Employment Matters Blog - A blog about current developments & issues in employment, labor & benefits law

Mintz Levin | Mintz Levin Cohn Ferris Glovsky and Popeo PC

Posted by Martha Zackin on January 24, 2012

Reminder: Include GINA "Safe Harbor" Language in FMLA Forms

Employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors to covered employers, must comply with the Family and Medical Leave Act ("FMLA"). The FMLA requires covered employers to comply with various notification requirements, and allows employers to obtain medical certifications from employees requesting leave. The Department of Labor ("DOL") has authored various form notices and certifications, which employers may choose to use.

The DOL-drafted forms expire on January 31, 2012. New forms, which have been submitted to the United States Office of Management and Budget, are not likely to be approved before the old forms expire. Nevertheless, under the law, expired forms may continue to be used while new forms are awaiting approval.

But – and this is important – the soon-to-expire forms do not include the "safe harbor" language under the Genetic Information Nondiscrimination Act, which tells employees and their medical providers that they should not provide "genetic information" when responding to a request for certification.

GINA regulations define "genetic information" to mean information about:

(i) An individual's genetic tests;

(ii) The genetic tests of that individual's family members;

(iii) The manifestation of disease or disorder in family members of the individual (family medical history);

(iv) An individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or

(v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

The specific "safe harbor" language that should be included with any request for FMLA certification (or any request for medical information) to employees or their medical providers is as follows:

> 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 an individual or family member of the individual, except as specifically allowed by this law. 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 may be obtained by an employer without violating GINA when it requests family medical history to comply with the certification provisions of the FMLA, state or local family leave laws, or pursuant to a policy that permits the use of leave to care for a sick family

member and that requires all employees to provide information about the health condition of the family member to substantiate the need for leave. In this circumstance, the above-quoted "safe harbor" language is not required (but may be included).

This is not a change in the law. However, given the questions that have come up regarding the use of expired DOL forms, we thought it was an opportune time to remind our readers of GINA, and how to best protect themselves from inadvertent violations.

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Posted by Martha Zackin on January 26, 2012

Retaliation: 2012 and Beyond

Retaliation claims are here to stay. According to charge statistics recently released by the EEOC, retaliation claims rose to an all-time high of 37,344 in fiscal year 2011, and were included in 37.4% of all charges filed with the agency. Recent developments lead us to conclude that this trend will continue, in 2012 and beyond.

In December 2011, the U.S. Department of Labor ("DOL"), Wage and Hour Division ("WHD"), released guidance pertaining to prohibitions against retaliation under the Fair Labor Standards Act ("FLSA") and the Family and Medical Leave Act ("FMLA").

The WHD FLSA guidance, set forth in Fact Sheet #77a, incorporates the holding from the United States Supreme Court's decision in *Kasten v. Saint-Gobain*, where the Court expanded the FLSA's anti-retaliation provision to include an internal, verbal complaint made by an employee about possible FLSA violations. Specifically, Fact Sheet #77a states the WHD's position that:

- Employees are protected regardless of whether the complaint is made orally or in writing.
- Because the FLSA prohibits "any person" from retaliating against "any employee," the protection against retaliation applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA.
- Prohibitions against retaliation also apply in situations where there is no current employment relationship between the parties. For example, an individual is protected from retaliation by a former employer.

For more information about *Kasten v. Saint-Gobain*, click here.

As to the FMLA, Fact Sheet #77b gives specific examples of prohibited conduct, including:

- Refusing to authorize FMLA leave for an eligible employee,
- Discouraging an employee from using FMLA leave,
- Manipulating an employee's work hours to avoid responsibilities under the FMLA,
- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or,
- Counting FMLA leave under "no fault" attendance policies.

For more information about recent developments pertaining to the anti-retaliation provisions of the FMLA, click here and here.

With new statutory prohibitions against retaliation, such as the prohibitions set forth within the Dodd–Frank Wall Street Reform and Consumer Protection Act, and the recent developments described above and elsewhere (read more here and here), it does not take a crystal ball to predict that retaliation claims will continue to rise.

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Posted by Martha Zackin on September 28, 2011

California's DFEH Drops The Disability Discrimination Hammer - Largest Administrative Award In Its History

By Brandon T. Willenberg

On September 12, 2011, the California Department of Fair Employment and Housing ("DFEH") announced its largest-ever administrative award of $846,300 (and no, that's not a typo) against electrical supplier Acme Electric Corporation ("Acme") for firing an employee, Mr. Charles Richard Wideman, because he had cancer.

Here is what happened...

Mr. Wideman worked for Acme as western regional sales manager overseeing sales operations in the company's largest territory, a position that

required significant travel. He developed cancer. Although Acme granted Mr. Wideman's requests for time off for surgery and recuperative leave, when he requested further accommodation for the travel limitation his cancers caused, Acme refused to grant or even acknowledge these accommodation requests. Instead, Mr. Wideman's supervisor gave him an unfavorable performance evaluation, criticizing him for insufficient travel. Two months later, Acme terminated Mr. Wideman, allegedly because of his travel restrictions.

The DFEH rejected Acme's argument that Mr. Wideman's poor performance and travel restrictions led to his dismissal. Instead, the DFEH found Acme violated the California Fair Employment and Housing Act ("FEHA") by failing to accommodate Mr. Wideman's known travel limitation due to his cancers, failing to engage in a good faith interactive process, discriminating against Mr. Wideman because of his disability, and failing to take all reasonable steps necessary to prevent discrimination from occurring. The DFEH awarded Mr. Wideman $748,571 for lost wages, $22,729 for out-of-pocket expenses and $50,000 for emotional distress. And for good measure, it ordered Acme to pay $25,000 to the State's General Fund as an administrative fine.

California employers (or companies with California-based employees) have affirmative obligations under FEHA to reasonably accommodate employees' disabilities unless doing so would cause undue hardship – and establishing undue hardship is a significant hurdle for employers. Employers, as part of this accommodation process, are required to engage in a good faith interactive process to assess what, if any, reasonable accommodations are necessary. Acme learned these lessons the hard way. And while the Acme result certainly is not typical -- indeed it was billed as "historic" -- it certainly underscores the fact that California employers must be diligent in their assessment of employee disability issues, in engaging in the good faith interactive process, and in determining whether and how to reasonably accommodate an employee's disability. Failure to do so may just lead to a starring role in the DFEH's next press release about imposing another significant disability discrimination award.

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Recent happenings on EEOC's systemic discrimination initiative

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March 1 2012

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On February 22, 2012, a split U.S. Court of Appeals for the 8th Circuit in EEOC v. CRST Van Expedited, Inc.held that the EEOC must satisfy its investigation and good faith conciliation requirements under Title VII for each purported class member before bringing suit to maintain a Section 706 class action, as opposed to a pattern or practice action. The EEOC strongly disagrees with this approach because it will place significant burdens on the EEOC's investigators to develop class-wide evidence to bring a class action. Practically, this may mean that the EEOC will continue to pursue on-site investigations to develop class action type evidence and subpoena broader information that most employers are willing to voluntarily (without a subpoena) provide in response to a single complainant EEOC charge.

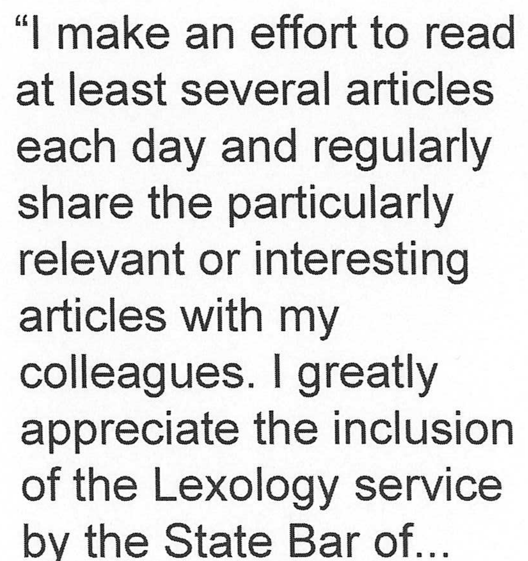
A similar issue is pending before the Sixth Circuit in EEOC v. Cintas Corp. in which the EEOC is appealing the district court's granting of summary judgment. Cintas successfully defeated the EEOC's claims asserting, like the defendant in CRT, that the EEOC failed to exhaust administrative remdies on behalf of the named plaintiffs. This CRT decision will places more stringent requirements on the EEOC to investigate something that might hinder its systemic discrimination initiatives.

The EEOC also implemented its new strategic plan for 2012 through 2016 in February. The plan identifies stopping and remedying unlawful employment discrimination as its core mission. It further set strategic objectives of combating discrimination through strategic enforcement and education and outreach. In 2011, the EEOC filed 23 lawsuits alleging systemic discrimination, with each case involving 20 or more individuals. Those cases are 14% of the EEOC's litigation docket. To date, the EEOC has had the most success in obtaining settlements based on allegations that employer's attendance policies failed to accommodate disabled employees. The most recent settlement was against Verizon in which the EEOC and Verizon settled for $20 million.

The EEOC continues to aggressively pursue systemic discrimination in the workplace. What remains to be determined is how much work courts will make them put into these matters before the reach litigation.

Tags USA, Employment & Labor, Litigation, Gardere Wynne Sewell LLP

If you are interested in submitting an article to Lexology, please contact Andrew Teague at ateague@lexology.com.



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Posted by Martha Zackin on August 24, 2011

EEOC: Employer Liable for Violating ADA Despite Employee's Failure to Adequately Document Disability or Need for Accommodation Prior to Filing Her Claim

In a case all employers should find troubling, the EEOC recently held that a federal agency-employer discriminated on the basis of disability by denying an employee's request for accommodation, *despite the fact that information the employee provided when making his request and during the time in which the employer and employee engaged in the required interactive process did not show either that the employee was disabled or how the accommodation related to his alleged disability.* In Harden v. Astrue, EEOC DOC 0720080002 (August 12, 2011) the EEOC found that

sufficiently detailed medical and other documentation was provided to the employer after the employee filed a charge of discrimination, during discovery process associated with the charge. Therefore, the EEOC concluded, the employee was disabled and entitled to reasonable accommodation.

Huh? So what's an employer to do? From the EEOC's perspective, the apparent answer is that an employer must continue to engage in the interactive process of accommodation indefinitely and must err on the side of allowing an accommodation.

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Employer's Practice of Requiring Medical Reasons for Absence in Doctor's Statements Violates ADA

By Ted Olsen

An employee (we'll call her Ms. Jones) who missed three days of work presents to you the following doctor's note: "Ms. Jones off work three days, will return next Monday." Do you have to accept this "because I said so" explanation? Is an employer entitled to more information before excusing such an absence under its sick leave policy? Can the company require the doctor to provide a description of Ms. Jones' condition? Even if a medical diagnosis is not required, can the employer require that the note say something more general, to help verify that the employee's absence was at least health-related? Perhaps something like, "Ms. Jones was seen by me today. I prescribed some medication, but it will take a few days for the medication to work. She will return to work next Monday."?

In a case defying real world logic, the U.S. District Court for the Southern District of California held that the first doctor's note (above) is legally sufficient, and that the other possibilities mentioned above would be unlawful medical inquiries under the Americans with Disabilities Act. *EEOC v. Dillard's, Inc.** In the course of this decision, the Court not only ruled that requiring more than the original note would be an intrusive and unlawful medical inquiry, but that there was no demonstrated business necessity for an employer asking for even a few crumbs of information to verify the health-related basis for an absence.

The case arose from a Dillard's store in El Centro, California. At that time, the store had a policy requiring that notes for health-related absences state "the nature of the absence (such as migraine, high blood pressure, etc....")". In practice, store management did not demand specific diagnoses, but rather, some general information providing a medical explanation for the employee's absence, such as the alternative note language ("it will take a few days for the medication to work ") suggested above. During the lawsuit, the store stopped its policy.

The lawsuit was filed by the EEOC on behalf of three employees, one of whom was fired for accumulating unexcused absences the last of which was not excused because her doctor's notes did not give a medical reason for her absence. The other two employees had provided detailed doctor's notes in compliance with the policy before their unrelated separations (one was fired for not returning from a medical leave and the other voluntarily quit).

The Court ruled that the policy violated the Americans with Disabilities Act, as it called for prohibited disability-related inquiries.** That section of the ADA prohibits an employer from making "inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability." Such inquiries of employees may be lawful under the ADA if they are "job-related" and required by "business necessity." When denying the company's summary judgment motion, the Court ruled that Dillard's lacked any business necessity to receive additional information from an employee's physician about an employee's absence, as proven by the employer's discontinuance of the policy during the litigation. Such a ruling basically means that a doctor's note need say nothing more than "I saw Ms. Jones. She will be back at work on Monday." The fact that Dillard's had decided to discontinue the policy - no doubt believing the policy was not worth the cost of litigation in California - did not necessarily mean the policy had not performed an important business-related function.

Although the Court's ruling technically decided only that the EEOC could proceed with its case, by denying the employer's only defenses, the ruling effectively decided the case on the merits. The EEOC was permitted to proceed with discovery to locate additional claimants.

* *EEOC v. Dillard's, Inc.*, Case No. 08cv1780-IEG(PCL) (S.D. Cal. Feb. 9, 2012).

** 42 U.S.C. § 12112(d)(4)(A).

Sherman & Howard has prepared this advisory to provide general information on recent legal developments that may be of interest. This advisory does not provide legal advice for any specific situation and does not create an attorney-client relationship between any reader and the Firm.

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