



Wimberly Lawson
 Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly
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IMMIGRATION SOLUTIONS GAIN MOMENTUM



Anita Patel.....

“Once the set-up or enforcement measures were complete, people with probationary status could earn green cards, which would lead to citizenship, if they paid taxes, learned English and met other requirements.”

Several events took place during the week of January 28th that gives momentum to immigration reform. On that date, a bipartisan group of both liberal and conservative U.S. Senators endorsed a variety of general provisions overhauling the federal immigration laws. The proposal was endorsed by four Republican and four Democratic Senators, and would allow people in the country illegally to qualify for probationary legal status, provided they register with the government and pay a fine and back taxes. Once the set-up or enforcement measures were complete, people with probationary status could earn green cards, which would lead to citizenship, if they paid taxes, learned English and met other requirements. Other important provisions would include a system for employers to verify workers’ legal status, stiffer penalties for employers who fail to verify such status, and further to allow employers to be able to hire new immigrants for low-skilled jobs if they can show that they were unsuccessful in recruiting Americans. There would also be special provisions applicable for agricultural workers. The bi-partisan group of Senators include Republicans Marco Rubio, John McCain, Lindsey Graham and Jeff Flake, and Democrats Charles Schumer, Bob Menendez, Dick Durbin and Michael Bennet. Senator McCain pointed out that the current system is not only unacceptable, but amounts to “de facto amnesty.”

Various business and labor groups immediately voiced support for the concepts. The U.S. Chamber of Commerce particularly praised a provision that would let employers hire immigrants if they can’t find U.S. Citizens to fill the job. Leaders of the AFL-CIO also supported the general framework.

On January 29, President Obama presented his own immigration proposals, supporting many of the same principles. However, neither the President’s proposals nor those of the bi-partisan group of Senators went beyond general principles to deal with the specifics. Further, some differences were noted between the Senators’ proposals and the President’s, on the issue of a pathway to citizenship contingent on tighter border security. Further, Republicans in the Senate and House had a cautious reaction to the proposals. The President’s plan also calls for electronic employment verification to become mandatory for employers over a five-year period, with some small businesses exempt from the requirements.

The last time immigration reform almost became a reality was in 2007, when then President George W. Bush introduced a comprehensive immigration overhaul.



TARGET OUT OF RANGE

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The 2013 Wimberly Lawson Labor and Employment Law Update Conference

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

CONFIDENTIALITY REQUIREMENTS FOR MEDICAL INQUIRIES



Cathy Shuck.....

“Some of the requirements relate to activities lawful under the ADA, but not under GINA.”

Both the ADA and the Genetic Information Non-Discrimination Act (GINA) have confidentiality requirements. Some of the requirements relate to activities lawful under the ADA, but not under GINA. The ADA focuses on actual conditions, while GINA focuses on genetic information that may never develop into a condition.

An example of the difference is the situation in which an employee has job issues suggesting alcoholism, and the employer has a legitimate reason to ask questions or even send the employee to a doctor. If the doctor, who serves as the employer’s agent for this purpose, asks questions about alcoholism, the question may be permissible under the ADA. However, if the doctor for the employer asks questions about a family history of alcohol, it becomes a prohibited question under GINA.

Employers should avoid requesting or receiving GINA-protected information. Not only is the seeking of such information prohibited, but additional confidentiality requirements also apply even if the information is lawfully-obtained. Several proactive steps can be taken, such as directing company doctors not to ask for or collect genetic information. Another important proactive step is to write a warning to the applicant or employee who is taking the exam or filling out health forms, or to the doctor who is conducting the medical inquiry or exam, not to seek or reveal any genetic information. The EEOC has regulations that provide some sample language that should be used for this purpose, or at least reviewed. If you need additional guidance or help locating the regulations, please contact your Wimberly Lawson attorney for assistance.

DISABILITY ISSUES OF WHAT CONSTITUTES A MEDICAL INQUIRY AND WHETHER TO KEEP RESPONSES CONFIDENTIAL

Cathy Shuck.....

“... it is a good idea for employers to keep all medical information confidential whether revealed from a “medical inquiry” or not.”

Most employers are aware that in general the Americans with Disabilities Act (ADA) prohibits employers from asking applicants and employees (subject to certain exceptions) about medical inquiries or conducting medical examinations. Further, employers are generally familiar with the concept that employers are supposed to keep medical information confidential. A recent case deals with the interplay between these two concepts in circumstances where an employer inadvertently learns such medical information and allegedly passes it on to prospective employers during reference checks. *EEOC v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012).

The case involved a plaintiff former employee who failed to arrive at work one day. The employer sent him an email asking him to call in because, “we need to know what is going on.” Several hours later, in response, the employee sent the employer a long detailed email explaining that he suffered from migraines. The employee then quit the job a month later.

Subsequently, the plaintiff had a difficult time finding a new job and began to suspect his former employer was saying negative things about him to prospective employers who called for reference checks. The EEOC alleged that during these reference checks, the former employer was revealing information about the plaintiff’s migraine condition to prospective employers. The EEOC argued that revealing that the former employee suffered from migraines violated the ADA’s requirement that employee medical information obtained from “medical examinations and inquiries” be “treated as a confidential medical record.”

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Amanda Inman Lowe.....

“The main changes to FMLA pertain to military caregiver leave for a veteran, qualifying exigency leave for parental care, and the leave calculation method for flight crew employees.”

FMLA CHANGES REQUIRE EMPLOYERS TO POST REVISED NOTICE

Several recent changes to the Family and Medical Leave Act (FMLA) resulted in a revised notice that employers must post as of March 8, 2013. The main changes to FMLA pertain to military caregiver leave for a veteran, qualifying exigency leave for parental care, and the leave calculation method for flight crew employees. FMLA is now available to family members of: (1) members of the Regular Armed Forces for qualifying exigencies related to deployment; (2) current service members for a pre-service injury/illness that was aggravated in the line of duty on active duty; and (3) certain veterans with serious injuries or illnesses. Regulations were also amended to establish FMLA eligibility requirements for airline flight crew members and flight attendants and to provide clarification on calculation of intermittent or reduced schedule FMLA leave.

Nothing changed about an employers’ responsibility to conspicuously display this notice at all locations, regardless of whether any eligible employees work at the particular location. Leave certification forms are located on the Wage and Hour Division website, and the official, revised poster is available at:

www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.

KNOW YOUR CONSULTANT CAROL R. MERCHANT

CAROL R. MERCHANT is a consultant with Wimberly Lawson Wright Daves & Jones, PLLC. She provides consulting services, in conjunction with the firm’s attorneys, with emphasis on compliance with regulations under the Fair Labor Standards Act, Family and Medical Leave Act, Davis Bacon and Related Acts, Service Contract Act, Contract Work Hours and Safety Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, H2A provisions of the Immigration Reform and Control Act, Employee Polygraph Protection Act and the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act).



Carol retired from the U. S. Department of Labor, Wage and Hour Division, in December 2007, after 33 years of service with the Division. From 2000 to the end of 2007 she was the Nashville District Director, supervising enforcement of Wage and Hour laws in the state of Tennessee. Prior to that she had been Assistant District Director of the Knoxville Wage and Hour office after 11 years as an investigator in Columbia, South Carolina.

During her years as District Director and Assistant District Director, she reviewed investigative files, conferred with the Solicitor’s Office of the U.S. Department of Labor on cases that should be litigated, and assessed and negotiated payment of civil money penalties under the Fair Labor Standards Act (including child labor), Migrant and Seasonal Agricultural Worker Protection Act, H2A and Employee Polygraph Protection Act.

She worked on rewriting portions of the Wage and Hour Divisions’ Field Operations Handbook, organized and conducted three national training classes for Wage and Hour Technicians, and co-wrote the national training manual for investigators on developing litigation cases.

From 2003 until her retirement in December 2007, she was the Southeast Regional Representative on the National Health Care Team examining compliance problems in the health care industry. She testified in Federal Court on numerous cases litigated by the U. S. Department of Labor.

Carol received her Master of Arts degree in American History from the College of William and Mary and her Bachelor of Arts degree in History from Columbia College. In 2000, she was awarded the Distinguished Career Service Award from the Secretary of Labor.

EMPLOYERS SHOULD USE NEW FORM I-9



Jerome Pinn.....

“Employers who do not use the new form on or after May 7, 2013 will be subject to penalties imposed by federal law.”

On March 8, 2013, the government issued a new and revised Form I-9 with a revision date of 03/08/13. Employers should begin using this new form immediately. Employers who do not use the new form on or after May 7, 2013 will be subject to penalties imposed by federal law.

Here are a few reminders and highlights:

- Section 1 of Form I-9 must be completed by the employee by the first day of work.
- Section 2 of Form I-9 must be completed by the employer within 3 business days of the first day of work.
- Form I-9 may be completed prior to the first day of work provided the employee has been offered and accepted employment.
- If a field on the form is left blank (e.g. “former names” field), then N/A should be inserted rather than leaving the field blank.
- If the hire date is changed after completing Form I-9, then the form should be corrected.
- Inserting an employee email address and phone number in Section 1 is optional, not mandatory.
- Inserting a Social Security Number in Section 1 is optional, unless the employer is participating in E-Verify.

More information about the new Form I-9 may be obtained from the USCIS at <http://www.uscis.gov/portal/site/uscis>. The USCIS also issued a revised “Handbook for Employers Guidance for Completing the Form I-9 (M-274)” to correspond with the new Form I-9. An updated copy of the Handbook can be obtained at <http://www.uscis.gov/files/form/m-274.pdf>.

Be sure to visit www.wimberlylawson.com often for the latest legal updates, seminars, alerts and firm biographical information!

“DISABILITY ISSUES OF WHAT CONSTITUTES A MEDICAL INQUIRY”

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The EEOC initially argued, but later abandoned its argument, that the employer’s email asking about the plaintiff’s reason for absence constituted a “medical inquiry” (as opposed to a broader job-related inquiry). After dropping that argument, the EEOC argued on appeal that whenever an employer makes a job-related inquiry and receives medical information in response, the confidentiality provisions apply even though the medical information was not revealed through a “medical inquiry.”

The Seventh Circuit Court of Appeals affirmed a lower court ruling in favor of the employer, holding that the former employer learned of the plaintiff’s migraine condition *outside* the context of a “medical examination or inquiry,” and therefore the confidentiality provisions of the ADA did not apply. The court rejected the EEOC’s arguments, and ruled that to constitute a “medical inquiry,” the employer at a minimum must already know something was wrong with the employee before initiating the interaction. The court found that as far as the employer was concerned, the absence was just as likely due to a non-medical condition as it was due to a medical condition, and therefore the inquiry could not constitute a “medical inquiry” protected by the ADA.

Editor’s Note - This case seems to stand for the proposition that an employer does not make an illegal “medical inquiry” without knowing the employee or applicant is likely to reveal medical information in response to the inquiry. The case also stands for the proposition that medical information is only subject to the ADA confidentiality provisions if it is received in response to a “medical inquiry.” Nonetheless, it is a good idea for employers to keep all medical information confidential whether revealed from a “medical inquiry” or not.