Warner Norcross + Judd

HR FOCUS

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Recent DOL Enforcement Action Highlights Risk of Not Offering Reasonable Alternative in Wellness Programs

NORBERT KUGELE
616.752.2186
nkugele@wnj.com

Although wellness programs seem like they should be simple, they are subject to a number of complex legal requirements.

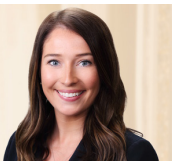
One requirement under HIPAA's nondiscrimination rules is that employers that have rewards or penalties associated with a particular health factor must offer a reasonable alternative standard so that an employee who cannot meet the health factor can still earn the reward or avoid the penalty. Failing to provide such an alternative can lead to enforcement actions and even penalties under ERISA. In a recent Department of Labor (DOL) enforcement action against Dorel Juvenile Group, Inc., the DOL reached a $160,000 settlement with Dorel over its tobacco use program.

Under Dorel's program, employees who used tobacco were required to pay a surcharge if they enrolled in the company's medical plan. While Dorel offered employees smoking cessation classes, completing the class didn't necessarily avoid the surcharge; the only way to avoid the surcharge was for the employee to certify that he or she did not use tobacco. Because employees who were addicted to nicotine and could not quit using tobacco were not offered an alternative way to avoid the surcharge, the DOL filed suit against Dorel. As part of its settlement with the DOL, Dorel agreed to reimburse $145,635 directly to participants who paid the surcharge from 2013 through 2017.

The DOL also found that Dorel had breached its fiduciary duty under ERISA by failing to operate the program in the best interests of plan participants. Penalties for breach of fiduciary duty are particularly risky for employees involved in the administration of employee benefits, as they can be assessed against any individual who exercises discretion over the management of an employee benefit plan. In this particular case, the DOL did not single out any specific individual but instead chose to assess nearly $30,000 in penalties against the company for the breach of fiduciary duty, which it then agreed to reduce to $14,563.50 as part of the settlement.

Whether you are putting in place a new wellness program or making changes to an existing program, the Employee Benefits Practice Group at Warner Norcross + Judd can work with you to ensure that your wellness program will meet all legal requirements.

Users Beware: Personal Conversations Are Not So Personal in Court



BRIANNA RICHARDSON
616.752.2558
brichardson@wnj.com

ALLYSON TERPSMA
616.752.2785
aterpsma@wnj.com

With today's technology, everything is accessible at our fingertips. Work emails are a click away from personal emails and text messages offer an even faster mode of communication. Most professionals understand that work emails can be discovered in litigation. This means that an adverse party can obtain these communications if they are relevant to the dispute. However, courts are now ordering parties to produce communications from personal email accounts as well. Below are a few tips to avoid discovery pitfalls.

Almost 2.7 million emails are sent per second: over 200 billion every day. That's over 30 emails for every person on earth, every day.

TIP #1: BE CAREFUL WHAT YOU PUT IN WRITING.

We often advise clients to timely document employee issues such as performance concerns and disciplines, accommodation requests and the interactive process, and internal complaints and investigations. However, for certain discussions, typically those involving compliance questions or litigation concerns, in-person or telephone conversations are preferable to written communications.

In a Texas case, an HR manager's email became the plaintiff's "smoking gun" in her sexual harassment and retaliation case. The plaintiff, a female sales representative, reported sexual harassment multiple times to HR. The employer fired the harassing employee. Unfortunately, coworkers criticized the plaintiff for the harasser's firing. The plaintiff quit and filed suit, alleging that the employer knew about the harassment and retaliation she faced and did nothing. During discovery, the court ordered the employer to produce company emails. One email essentially proved the plaintiff's case. The HR supervisor had sent an email to department supervisors stating, "Ultimately, the fear is that no matter what is done [plaintiff] will attempt to sue for retaliation. This may be an issue for us, as we have kept no real written documentation of any incident on file. We will need to create documents to complete her file." The court found this email to prove that the employer was aware of the harassment and then tried to fabricate employment documents. The employer ended up settling with the plaintiff.

TIP #2: EVEN PERSONAL EMAILS MAY BE DISCOVERABLE.

Courts will order parties to produce their personal emails if those emails are likely to contain information that is relevant to the lawsuit. In a New York case, the plaintiff sued six male attorneys for underpaying female attorneys. The male attorneys claimed that individually, none of them had power to hire or fire employees and offered their business emails as proof. However, the plaintiff insisted that these six attorneys were all members of a sub-committee that exercised unilateral control over hiring and firing decisions. The plaintiff asked the court to order production of the attorneys' personal emails. The male attorneys insisted that they had never conducted business from their personal accounts. However, the court relied on the plaintiff's allegation that the relevant emails were in the attorneys' personal accounts and ordered the attorneys to produce their personal emails. Not only did these emails indicate that there was a sub-committee, but they also were very damaging to the law firm.

TIP #3: TEXTING FROM YOUR PERSONAL PHONE IS NOT AN EXCEPTION EITHER.

If you conduct business via text, your personal text messages are likely to be discoverable. In a Tennessee case, the plaintiff, a female chef, filed suit for sexual harassment and tortious

interference with employment. The plaintiff claimed that the owner of the restaurant was sexually harassing her. She put up with the treatment for some time but eventually complained via email to the restaurant's director of operations. Shortly after the director of operations received this email, he terminated the plaintiff. The employer claimed her termination was work related and had nothing to do with her harassment complaint. The court found that, in general, restaurants often conduct business via text messages and ordered production of the owner's and director of operations' text messages. One text stated that they needed to make the plaintiff's harassment claim "go away." Another text even discussed blaming her firing on a work slip-up instead of her harassment claim. The court ruled in favor of the plaintiff on both claims.

TIP #4: EVEN IF YOU DO NOT CLICK SEND, DRAFTS ARE DISCOVERABLE TOO.

In a case out of Minnesota, two snowmobile manufacturers went head to head in a patent infringement battle. The defendant was convinced that the other side had copied its snowmobile design. The defendant claimed that the infringement could be exposed by the engineer's design drafts, and the court ordered them to be produced. The engineer's handwritten notes were produced and proved to be potentially damaging.

In an employment case, courts can order the production of draft investigation reports, performance evaluations or disciplinary actions. Employers are advised to keep only final, clean copies of such personnel documents.

TIP #5: IF YOU MUST PUT IT IN WRITING, CONSIDER INVOLVING YOUR ATTORNEY.

Although no secure server can keep written communications out of court, discussions with your attorney for the purpose of obtaining legal advice are shielded from discovery by the attorney-client privilege. This privilege exists to encourage clients to communicate openly and honestly with their attorneys, without the fear that those communications will later harm them. So if you have a sensitive employment matter to discuss, loop your attorney into the conversation for confidential legal advice.

401(k) and Pension Sponsors — Do You Know Where Your Securities Are?

MARY JO LARSON
248.784.5183
mlarson@wnj.com

The Department of Labor (DOL) has recently turned its attention to securities lending. If you are responsible for selecting funds for a retirement plan, you must understand securities lending.

WHAT IS SECURITIES LENDING?

Third parties may want to borrow a security for a short time. The borrower will typically "short sell" the security, i.e., sell the security expecting to buy it back later at a lower price, generating a profit equal to the decline in the price of the security. The borrower pays a fee to borrow the security and provides collateral to secure the loan (usually cash or an equivalent). At the end of the loan period, the borrower returns the security to the plan. The plan benefits by receiving the fee and investing the collateral, while continuing to receive any dividends and growth in the value of the loaned security.

Securities lending is not without risk. If the borrower fails to return the security and the collateral is insufficient, the plan could suffer a loss. In addition, because the plan trustee or investment manager usually acts as the lending agent and shares in the profits, lending is a prohibited transaction (PT) under the Employee Retirement Income Security Act of 1974 (ERISA). The practice is so common, however, that the DOL has granted a prohibited transaction exemption (PTE) that hinges on approval of the arrangement by an independent fiduciary—*you*, the plan sponsor fiduciary.

> Securities lending is not without risk. If the borrower fails to return the security and the collateral is insufficient, the plan could suffer a loss.

WHAT DO YOU NEED TO DO?

1. Determine your responsibility.

When you approve a new investment, review the documents to determine whether you are approving securities lending. This will likely be the case if you are approving a collective investment trust (CIT). Many plans are turning from mutual funds to CITs because of the potential cost savings, but CITs carry additional risks and responsibilities for the fiduciary approving them. With mutual funds, the fund shares, not the underlying investments, are the plan's asset. With a CIT, the plan is appointing a CIT trustee—an ERISA fiduciary—for a portion of its assets, and the underlying investments *are plan assets*. So, when a plan CIT loans securities, a plan fiduciary is loaning *plan* assets. You are the independent fiduciary approving that fiduciary's profit on the lending.

2. Understand the securities lending program terms.

Before approving a CIT that includes securities lending, you should document your understanding of the following issues:

- *Who is the lending agent?* It most likely will be the trustee of the CIT or an affiliate.
- *Is the lending agent's share of the profits reasonable for the services provided?* Investigate what the standard share is for the level of assets invested in the CIT and the level of risk retained by the plan.

- *Do borrowers have to meet minimum requirements?* The lending agent should set strict standards borrowers must meet to limit the risk to the plan.
- *What types of collateral are required?* The lending agent should limit acceptable collateral to cash or cash equivalents and require that the value of the collateral exceed the value of the loaned security.
- *How is the collateral invested?* The lending agent should limit collateral investments to secure, limited duration investments.
- *What is the net profit to the plan?* Is it worth the risk?
- *What portion of assets are on loan at any time?* The more that is loaned, the higher the risk. Also, consider the effect of the lending on any asset allocation requirements.
- *What does the plan's investment policy statement say about securities lending?* Follow your Investment Policy Statement (IPS).
- *Who bears the risk of the arrangement?* Often the plan bears the entire risk of losses. If the arrangement is insured, determine what losses are covered.
- *Are any non-lending versions of the investment or a similar fund available?*
- *Is the CIT trustee also a part-owner of Equilend?* Equilend is a platform for lending securities that a number of lending agents co-own. The DOL has issued another PTE for their use of Equilend, which also depends on your consent. If the lending agent is one of Equilend's owners, you must understand the implications of that PTE as well.

3. Determine whether the lending arrangement is in the best interest of plan participants and document your reasons for your conclusion.

4. Make sure all the other requirements of the relevant PTEs are met.

When you sign CIT documents, you alone are responsible for approving any securities lending arrangement disclosed. The CIT trustee is not responsible and will not highlight the issue apart from what appears to be a routine disclosure. The DOL expects you to determine whether the decision to permit securities lending was made with due care and in the participants' best interests.

Recreational Marijuana – Revisiting Your Drug and Alcohol Strategy

LOU RABAUT
616.752.2147
lrabaut@wnj.com

KAITLIN SHEETS
616.752.2564
ksheets@wnj.com

Joe is a great employee. His work ethic and likable personality recently landed him a coveted supervisor position. You random drug test employees every few months because most employees operate heavy machinery. Joe tested positive. Joe explains that he has never been high at work. Joe tells you that he went to a buddy's house for a party last weekend. One of Joe's friends brought a joint which the friends passed around. Joe thought this was okay because marijuana is now legal in Michigan and he smoked marijuana on a Saturday, not during work hours.

After Colorado legalized recreational marijuana, a 2014 survey of Denver-based employers revealed that approximately 20% of employers increased their drug testing policies and protocols.

Carrie is a Neonatal Intensive Care Unit (NICU) nurse at your hospital. She graduated top of her class in nursing school. Patients adore her. Her duties include administering treatments and medications to infants, operating advanced medical devices, and educating family members on infant care. One night, Carrie is catching up with another nurse between rounds. Carrie says work is great, but personal issues with her boyfriend are stressful. Her anxiety makes it hard to sleep through the night. Carrie then mentions that, because marijuana is now legal, a friend recommended smoking marijuana before bed to help her fall asleep. She tells the nurse that this has really decreased her stress levels and she is able to fall asleep much faster. Dr. Johnson, the physician on staff, overhears Carrie's entire conversation.

NOW WHAT?

Employers have long dealt with difficult scenarios involving alcohol and drugs. With the legalization of recreational marijuana in Michigan, the complexity will rise. Each employer's situation is unique. Here are some factors employers should consider when creating their strategies.

Nature of your jobs. Do you have a safety sensitive workplace? Do employees operate dangerous equipment? Do you have employees who operate medical devices or interact with patients? And, given that marijuana is still illegal under federal law, do you hire employees to perform federal contracts or who are subject to federal agency regulations?

Testing. What are the mechanics of your drug testing policy? Do you test pre-employment, randomly or for cause? Do you conduct preliminary on-site alcohol/drug testing or will you transport employees off-site? How close is the nearest testing facility? Who will do the transporting? What about employees on second or third shift, or those working weekends?

Employers should consider the drug testing itself. Some drug test panels only test for five drugs. Some panels test for 14 drugs. What are the "drugs of choice" in your community and are you testing for them?

Discipline. What if an employee tests positive for alcohol or drugs? What if the employee refuses to take a drug test? Employers should consider whether their drug policies define discipline as giving employees one free pass or immediate termination. Will you draw a distinction between alcohol, marijuana and other drugs like cocaine, heroin or meth-amphetamines? Are you prepared to lose a top performer because of a positive marijuana test result?

Communicating expectations with employees. Whatever your drug and alcohol policy is, you should remind all employees of its details, especially in light of the new recreational marijuana law. Employees need to understand that a drug test could still be positive even if the employee used marijuana hours, days or even weeks before the test. And, they should understand the consequences of a positive test.

Summary. The legalization of recreational marijuana in Michigan certainly raises new concerns for employers. Now is a good time to revisit your drug and alcohol policies.

NEWS DIGEST:

ROBERT DUBAULT
231.727.2638
rdubault@wnj.com

A Cautionary Tale When It Comes to Separation Agreements

The Sixth Circuit's recent decision in *McClellan v. Midwest Machining, Inc.*, No 17-1992 (Aug. 16, 2018), reinforces an old rule when it comes to separation agreements and plows new ground as to whether an employee who signs a separation agreement must return the severance payment before suing. Everyone should know that separated employees must be given a reasonable amount of time to consider and sign a separation agreement. Because Ms. McClellan felt bullied into signing the separation agreement before leaving on the day she was fired, the separation agreement did not bar her subsequent lawsuit. However, because she did not repay the severance before she sued, the trial court dismissed her case. On appeal, the Sixth Circuit reversed the trial court and held for the first time that the "tender back" doctrine does not bar claims under Title VII or the Equal Pay Act. It relied on the laws' remedial nature, along with the practical fact that requiring plaintiffs to return severance before suing would tempt employers to break the law in hopes the employee could not repay the money. However, the court did hold that the severance must be deducted from any award the employee might recover.

OSHA Memo Clarifies Agency's Stance on Safety Incentive Programs & Drug Testing

An October 2018 internal memo to regional OSHA administrators and state designees indicates that despite the Obama-OSHA rule prohibiting employer reprisals for employees reporting injuries, the Agency will not penalize well-intentioned efforts by employers to control on-the-job injuries through safety incentive programs or post-incident drug testing. Consistent enforcement of legitimate work rules is important, as is providing incentives to employees who report unsafe work conditions (instead of only penalizing employees for workplace injuries/illnesses), along with informing employees of their injury/illness reporting rights and responsibilities and the employer's non-retaliation policy. In addition, drug testing of all involved employees to evaluate the root cause of a workplace incident that did or could have resulted in an injury is permissible.

KENT SPARKS
616.752.2295
ksparks@wnj.com

Dust Off Your Loan Procedures to Avoid a Compliance Trap

A 401(k) plan that allows participants to take loans must specify the procedures for applying for a loan and the loan's repayment terms. These loan procedures are an important plan document, and you should review your plan's loan procedures regularly to ensure that they reflect the terms of your plan and your current practices for administering loans. If they don't, you risk walking into a compliance trap, and you should contact your Warner ERISA counsel to discuss updating your plan's loan procedures.

SAVE THE DATE

Warner's HR Seminar is coming to Grand Rapids, Michigan on Tuesday, May 7, 2019.

We look forward to seeing you there!
More details and registration will follow.

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900 FIFTH THIRD CENTER, 111 LYON STREET NW, GRAND RAPIDS, MI 49503-2487

ADDRESS SERVICE REQUESTED

Human Resources Attorneys

LABOR AND EMPLOYMENT

Ojone Ameadaji	616.752.2517
Edward Bardelli*	616.752.2165
Andrea Bernard*	616.752.2199
Kelsey Dame	616.752.2519
Gerardyne Drozdowski*	616.752.2110
Robert Dubault	231.727.2638
Pamela Enslen*	269.276.8112
Amanda Fielder*	616.752.2404
C. Ryan Grondzik*	616.752.2722
DeAndre' Harris	616.752.2331
Angela Jenkins	616.752.2480
Warda Ashraf Kalim	616.752.2570
Jonathan Kok*	616.752.2487
Matthew Nelson*	616.752.2539
Dean Pacific*	616.752.2424
Steven Palazzolo	248.784.5091
Johnny Pinjuv	231.727.2655
Louis Rabaut	616.752.2147
Kaitlin Sheets	616.752.2564
Margaret Stalker*	616.752.2767
Allyson Terpsma*	616.752.2785
Karen VanderWerff	616.752.2183
Elisabeth Von Eitzen*	616.752.2418
Michael Wooley	989.698.3715
B. Jay Yelton III*	269.276.8130

** Litigators*

EMPLOYEE BENEFITS

Katy DeVillez	616.752.2782
Stephanie Grant	248.784.5068
Anthony Kolenic, Jr.	616.752.2412
Norbert Kugele	616.752.2186
Mary Jo Larson	248.784.5183
Heidi Lyon	616.752.2496
Brianna Richardson	616.752.2558
Vernon Saper	616.752.2116
Kent Sparks	616.752.2295
Justin Stemple	616.752.2375
Jennifer Watkins	248.784.5192
Lisa Zimmer	248.784.5191