhere, please contact Pat J. Skoglund, Marlene S. Garvis or Vicki A. Hruby.

The reference materials contained in this update have been abridged from a variety of sources and should not be construed as legal advice.

Please consult legal counsel with any questions concerning this update.

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