WILLCOX SAVAGE

Employment Law Outlook

Summer 2013

VIRGINIA GENERAL ASSEMBLY ENACTS PRIVACY LAW PROTECTING EMPLOYEES' PERSONAL INFORMATION

William M. Furr

The Virginia General Assembly recently enacted a privacy law providing that Virginia employers will not be required to release to third parties personal information relating to their current or former employees unless certain exemptions apply. Section 40.1-28.7:4 of the code of Virginia provides that an employer shall not be required to distribute to a third party any current or former employee's "personal identifying information." Personal identifying information is defined as home telephone numbers, mobile telephone numbers, email addresses, shift times and/or work schedules.

The statute, effective July 1, 2013, exempts the communication of personal identifying information: 1) that is required by a subpoena in a civil or criminal case; 2) that is requested in discovery in a civil case; 3) that is required pursuant to a warrant issued by a judicial officer; 4) that is ordered by a court; or 5) that is required pursuant to applicable federal law.

The statute does not actually prohibit employers from releasing such personal information. Rather, the statute says that employers are not required to release or communicate such information except for the reasons listed.

Employers should implement policies governing the release of information regarding employees to third parties. Most employers limit the information that they disclose about their employees to job titles and dates of employment. If employers choose to provide more than a neutral reference, we advise them to procure a release from the former employee before doing so.■

In This Issue...

Save-the-Date!

Join Our Complimentary Seminar

Are you compliant with the new HIPAA Omnibus Rule?

By September 23, covered entities (health plans, certain health care providers, and health care clearinghouses) and their business associates must comply with the new HIPAA Omnibus Rule.

During the session we will cover the following issues:

- Modifications to the HIPAA Privacy Rule
- New breach notification standards and increased penalties
- New guidance for business associate agreements

Date/Time

Wednesday, September 4, 2013
8:00 am - 10:00 am

Location

Willcox Savage
440 Monticello Avenue
Suite 2200
Norfolk

Speakers

Corina V. San-Marina
Amber R. Randolph
Willcox Savage

Register

www.willcoxsavage.com
Seating is limited

The session has been submitted for 1.5 continuing education credits through HRCI.

AFFORDABLE CARE ACT NOTICE REGARDING EXCHANGES REQUIRED BY OCTOBER 1, 2013

Cher E. Wynkoop and Corina V. San-Marina

On May 8, 2013, the Department of Labor (DOL) issued temporary guidance through Technical Release No. 2013-2 that implements Section 18B of the Fair Labor Standards Act (FLSA), as added by the Affordable Care Act (ACA), which requires employers to provide employees with a written notice describing the public Marketplaces (referred to as Exchanges in the law) effective October 1, 2013.

In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. For most firms, a test of not less than $500,000 in annual dollar volume of business applies. The FLSA also specifically covers the following entities: hospitals; institutions primarily engaged in the care of the sick, the aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state and local government agencies.

The notice must be provided to all employees regardless of plan enrollment status (if applicable) or of part-time or full-time status. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

To inform employees of their coverage options, the notice must include the following information:

- The existence of the Marketplace, contact information, and a description of the services provided by a Marketplace;
- That the employee may be eligible for a premium tax credit for qualified health plans purchased through a Marketplace; and
- A statement that if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution to benefits offered by the employer, and that all or a portion of that employer contribution may be excluded from Federal income tax.

To satisfy the content requirements, the DOL has provided model language. There is a model notice for employers who offer a health plan to some or all employees, and a model notice for employers who do not offer a health plan. Employers can use a modified version of the notice as long as the content requirements are met.

The model notice for employers who offer a health plan also requires the following information:

- Whether the plan is offered to some or all employees, and the definition of eligible employees;
- Whether the plan is offered to dependents, and the definition of eligible dependents; and
- Whether the coverage satisfies the 60% minimum value standard and whether the coverage is intended to be affordable.

Employers also have the *option* to include employee-specific information in the notice, including:

- The employee's eligibility for coverage;
- Whether the employer offers a health plan that meets the minimum value standard;
- Employee contributions for the lowest cost employer plan that provides minimum value; and
- Changes in the employer plan for the new plan year.

The notices also provide a link to www.HealthCare.gov, a site that will provide additional information on health care reform as well as an online application for health insurance coverage and contact information for a local Marketplace.

For 2013, the notice must be provided to each new employee on their date of hire starting October 1, 2013. For employees who are current employees before October 1, 2013, the notice must be provided no later than October 1, 2013. For 2014, the notice must be provided within 14 days of the employee's start date.

The notice can be provided by first-class mail. Alternatively, it can be provided electronically if the DOL electronic safe harbor requirements are satisfied. DOL regulations allow plan sponsors to use electronic media to distribute Summary Plan Descriptions and other ERISA-required notices to participants who have "work-site access" – meaning they have access to a worksite intranet or electronic information system as an integral part of their work duties. For participants who do not have this type of worksite access or who want to use non-company networks or other electronic media (Internet or CD-ROMs mailed to homes), additional requirements must be met.■

FOURTH CIRCUIT STRIKES NLRB POSTER RULE

Susan R. Blackman

The U.S. Court of Appeals for the Fourth Circuit ruled on June 14, 2013 that the National Labor Relations Board overstepped its authority when it issued a rule that would have required employers to post notices informing workers of their rights under the National Labor Relations Act.

The court noted that Board's responsibility is limited to handling charges of unfair labor practices and issues involving union representation. This comment raises questions about recent proactive measures the Board has taken to expand protections of workers, including those in non-unionized workplaces. Such measures have included issuing memoranda warning employers that social media policies should not chill an employee's right to complain to coworkers about the conditions of employment. The poster rule would have required employers to post notices confirming workers' rights under the NLRA, including the rights to organize and bargain collectively and to engage in concerted activity with coworkers concerning terms and conditions of employment.

The lawsuit challenging the rule was filed by the U.S. and South Carolina Chambers of Commerce, which prevailed at the district court level as well as at the Fourth Circuit. A separate case filed by the National Association of Manufacturers resulted in a similar outcome by the U.S. Court of Appeals for the D.C. Circuit.

The Fourth Circuit found that unlike the EEOC and OSHA, which have specific statutory authority to require employers to post notices of employee rights, there is "no indication in the plain language of the [NLRA] that Congress intended to grant the Board the authority to promulgate such a requirement."■

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MILITARY PERSONNEL ARE NOT "STATUTORY EMPLOYEES" UNDER THE VIRGINIA WORKERS' COMPENSATION ACT

Stephen R. Jackson

Given the pervasive presence of the military in Hampton Roads, it is not uncommon for there to be commercial interaction between private employers or contractors and military personnel. Perhaps nowhere is this more true than in local shipyards, where Navy personnel often remain on duty aboard vessels being overhauled either to supervise the work or to carry out their normal duties. Such was the case in a recent decision of the Supreme Court of Virginia in *Gibbs v. Newport News Shipbuilding and Drydock Company*.

The issue in *Gibbs* was whether military personnel with work-related injuries were subject to the exclusive remedy of workers' compensation as against the shipyard. In that case, Gibbs was diagnosed with an asbestos-related disease over 40 years after serving on the pre-commissioning crew aboard a submarine being constructed at Newport News Shipbuilding. His estate sued the shipyard, which, in turn, argued that he was a "statutory employee" bound by the Virginia Workers' Compensation Act. The trial court agreed and the case was dismissed.

On appeal, the Supreme Court of Virginia wasted little time in reversing the decision. The Court noted that the exclusivity provision of workers' compensation is essentially a pact between employer and employee and that the Navy had never agreed to be bound by it. The Court also noted that members of the military, unlike private citizens, are not engaged in the typical employer-employee relationship. Rather, military personnel are subject to strict discipline and may be exposed to hazardous duties, none of which could have been anticipated by the Virginia General Assembly when it contemplated injuries to employees under a "contract for hire." Finally, the Court noted that the Virginia General Assembly had no authority to affect the relationship between the federal government and members of its armed forces.

Interestingly, although a majority of the Court held that members of the military were not subject to the Virginia Workers' Compensation Act, the decision was not unanimous. Two of the justices applied a traditional analysis to the problem and noted that in prior cases the Navy had sought the benefits of the exclusivity provision of the Act. However, at least for now, military personnel injured in work-related accidents under similar circumstances retain their right of action under Virginia common law.■

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Return Service Requested

NEW ARRIVAL/DEPARTURE-RECORD PROCESS FOR INDIVIDUALS ARRIVING IN THE U.S. IN NONIMMIGRANT STATUS

Luba I. Seliavski

The U.S. Customs and Border Protection (CBP) has implemented a new process which substituted paper I-94 Forms, Arrival/Departure Records, with electronic records. The new process was already implemented at U.S. airports, sea ports and CBP pre-clearance stations. Pursuant to the new process, individuals seeking admission in the U.S. with nonimmigrant visas will no longer receive paper I-94 Forms when they enter the United States. CBP will collect most of the information pertaining to nonimmigrants prior to their arrival in the U.S. During the immigration inspection of a nonimmigrant, a CBP officer will stamp the individual's passport (the stamp should show the date of admission, class of admission, and the admission end date) and confirm the individual's U.S. address, telephone number, and email address.

Individuals should review the admission stamps in their passports at the conclusion of the immigration inspection, to ensure the correct class of admission is listed and review the end date of the admission period. Following admission into the United States, individuals may access their electronic Arrival/Departure records on CBP's website: https://i94.cbp.dhs.gov/I94/request.html, review their electronic records for accuracy, and print them. Printed records can be used to prove the individual's legal status in the United States to various governmental agencies (such as Department of Motor Vehicles and Social Security Administration offices), U.S. employers, schools and universities.■