EMPLOYMENT LAWSCENE ALERT: MAKING SURE YOUR WELLNESS PROGRAM COMPLIES WITH THE LAW

Litigation against employers by the EEOC regarding the implementation of wellness programs is ongoing in federal court, but no instructive decisions have been issued by the courts. Employers wishing to implement a wellness program but stay out of litigation may feel like they have little guidance on the issue, but there are some instructions out there on how to avoid, at the very least, disability discrimination lawsuits brought by the EEOC.

In April 2015, the EEOC published proposed interpretive guidance on how employers can run wellness programs without running afoul of the Americans with Disabilities Act (ADA). The EEOC's guidance is an attempt to balance the ADA's goal of limiting employer access to medical information and the Affordable Care Act's goal promoting wellness programs. The proposed rule does not touch on how wellness programs may be affected by any other laws prohibiting discrimination, such as Title VII, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act (GINA).

As a brief review, the ADA prohibits discrimination against individuals with disabilities and restricts the medical information employers may obtain from employees and applicants. Wellness programs are generally programs and activities that promote a healthier lifestyle or prevent disease, which in turn attempts to improve employee health and reduce healthcare costs. Wellness programs may also incorporate health risk assessments and biometric screenings that measure an employee's health risk factors. Incentives are usually offered for either participation (participatory wellness programs) or for achieving certain health goals (health-contingent wellness programs). Incentives are both financial and in-kind incentives, such as time-off awards, prizes, and other items of value. These wellness programs, however, must comply with the ADA, among other employment laws.

The focus of the EEOC's attack upon employers' wellness programs has been on whether such programs are voluntary. The ADA generally restricts employers from obtaining medical information from employees through disability-related inquiries or medical examinations. However, the ADA and GINA do permit employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program. Voluntary is defined as neither requiring participation or penalizing employees who do not participate. The main effect of the EEOC's proposed regulations is the extent to which incentives affect the voluntary nature of wellness programs.

In its guidance, the EEOC has decided that it will allow certain incentives related to wellness programs, while limiting others to prevent economic coercion that could render the program

involuntary. This can be achieved, according to the proposed rule, by allowing an employer to offer incentives up to a maximum of 30% of the total cost of employee-only coverage to promote participation. Under the proposed rule, employers are not allowed to require participation or deny coverage to or take an adverse employment action against any employee who does not participate. Employers would be further required to provide a notice that clearly explains what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. The proposed rule also allows disclosure of medical information obtained by the wellness program to employers only in aggregate form, except as needed to administer an employer's health plan.

Finally, wellness programs must provide reasonable accommodations to employees with disabilities so that such employees have the ability to participate in wellness programs and earn the incentives offered by the employer. This is in line with the employer's duty to accommodate under the ADA.

Despite the EEOC's guidance, there remain unanswered questions. For example, the incentive language allows for up to 30% of the cost of employee-only coverage, but there is no guidance on whether incentives can be offered to encourage other family members who are covered under the insurance to participate in wellness programs. It is also expected that separate guidance on how GINA and wellness programs can coexist will be forthcoming.

Although the notice and comment period on the proposed rule has ended, the final rule is not likely to be issued until the fall. Employers should keep apprised of this rule making to make sure that their wellness programs do not find the attention of the EEOC.

EMPLOYMENT LAWSCENE ALERT: DOL MEMO STATES THAT MOST WORKERS ARE EMPLOYEES UNDER THE FLSA

Today, July 15, 2015, the U.S. Department of Labor (DOL) issued a memo regarding the classification of workers as either employees or independent contractors, which stated that most workers qualify as employees under the Fair Labor Standards Act (FLSA). The DOL noted that the FLSA has an expansive definition of employment and that workers who are misclassified may miss out on many protections that they should be given, including minimum wage, overtime, unemployment compensation, and workers' compensation.

Under the FLSA, a worker is an independent contractor if he is genuinely in business for himself; if a worker is economically dependent on the employer, however, the worker is an employee. To determine if the worker is economically dependent on the employer, the DOL looks at the six-factor economic realities test, which must be applied consistently with the broad scope of the FLSA. These factors are 1) the extent to which the work performed is an integral part of the employer's business; 2) the worker's opportunity for profit or loss depending on his or her managerial skill; 3) the extent of the relative investments of the employer and the worker; 4) whether the work performed requires special skills and initiative; 5) the permanency of the relationship; and 6) the degree of control exercised or retained by the employer. None of the six-factors is determinative; instead, the DOL states that they are indicators of the broader concept of economic dependence, which is the ultimate determination. Importantly, neither an employee's job title or an agreement between the worker and the employer factor into the analysis of whether a worker is an employee or an independent contractor. It is the reality of the working relationship that is determinative of an individual's employee or independent contractor status.

The DOL's conclusion is that most workers are employees under the FLSA and are thus entitled to all of the protections afforded employees. Therefore, employers need to be proactive and regularly revisit and reassess their use and classification of independent contractors to avoid liability for misclassification. If an individual is being treated like an employee, he or she needs to be classified as an employee. Employers who do otherwise are likely to find themselves facing litigation.

EMPLOYMENT LAWSCENE ALERT: TRANSGENDER EMPLOYEES AND BATHROOMS—WHAT SHOULD AN EMPLOYER DO?

A few weeks ago, we posted a blog about the protection of transgender employees under Title VII. Since then, Caitlyn Jenner has graced the cover of Vanity Fair, the EEOC has further solidified its position on the matter, and OSHA has weighed in on the issue.

One matter that has come up in many of the transgender discrimination lawsuits that have been filed to date is the use of bathrooms. This is the situation in the most recent lawsuit by the EEOC. It alleges that a Minnesota company discriminated against a transgender employee by not letting her use the women's restroom and subjecting her to a hostile work environment.

Likely in response to these issues, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued "A Guide to Restroom Access for Transgender Workers." OSHA requires, among other things, that employees are provided with sanitary and available restrooms. It is estimated that 700,000 adults in the United States are transgender, and OSHA stated that restricting employees to restrooms that do not conform with their gender identities or by requiring them to use a segregated gender-neutral or other specific restrooms singles transgender employees out and potentially makes them fear for their safety. Therefore, OSHA recommends that all employees should be permitted to use the facilities that correspond to their gender identity, and each employee should determine the most appropriate and safe option for him or herself. OSHA proposed two other optional solutions: 1) single occupancy, gender-neutral facilities for all employees; or 2) use of multiple-occupant, gender neutral restrooms with lockable single occupant stalls for all employees. Further, OSHA's best practices recommend that employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to appropriate facilities.

Based on the EEOC's current litigation trend and OSHA's best practices recommendation, employers should permit all employees to use the facilities that correspond with their gender identity. For now, the stance of the federal government is that employees should have unrestricted access and use of restrooms according to their full-time gender identity. Employers will need to deal with these situations on a case-by-case basis to find solutions that are safe, convenient, and respectful.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT SETS STANDARD FOR EEOC CONCILIATION EFFORTS

On Wednesday, April 29, 2015, the U.S. Supreme Court issued its unanimous decision in *Mach Mining LLC v. Equal Employment Opportunity Commission*, addressing the issue of the level of judicial review allowed regarding the EEOC's duty to conciliate charges of discrimination prior to litigation. We have discussed this decision in this blog from its early stages (here, here, and here), and the Supreme Court has finally proven what we said in July 2013, that the EEOC's conciliation efforts are indeed subject to judicial review, to be true. However, the Supreme Court did not choose to hold the EEOC to the "good faith" standard that many employers had hoped for or the mere facial examination that the EEOC had championed, instead striking a balance between the two by limiting the court's review to a "narrow" one. In rendering its decision, the Supreme Court recognized the EEOC's

extensive discretion to determine the kind and amount of communication necessary with any employer to satisfy its statutory duty to engage in conciliation efforts prior to filing suit. Under this new standard, a court's review is limited to reviewing only that the EEOC gave the employer notice of the charge and an opportunity to achieve voluntary compliance.

It has always been the law under Title VII that, prior to the EEOC suing an employer for discrimination, it must first engage in conciliation. Not until after efforts at conciliation have failed may the EEOC file a lawsuit in federal court. The Supreme Court held that Congress meant to allow judicial review of administrative actions, including the duty to attempt to conciliate. The Court obviously rejected the EEOC's "just trust us" method of review.

According to the Supreme Court, in order to show that the EEOC has met its statutory burden to conciliate, it must notify the employer of the claim and give the employer an opportunity to discuss the matter. The judicial review is limited to those elements. Simply, the EEOC must inform the employer about the specific discrimination alleged by describing what the employer has done and which employees have suffered. The EEOC must then try to engage the employer in a discussion in order to give it a chance to remedy the alleged discrimination, although the EEOC is still allowed substantial flexibility in the process. The Court found that delving into whether or not the EEOC had conciliated in good faith conflicted with the latitude Title VII gives the EEOC, imposed extra procedural requirements, and was in conflict with Title VII's protection of the confidentiality of conciliation efforts. It is still within the discretion of the EEOC to accept a settlement or bring a lawsuit. Typically, a sworn affidavit from the EEOC that it has performed these obligations will be sufficient.

If the employer alleges through concrete evidence, either through its own affidavit or otherwise, that the EEOC has failed in its duty to conciliate, courts are allowed to engage in necessary fact-finding to decide the issue. If a court decides that the EEOC did not meet its statutory duty to conciliate matters prior to filing suit, the appropriate remedy is to stay the action, rather than dismissal, and order the EEOC to undertake the mandated conciliation efforts.

Although the EEOC will likely still be aggressive in its litigation efforts, the Supreme Court's decision will ensure that the EEOC must engage in some form of articulable conciliation efforts, even if it is just a minimal effort, before commencing suit against an employer. Employers who believe that the EEOC has not met its statutory obligation to engage in conciliation will still have, thanks to the Supreme Court's decision, the "failure-to-conciliate" defense in its quiver.

EMPLOYMENT LAWSCENE ALERT: NLRB GENERAL COUNSEL ISSUES GUIDANCE ON EMPLOYEE HANDBOOKS

On March 18, 2015, the NLRB General Counsel issued a report concerning recent cases that raise significant legal and policy issues regarding employee handbook rules. Recently, the NLRB has been focusing on non-union employer's handbooks and whether they violate Section 7 of the NLRA, which permits employees to discuss wages, hours, and other terms and conditions of employment and to otherwise engage in protected concerted activity. The most clear violation of Section 7 would be a ban on union activity; however, if an employee could reasonably construe a rule or policy to prohibit activities protected by Section 7, the NRLB will find that it is in violation of the law. The report gives specific examples of handbook policies that were found lawful and unlawful and why. The report specifically states that even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act are not allowed under the law. The rules and policies that are most frequently called into question are those covering confidentiality, professionalism, anti-harassment, trademark, photography/recording, and media contact.

Confidentiality policies cannot specifically prohibit employees from discussing the terms and conditions of their employment (e.g., wages, hours, workplace complaints), nor can the policies be reasonably understood to prohibit such discussions. Policies cannot broadly define "employee" or "personnel" information as confidential. However, the NLRB does recognize that employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

Employee conduct policies will run afoul of the NLRA if they prohibit employees from engaging in disrespectful, negative, inappropriate, or rude conduct toward the employer or management absent sufficient clarification or context. Even false or defamatory statements can find protection under Section 7 unless they are "maliciously false." Employers can promulgate blanket rules that require employees to be respectful and professional to clients and competitors because there is a sufficient business interest in that behavior. Employers are also permitted to ban insubordinate behavior. However, employers cannot ban employees from negative or inappropriate discussions with their fellow employees because employees have the right to argue and debate with each other about unions, management, and the terms and conditions of employment, which can sometimes be contentious. Therefore, anti-harassment rules cannot be overly broad either. Employers cannot ban employees from discussing terms and conditions of employment with third parties, including news media. Although employers may designate who can make official statements to the media on behalf of the company, they cannot ban employees from speaking to third parties on their own behalf or on behalf of other employees.

Although employers have an interest in protecting their intellectual property, the NLRB has taken the stance that rules prohibiting employees' fair use of that property are unlawful. This "fair use" includes using things such as company names and logos on picket signs, leaflets, and other protest material because these are non-commercial uses. According to the report, employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. Therefore, a total ban on photography, recordings, or use of personal devices is overbroad if it can be read to prohibit use during breaks and other non-work time.

Employer rules regulating when employees can leave work are unlawful if employees could reasonably read them as forbidding protected strikes and walkouts, as the right to go on strike is a fundamental Section 7 right. Policies should reflect that leaving their posts for reasons unrelated to protected activity will subject employees to discipline.

Because Section 7 allows employees to engage in activity to improve their terms and conditions of employment, which may be in conflict with the interests of an employer, broad conflict-of-interest policies are unlawful. Employer policies should be limited to legitimate business interests.

The differences between what is lawful and what is not are incredibly nuanced, and the General Counsel's report did not present what could be considered "bright line" rules. The NLRB has stated that it will read rules in context with other rules and not in isolation, which could lead potentially unlawful policies to be held lawful in context. Overall, the emphasis is that rules need to be narrowly tailored and include context and examples in order to steer clear of violating the NLRA.

It should be noted that the General Counsel's report is not law but, instead, represents the current enforcement policy of the NLRB. However, given the NLRB's recent aggressive position relative to enforcing Section 7 rights in non-union workplaces, employers should review their handbooks to determine if any of their rules or policies may run afoul of the NLRB's current set of enforcement policies concerning employee handbooks.

EMPLOYMENT LAWSCENE ALERT: GOVERNOR WALKER SIGNS RIGHT-TO-WORK BILL

Wisconsin Governor Scott Walker has officially signed Right-to-Work legislation, which, as discussed in last Friday's blog, will allow workers covered by union representation to not pay union dues if they do not wish to. Although the union will still have the right to collectively

bargain on behalf of all private-sector employees in a bargaining unit, employees can elect not to pay the union dues or fees. This law affects new collective bargaining agreements, as well as the renewal, modification, or extension of a current collective bargaining agreement. However, employees who are currently under a collective bargaining agreement will have to continue paying union dues until that agreement expires or is renewed, modified, or extended. The full text of the bill can be found here.

EMPLOYMENT LAWSCENE ALERT: RELIGIOUS ACCOMMODATIONS AND YOUR WORKPLACE

Under Title VII of the Civil Rights Act of 1964, employers are required to accommodate employees' religious beliefs. Two recent cases demonstrate the importance of recognizing when religious accommodations might be necessary.

In March 2014, the EEOC published guidance on religious garb and grooming in the workplace. The guidance states that an employee does not have to use "magic words" to request an accommodation and that a request for a religious accommodation may not even be necessary when the religious practice is "obvious." Of course, the EEOC's guidance is only guidance and does not have the force of law.

Whether notification to the employer and a specific request is necessary to succeed on a Title VII religious discrimination case will be decided by the United States Supreme Court in the coming year when it hears the case *EEOC v. Abercrombie and Fitch*. The case stems from a Muslim applicant who was not given a job at the retailer, allegedly because she wore a headscarf to her interview that conflicted with the store's dress code, which prohibited headgear. The case was dismissed because the Tenth Circuit found that forcing employers to infer that an accommodation was necessary was too burdensome and that a request for accommodation from the employee is necessary before the employer is required to act on it. The Supreme Court will determine whether that is the correct standard for religious discrimination. Until a final decision is made, employers should be aware of the potential need for a religious accommodation even if the employee does not request it because the EEOC is likely to support employees who bring these kinds of claims.

Another recent example is the January 15, 2015 jury verdict out of a West Virginia federal court. In *EEOC v. CONSOL Energy, Inc. and Consolidated Coal Company*, the jury determined that the employer had violated Title VII by failing to accommodate a mine worker's religious objection to using a biometric hand-scanning system that tracked employee time. The employee claimed that he had a sincerely-held religious belief that the hand-scanning system

was connected to the “mark of the beast” and the Antichrist and retired instead of using the device. Although the employer offered to let the employee use his left hand with his palm up, the jury determined that it was not a reasonable accommodation.

Employers need to be aware of the need to discuss accommodations for sincerely-held religious beliefs with their employees and their applicants when those issues arise.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT HEARS ORAL ARGUMENTS ON THE EEOC’S DUTY TO CONCILIATE

On Tuesday, January 13, 2015, the United States Supreme Court heard oral arguments in *Mach Mining LLC v. EEOC*, 13-1019, the outcome of which will have a significant effect on the EEOC conciliation process and a case we have posted on this blog previously. The dispute revolves around whether — and to what extent — courts can enforce the EEOC’s obligation under Title VII to conciliate before filing a lawsuit.

The EEOC initially filed a Title VII gender discrimination complaint against Mach Mining in 2011 for allegedly failing to hire or refusing to hire women because of their gender. The EEOC claims that it filed suit after trying to reach a prelitigation settlement through its conciliation process. Mach Mining disagreed and asserted as an affirmative defense in its answer to the complaint that the EEOC had failed to conciliate in good faith as required by the statute.

The Seventh Circuit Court of Appeals created a circuit split when it ruled that employers cannot allege as a defense that the EEOC didn’t work hard enough to reconcile disputes before filing suit. All other circuit courts have held that the adequacy of conciliation is subject to court review, although the standard of review varies between courts. According to the Seventh Circuit, the failure-to-conciliate defense went against the statutory prohibition on using what was said and done in conciliation as evidence in future proceedings.

During oral arguments, Mach Mining’s attorney suggested that courts be able to conduct a “modest inquiry” into whether the EEOC attempted to resolve a claim of discrimination through conciliation and, if determined that the EEOC had not done so, to require it to conciliate. The EEOC, on the other hand, does not want the courts to have any ability to review its pre-suit conciliation efforts. Chief Justice Roberts, however, voiced his concern that he was “troubled by the idea that the government can do something that [the courts] can’t even look at whether they’ve complied with the law.” Justice Beyer echoed Chief Justice

Roberts' concerns by saying that "everything just about" is subject to judicial review. Justice Scalia called the EEOC's request that its conciliation efforts be exempted from judicial review as "extraordinary."

The main concern over any judicial inquiry into the EEOC's pre-suit conciliation efforts is the level of inquiry a court should undertake. This is where the appellate circuit courts differ. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith.

Justices Kagan and Ginsberg's questions seemed to belie a belief that Congress has not put an onerous requirement on what was required of the EEOC in conciliation. Justice Sotomayor stated that she didn't "know how you make something that's designated by Congress as informal into a formal proceeding." Justice Kennedy stated that Title VII's requirement that the EEOC try to eliminate allegedly unlawful employment practices "by informal methods of conference, conciliation, and persuasion" were "very difficult words" for Mach Mining's position. Mach Mining responded by stating that "informal" did not mean that the EEOC could do whatever it wanted.

Although the Court continued to ask the parties to give them a rule that would be acceptable to them, neither came up with an answer the Justices seemed satisfied with. The EEOC initially argued that it should only be required to show that an attempt to conciliate had been made. Justice Scalia, however, honed in on the fact that the EEOC is obligated to try to obtain an agreement that is acceptable to it but, in order to try to obtain an agreement, you have to tell the other side what you want. Similarly, Chief Justice Roberts did not like the "just trust us" approach. The EEOC eventually conceded that the Court could require it to say that it informed the employer of what it objected to and that they had communicated about the issue.

Mach Mining argued that the Court should require that the EEOC reach out to the employer and, if the employer responded that it wanted to conciliate, that the EEOC should have to tell the employer what would be an acceptable offer, which they could legally obtain in court, and how they had arrived at that number. Justice Kennedy stated that this would be akin to enforcing the good faith bargaining of contracts and labor law, which he referred to as "a morass." Justice Kagan called this inquiry "intrusive."

The decision in this case will have a large impact on how the EEOC conciliates cases prior to litigation and how employers will need to approach such conciliation efforts. If the Court rules in the EEOC's favor, it would likely mean that the EEOC could become even more aggressive with its charge to the courthouse with high profile cases, as a lack of good faith or reasonableness would not create a barrier to the EEOC's efforts to litigate a case that an employer might be more than willing to conciliate on fair and reasonable terms — if only

given an opportunity.

EMPLOYMENT LAWSCENE ALERT: OSHA IMPLEMENTS NEW REPORTING REQUIREMENTS

New Occupational Safety and Health Administration (OSHA) reporting requirements went into effect on January 1, 2015. These new rules require all employers, even those who are exempt from routinely keeping OSHA injury and illness records due to company size or industry, to report all work-related fatalities, hospitalizations, amputations, and losses of an eye to OSHA.

Employers must report work-related fatalities within 8 hours of finding out about them. Employers will also now be required to report all amputations, partial amputations, losses of an eye, and any inpatient hospitalization of an employee due to workplace injuries to OSHA within 24 hours of the incident. Previously, employers only had to report hospitalizations if they involved three or more employees, which was rare. Employers do not have to report a hospitalization if it is only for diagnostic testing or observation. OSHA's new reporting requirements will dramatically increase the number of incidents that have to be reported to OSHA.

For example, employers will now be required to report all work-related amputations as OSHA broadly defines "amputations" to include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; and amputations of body parts that have since been reattached.

Employers will have three options by which to comply with their reporting requirement to OSHA. First, employers may make a report by telephone to the nearest OSHA area office. Second, employers may make a report by telephone to the 24-hour OSHA hotline at 1-800-321-OSHA (6742). Lastly, employers can report online through OSHA's website (www.osha.gov), which is expected to be operational by mid-January. It is OSHA's plan to publish all reports of injuries on its website.

Because there is likely to be additional reporting to OSHA, OSHA will have additional enforcement opportunities, which means additional inspections for employers. Because OSHA enforcement inspections typically result in citations, this could have a significant impact on the companies that face these inspections due to on-the-job injuries.

Employers should make sure that they are aware of their new reporting duties and are

complying properly. More importantly, employers should make sure that they have safe work practices and procedures, have proper safety policies, provide adequate safety training, and ensure that all workplace safety rules are strictly enforced. Preventing workplace injuries should be every employer's goal.

EMPLOYMENT LAWSCENE ALERT: NLRB DECIDES THAT WORKERS CAN USE THEIR EMPLOYERS EMAIL — EVEN FOR UNION ORGANIZING

On December 11, 2014, in *Purple Communications, Inc.*, the NLRB overturned its 2007 *Register Guard* decision and held that employees have the right to use their employers' email systems for nonbusiness purposes, including communicating about union organizing. The NLRB emphasized the importance of email as a critical means of communication for employees, especially in today's workplace culture, and noted that some personal use of an employer email system is common and often accepted by employers. Because communication among employees is a foundation for the exercise of Section 7 rights, the NLRB held that employers who have chosen to give employees access to their email systems must now permit those employees to use those systems for statutorily protected communications on nonworking time. Employers are permitted to monitor employees' email use to ensure that it is being used properly. Employers will not be engaged in unlawful surveillance of Section 7 activity unless they do something "out of the ordinary," such as increasing monitoring during an organizational campaign or focusing monitoring effects on protected conduct or union activists.

In an attempt to balance the employees' Section 7 rights to communication with the legitimate interests of employers, this decision only applies to workers who have already been given access to their employers' email systems; employers are not required to provide access to employees. Businesses may also be able to justify a complete ban on non-work use of email if they can point to special circumstances that make such a prohibition necessary to maintain production or discipline. It will be the employer's burden to show what the interest at issue is and demonstrate how that interest supports any email use restrictions the company has implemented. The decision did not address email access by non-employees or any other type of electronic communication systems.

Employers should review their computer use and e-mail policies in light of this decision. Employers should determine which employees should or need to have access to their

computer and e-mail systems and whether there is any business justification to impose a complete ban on non-work use of email.