Claremont Management Group Presents
Employer Update
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By

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I. FMLA Requires "Fitness for Duty" Advance notice

Recent cases have found employers discriminated against FMLA recipients when returning to work if they were not told at the outset that they would have to meet a standard for returning to work. Accepting routine releases from employee's doctor is not an issue. Requiring more than that is an issue. See WH-382, Attached.

II. Service on a Federal Court Jury Protected

The Jury System Improvement Act:

> 28 § **1875. Protection of jurors' employment**
> "(a) No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States.
> "(b) Any employer who violates the provisions of this section—
> "(1) shall be liable for damages for any loss of wages or other benefits suffered by an employee by reason of such violation;
> "(2) may be enjoined from further violations of this section and ordered to provide other appropriate relief, including but not limited to the reinstatement of any employee discharged by reason of his jury service; and
> Penalty. (3) shall be subject to a civil penalty of not more than $1,000 for each violation as to each employee.
> "(c) Any individual who is reinstated to a position of employment in accordance with the provisions of this section shall be considered as having been on furlough or leave of absence during his period of jury service, shall be reinstated to his position of employment without loss of seniority, and shall be entitled to participate

Passed in 1978, but recent court activity reminds employers to be mindful.

III. Importance of Background Checks

Due to recent intimidation attempts by EEOC, there has been a concern that use of background checks should be reduced or eliminated. The recent case of Mindi M. v. Flagship Hotel Ltd. 2014 WL 3734156 (Tex. App. Houston - 1st District) indicates the potential usefulness with regard to tort liability. Hotel bellman accused of sexual abuse of child of hotel guest. No check was run since he was referred by a current employee when hired. There was evidence of sexual misconduct in his background. Court referred for trial as jury might find the failure to run background check was negligence.

IV. Reminder on Drug Testing Programs

Employers should review their substance abuse policies to make sure they are clear enough and follow guidelines to insure acceptance by administrative agencies. A quick checklist follows:

1. Written substance abuse policy with a signed receipt by each employee.
2. Claimant must sign form indicating consent for drug test and communication of results to the employer. The policy of course should say that failure to consent to a drug test will result in termination for insubordination and presumption of a positive test.
3. Chain of custody of sample must be documented.
4. Documentation of GC/MS confirmation of positive test.
5. Lab provides documentation that positive sample exceeded standard limits.
6. Where possible, CMG recommends a Medical Review Officer ("MRO") review results and where indicated, the MRO speaks with the employee who provided the sample to determine if there are alternative explanations for the positive result, like taking a prescription medicine.
7. All employees must be treated consistently when a positive test result is received. Termination is standard discipline, but some companies provide an option to seek treatment for a first offense.

V. EEOC Challenges another Corporate Wellness Program

a) In our September 24, 2014, Mini-Seminar, we discussed an employer sued over wellness program in *EEOC v. Orion Energy Systems,* *http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm*

b) Now, Honeywell was sued in October by the EEOC in Federal District Court in Minnesota asking for a temporary restraining order ("TRO") against Honeywell, alleging that wellness programs sponsored by Honeywell violated both the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The tests, required by Honeywell in a recent policy change, measure blood pressure, cholesterol and glucose, as well as check for signs that an employee has been smoking. Employees who decline to take the tests could be fined up to $4,000 in surcharges and increased health costs. A Federal Judge has already refused to grant the TRO in this case, which means Honeywell can keep testing in the meantime. Note other considerations under HIPAA and ACA. Might such a plan violate the ADA, even if it was authorized by the ACA?

More information:
http://www.shrm.org/hrdisciplines/benefits/articles/pages/eeoc-sues-honeywell.aspx

VI. OSHA Reporting Requirements Increased

Effective January 1, 2015, OSHA has expanded requirements for employers to notify OSHA when a worker is killed on the job, or suffers a work related hospitalization, amputation or loss of an eye. For instance, employers must now report an incident causing the hospitalization of only 1 employee when it was formerly 3 employees. Time limit is 24 hours and now applies to amputation or loss of an eye as well. Fatalities must be reported within 8 hours.

For more information, see:
https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=26688

VII. Avoiding an Audit of Your 401(k) Plan

1. Respond to employee inquiries in a timely way. The most frequent trigger for a DOL audit is a complaint received from an employee. These complaints can originate from terminated employees who feel poorly treated or existing employees who feel ignored.
2. Improve employee communication. Often employee frustrations come from not understanding a benefit program – or worse, misunderstanding it.
3. Fix your plan. If the DOL decides to audit your retirement plan, statistics show that it almost always finds something wrong. Many times plan sponsors are aware that a certain provision in the plan is a friction point for employees. Or worse, the plan has something wrong and no one has taken the time to fix it.
4. Conduct your own audit. Many plan sponsors have found it helpful to conduct their own audits of their plans, or hire a consulting firm to do it for them.
5. Make sure your 5500 is filed correctly. The second most frequent cause of a DOL audit is problems which are identified on the annual Form 5500 filing. The most common 5500 errors include failing to follow EFAST 2 Electronic Filing Guidance, not attaching all required schedules and failing to answer multiple-part questions. Ensure that your 5500 is being filed by a competent provider and that it is filed on time. Most plan sponsors either use their recordkeeper or accountant to file their plan's 5500. Don't do it yourself. Provider fees for this service are very reasonable.

Source: **http://ebn.benefitnews.com/blog/ebviews/5-ways-to-avoid-a-dol-audit-of-your-401k-plan-2742863-1.html**

VIII. FLSA + State Wage Laws Could Mean Jail Time

1. In New York, the owner of a restaurant was arrested and arraigned for her first offense. She is accused of owing $35,000 in minimum wage and OT. She could serve up to one year in jail and be fined $5,000 for each count in addition to making the complaining employees whole.

2. Under the FLSA, prison time is generally limited to the second offense or more. Further, a person can only be imprisoned under the FLSA if he or she was found to have intentionally, deliberately and voluntarily disregarded requirements under the law.