WILLCOX SAVAGE

Employment Law Outlook

Winter 2015

PANDEMIC PREPAREDNESS - EMPLOYER CONSIDERATIONS

David A. Kushner

With the Ebola outbreak dominating headlines in late 2014, and with this year's H3N2 flu strain recently reaching "epidemic" status, many well-intentioned employers have asked just how far they can go to protect their workforce from potential "pandemics."

Although guidance on pandemic response is relatively limited, the Americans with Disabilities Act (ADA) creates a number of limitations on possible employer inquiries and responses to a pandemic. For example, the ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries, except when such examinations or inquiries are job-related and consistent with business necessity. Likewise, an employer cannot normally exclude a worker from the workplace for disability-related reasons unless the worker poses a "direct threat" to the safety of the worker or others. Whether an employee poses a direct threat is an extremely fact specific inquiry, and must not be made based on the employer's subjective fears. Typically, an employer must make a direct threat determination related to a pandemic based on current and objective medical evidence, such as from the Centers for Disease Control.

While every workplace and every potential pandemic is different (and employers should seek medical and legal advice before taking action to prepare for or respond to a pandemic), there are a number of steps which most employers can safely take when confronted with a pandemic or other significant outbreak. Indeed, in 2009 (after the worldwide H1N1 flu pandemic), the EEOC put out a technical assistance document on pandemic preparedness, in which it specifically authorized employers to take the following actions under appropriate pandemic circumstances:

- **Requesting Information from Employees:** During a pandemic or similar high risk outbreak, an employer can typically ask an employee whether they are experiencing symptoms of the condition subject to the outbreak. For example, during a flu pandemic, it would be lawful for an employer to ask employees who appear sick or who call in sick, whether they are experiencing flu-like symptoms.

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ACA COMPLIANT WELLNESS PROGRAM CHALLENGED BY EEOC

Cher E. Wynkoop and Corina V. San-Marina

The third lawsuit filed by the Equal Employment Opportunity Commission (EEOC) against Honeywell International, Inc. (Honeywell) is targeted at a wellness program that is otherwise compliant with the Affordable Care Act (ACA). The EEOC alleged that Honeywell violated both the Americans with Disabilities Act (ADA), by requiring participation in medical exams associated with Honeywell's group health plan and wellness program when it provided financial inducements to encourage participation, and the Genetic Information Nondiscrimination Act (GINA), by making financial rewards contingent upon participation by an employee's spouse. Although the EEOC sued two other employers for wellness program violations before it sued Honeywell, this is the first case where the agency seems to be challenging a fairly popular program used by many employers to reduce their overall healthcare costs, albeit one with somewhat hefty penalties.

Title I of the ADA prohibits medical examinations and inquiries by an employer unless the examinations or inquiries are either "job-related and consistent with business necessity" or "voluntary."

Title I of the ADA prohibits medical examinations and inquiries by an employer unless the examinations or inquiries are either "job-related and consistent with business necessity" or "voluntary." The "voluntary" standard was addressed by the EEOC in guidance issued in 2000 providing that a wellness program is voluntary as long as an employer does not require participation or penalize employees who do not participate. Despite repeated inquiries as to the meaning of voluntary or what would constitute an impermissible penalty, the EEOC has not provided any guidance on this issue. The EEOC has also taken no position as to whether the ADA prohibits the standards-based wellness programs contemplated by the ACA that permit an employer to offer a financial incentive of up to 30 percent of the cost of coverage for an employee's

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TELECOMMUTING EMPLOYEES: CONFUSING TRAVEL TIME REQUIREMENTS UNDER THE FAIR LABOR STANDARDS ACT

Phillip H. Hucles

The increase in technology over the last two decades has translated into a move away from typewriters and facsimile machines in favor of personal computers, laptops, tablets, and email. While some jobs still require the physical presence of a worker, many jobs today may be done anywhere in the world. All you need is a computer and internet connection.

The increase by employers using telecommuters raises concerns regarding travel time payment for these employees who typically work from home. Many employers require their employees who work from home, or "telecommute," to attend mandatory meetings, trainings, or conferences at the home office. Is an employer required to compensate the employee for the time it takes him or her to travel to the office?

The Fair Labor Standards Act (FLSA), as modified by the Portal-to-Portal Act (PTPA), states that an employee's normal and regular commute or travel time to and from work does not constitute hours worked and therefore is not compensable time. For most people, this means the car or public transportation ride to an office location. But for telecommuters, since they work from home, their normal commute time is non-existent. The FLSA's policy on travel time payment is one of the FLSA's most confusing and convoluted provisions. And the provisions related to telecommuters are no clearer.

Federal Regulations provide that when an employee normally works from home, but is required to attend a meeting at his or her employer's office, the travel to the office is compensable time if that employee has already commenced working prior to traveling to the office.

Federal Regulations provide that when an employee normally works from home, but is required to attend a meeting at his or her employer's office, the travel to the office is compensable time if that employee has already commenced working prior to traveling to the office. This is known as the "continuous workday" rule, which provides that an employee may continue to receive compensation, once he or she has commenced work, when the action is taken in furtherance of the employer's business and occurs during the normal work hours of the employee.

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ACA COMPLIANT WELLNESS PROGRAM CHALLENGED BY EEOC

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participation in the program (and up to 50 percent for a tobacco cessation program).

Prior to the Honeywell lawsuit, the EEOC's only comment regarding the voluntary standard came as a result of the EEOC filing lawsuits against two employers in Wisconsin. The comment suggested an EEOC view that causing an employee to pay 100 percent of the premiums for not participating constitutes a penalty, which, in turn, renders the program involuntary in violation of the ADA. What the comment did not address, is whether a surcharge or financial incentives authorized by ACA guidelines is viewed as compliant with the ADA by the EEOC. In view of the Honeywell suit, it seems that the EEOC deems even ACA compliant financial rewards as impermissible penalties under the ADA.

Under the wellness program designed by Honeywell, employees were required to undergo biometric testing to identify health risks and blood screening for tobacco. Employees and their spouses, if family coverage was elected, who did not take the biometric screening and blood draw, were subject to a set of annual penalties that included a $500 surcharge applied to an employee's medical plan cost, a $1,000 tobacco surcharge for the employee and spouse if they did not submit to testing, and loss of health savings account contributions from Honeywell of up to $1,500, depending on the employee's annual base wage and type of coverage. The financial incentives designed by Honeywell were within the limits allowed by the final regulations under the ACA. The EEOC claimed that the program was involuntary because it imposed a penalty on those who declined to participate.

In regard to the claim that the wellness program also violated GINA, prior comments from the EEOC appear to suggest that a wellness program can offer employees reward-type incentives and remain in compliance with GINA, but cannot offer those incentives to the employee's spouse.

Given the fact that the Honeywell lawsuit was brought on October 27, 2014, at a time when most employers were in the midst of the enrollment period for the 2015 calendar year, there was not much that employers (offering wellness programs similar in design to the Honeywell program) could have changed. As a result of the sharp criticism from trade organizations and members of Congress, the EEOC has announced that it expects to issue proposed rules addressing how the ADA and GINA affect employer-sponsored wellness programs by February 15, 2015. ■

PANDEMIC PREPAREDNESS- EMPLOYER CONSIDERATIONS

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- **Sending Employees with Flu-Like Symptoms Home for the Duration of a Short Term Illness:** Because flu-like symptoms do not typically rise to the level of a disability, and because flu-like symptoms may pose a direct threat during a flu or similar pandemic, during a pandemic an employer may lawfully require workers with flu-like symptoms to leave the workplace.

- **Asking Employees about Potential Exposure:** During an outbreak like the current Ebola scare, it is generally permissible for an employer to ask employees who have traveled whether their travel included locations that are subject to health advisories.

- **Requiring Telework:** During a sufficiently severe pandemic outbreak, the EEOC has suggested that an employer can require teleworking as an infection-control strategy. However, employers must be careful about choosing the employees who will be required to telework in a non-discriminatory manner, and should consult legal counsel before taking broad action.

- **Requiring Handwashing and Other Personal Protective Measures:** An employer may institute policies requiring its workforce to wash their hands during the workday, or to take other similar protective measures.

While the foregoing employer actions would generally be permissible during a pandemic, employers should not take the following actions during a pandemic without first seeking medical and legal advice.

- **Mandatory Temperature Checks:** A mandatory employee temperature check is considered a medical examination under the ADA, and should not be required without first seeking legal advice.

- **Required Vaccines:** Likewise, with very limited exceptions, an employer may not require employees to take any particular vaccine or medicine.

- **Terminating or Punishing Employees Who are Deemed Exposure Risks:** One of the main purposes of the ADA is to prohibit employers from taking adverse employment actions against employees based on unfounded fears about an employee's condition. Thus, there are very limited circumstances in which an employer can terminate an employee based on that employee's exposure or risk of exposure. An employer should contact employment law counsel before taking any adverse actions against an employee on the basis that the employee has contracted a condition subject to the pandemic. ■

H-1B SEASON: IT'S NEVER TOO EARLY TO PREPARE

James B. Wood

Whether you currently employ foreign workers or have a potential new hire who will require work authorization, the H-1B visa is one of the best visas for employers to use in order to hire foreign employees. Unfortunately though, there is an H-1B Cap that limits the number of available H-1B visas to 85,000. 65,000 visas are available for foreign workers with at least a Bachelor's degree (or equivalent) under the Regular H-1B Cap and 20,000 visas are available to foreign workers who obtained a Master's degree from a U.S. college/university under the Master's H-1B Cap.

Barring any changes due to comprehensive immigration reform, U.S. Citizenship and Immigration Services (USCIS) will begin accepting H-1B petitions on **April 1, 2015** for Fiscal Year 2016 (beginning on October 1, 2015).

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If USCIS receives over 85,000 Regular H-1B Cap and Master's H-1B Cap petitions within the first five business days (April 1- April 7, 2015), then there will be an H-1B visa lottery where cases will be randomly selected for processing. Cases that are not selected in the lottery will be returned by USCIS to the petitioners. In order to be eligible for a potential H-1B Visa Lottery, petitions must be received by USCIS on or before **April 7, 2015**. If the H-1B quota is not met within the first five business days, then cases will be adjudicated on a first come, first serve basis until the quota is met.

While we cannot predict whether there will be an H-1B Visa Lottery this year, there has been an H-1B Visa Lottery in the past two years. In fact, in 2014, USCIS received over 172,500 H-1B petitions within the first week!

Therefore, we encourage you to start planning now and contact our Immigration Team to ensure you are prepared for the upcoming H-1B Season. ■

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Additionally, when travel time may be completed in one day and is part of the employee's principal activities (typically seen in a situation in which an employee travels from work-site to work-site), the travel time is compensable under the FLSA. If travel is overnight, the FLSA only requires employers to pay employees for the time spent traveling during their normal work hours.

When an employee takes a "special assignment" in another city away from his or her normal working site, the employee is entitled to compensation for the travel time, minus the employee's normal commute time and any breaks.

Employers who allow employees to work from home should familiarize themselves with the Department of Labor's guidance regarding pay for time spent traveling. ■

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