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

Briefly

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EXECUTIVE ORDER TO OSHA BRINGS UPDATED GUIDANCE RE: COVID-19

Mary C. Moffatt

"Employers are encouraged to implement a 'COVID-19 Prevention Program' to mitigate the spread of COVID-19 in the workplace …"

While the world celebrates the ongoing vaccinations against COVID-19, it is clear the pandemic is far from eradicated and related adjustments in most aspects of life will continue for the foreseeable future. Evidence of this continuing trend in the workplace is clear in the recent guidance from the Occupational Safety and Health Administration (OSHA).

On January 29, 2021, OSHA posted updated guidance entitled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" (the "Guidance"), which was issued pursuant to one of President Biden's Executive Orders (EO). The Guidance can be found at *https://www.osha.gov/coronavirus/safework*. The stated purpose of the Guidance is to advise employers and workers regarding the risks of being exposed to and contracting COVID in workplace settings and "to determine any appropriate control measures" for the workplace. Although the Guidance is advisory and informational, it does provide insight into OSHA's expectations relative to addressing COVID protections in the workplace.

As noted in the Guidance, under the Occupational Safety and Health Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards that can cause death or serious physical harm. Employers are encouraged to implement a "COVID-19 Prevention Program" to mitigate the spread of COVID-19 in the workplace and to engage workers (and their representatives) in the program's development and implementation.

The Prevention Program should include assignment of a workplace coordinator responsible for implementation on the employer's behalf. OSHA also recommends that employers do a hazard assessment to identify potential hazards specifically related to COVID-19 and implement various measures directed at eliminating such hazards such as physical distance in all communal work, installing barriers where physical distancing is not possible, distributing and requiring the use of face coverings (and other applicable PPE), cleaning and disinfecting, good hygiene practices, and improving overall ventilation in the workplace. Although they are too extensive to list here, the Guidance provides detailed recommendations to accomplish these well-known measures.

Employers are encouraged to require employees who are infected or potentially infected to stay home, isolate, or quarantine, and to allow telework or work in an isolated area. The Guidance further suggests continuation of the benefits under the Families First Coronavirus Response Act (FFCRA) through March 31, 2021, which would also help to minimize the negative impact of employees missing work due to COVID.

One note of concern is OSHA's encouragement that all workers who "appeared to have symptoms upon arrival at work or who develop symptoms during their work shift" should immediately be separated from other workers, customers, and visitors, and be sent home and encouraged to seek medical attention. Employers need to be consistent in how they handle such situations, so good supervisory training is all the more important, as well as ensuring the HR department has input (if not final decision) in who gets sent home (which could be viewed as an adverse action).

The Guidance also encourages the reporting and recording of COVID-19 infections and deaths when they are work-related (as defined by 29 CFR 1904.5) and when the case involves one or more of the criteria set

Continued on page 4

TIMING OF TERMINATION

Courtney C. Hart

"In instances where terminating an employee is a consideration, you should be mindful of the surrounding circumstances as well as the information you share with the worker."

According to the 5th U.S. Circuit Court of Appeals, terminating an employee only hours after she expressed her concerns about gender discrimination suggests that employer's reasons for firing the employee may have been pretext for unlawful retaliation.

The plaintiff employee is a former Associate Financial Advisor (AFA) at REJ Properties, Inc. The plaintiff had been with the company for two and a half years, when in 2016 she expressed concerns to the company's compliance officer about REJ Properties' failure to comply with regulations regarding pay and how she was treated by one specific male colleague, specifically stating she "was not sure if she was not treated fairly because she was not family or because she is a woman." Several days after plaintiff expressed these concerns, the compliance officer contacted plaintiff's boss, suggesting that he consider consulting an employment attorney. On that same day, the plaintiff's boss called her in for a sit-down meeting, where he fired her because of the stress of dealing with constant complaints about her from her coworkers.

Following her termination, plaintiff sued REJ Properties, asserting claims of hostile work environment, gender discrimination, disparate pay under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, retaliation under Title VII and Louisiana state law, 42 U.S.C. §1985 conspiracy, and breach of contract. The district court granted a motion in REJ Properties' favor that dismissed all of the plaintiff's claims. Plaintiff appealed, and the 5th Circuit agreed with the district court, affirming the ruling on all claims except for the Title VII retaliation claim, which the 5th Circuit has sent back for further proceedings.

The plaintiff's boss denied having fired plaintiff in retaliation for her complaint. Instead, he asserted that the compliance officer had not relayed the plaintiff's gender-related complaint to him, and he had fired plaintiff because he was constantly receiving complaints about her from her co-workers due to her workplace behavior. However, plaintiff's boss did admit to asking plaintiff, "[D]o I have to worry about you suing me?" and telling her that the compliance officer had recommended the company hire an employment attorney, immediately before firing her.

In considering plaintiff's Title VII retaliation claim, the 5th Circuit applied the burden-shifting framework set forth in prior case law. The 5th Circuit found that the plaintiff had established a prima facie case of retaliation by pointing to evidence that (1) she told the compliance officer that she may have been treated unfairly because she is a woman, and (2) was fired within hours of the compliance officer informing plaintiff's boss about this specific complaint. In turn, REJ Properties provided a legitimate non-discriminatory reason for firing plaintiff – the continuous complaints from co-workers. The 5th Circuit, however, determined that plaintiff offered sufficient evidence of pretext to survive summary judgement on her retaliation claim, as the timing of her firing was highly indicative of motive.

While this decision directly discusses firing someone hours after they make complaint of discrimination, the importance of timing for other events shouldn't be overlooked. If an employer is getting complaints about an employee or having any other difficultly with an employee, the employer should address that issue as timely as possible. Employers should further keep detailed documentation of all problems they have with an employee, along with how and when they were addressed by the employer.

In instances where terminating an employee is a consideration, you should be mindful of the surrounding circumstances as well as the information you share with the worker. If you have concerns about the timing of a termination due to surrounding circumstances or if you're not sure what information you should or should not disclose in the course of a termination, you should consult with employment counsel prior to initiating the termination process.

THE SHRINKING INCENTIVE: WELLNESS PLANS UNDER REVIEW

Mary C. Moffatt

"The controversy arises when an inducement to participate … in a wellness program is substantial enough that it is no longer considered 'voluntary.'"

On January 7, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) issued two new proposed regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Non-discrimination Act (GINA) with respect to wellness programs. On January 20, 2021, the Biden administration issued an Executive Order (EO) asking administrative agencies to review any pending (non-final) regulations and as a result of the EO, and as of the publication of this Newsletter, the proposed regulations have not yet been published in the Federal Register so that the 60-day comment has not yet started.

However, the proposed regulations should still be of interest to employers with wellness plans because they may be the bellwether of things to come.

As readers will recall, the EEOC previously issued final rules under the ADA and GINA with respect to wellness programs in May 2016, but in 2017, in the case of *AARP v. EEOC*, the District Court for the District of Columbia determined that the rules were arbitrary and capricious and vacated the rules. *AARP v. EEOC*, 267 F. Supp. 3d 14 (D. D. C. 2017). In response to the AARP decision, the EEOC issued revised rules in 2018 removing the incentive language from the ADA and GINA regulations.

The January 2021 proposed regulations circle back to address the level of incentive employers may offer in order to incentivize employee participation. Employers with wellness programs have utilized a variety of incentives in order to encourage employees to participate in those programs. However, the ADA and GINA place limits on an employer's ability to require medical exams or make inquiries of an employee's disability, personal genetic information or family medical history. Both the ADA and GINA allow employers to conduct medical examinations and examinations as part of wellness programs as long as the employees' participation is considered "voluntary." The controversy arises when an inducement to participate (either through a reward or the risk of a penalty) in a wellness program is substantial enough that it is no longer considered "voluntary."

Wellness programs are generally divided into two categories: (1) participatory programs that do not require the satisfaction of a particular health goal but that may require activities such as completion of a health-risk assessment with no requirement to improve the results; and (2) health-contingent programs that provide rewards for completion of a particular health-based activity or based on satisfying some goal related to a health factor. The proposed regulations do not apply to programs that do not include disability-related questions or medical examinations, such as programs that provide only general health information.

Under the proposed regulations, most wellness programs would be limited to no more than "de minimis incentives" to employees, such as a water bottle or gift card of modest value (i.e., $10-15). For example, incentives of significant value, such as an employer-paid gym membership, would not be considered "de minimis."

Wellness plans may be, but are not required to be, part of a group health plan (GHP) and the proposed regulations noted one exception to the general rule, which is for a health contingent wellness program that provides an incentive as part of or that qualifies as a GHP. Under those circumstances, the employer could offer the maximum allowed under the 2013 HIPAA regulations but must meet all of the requirements for such programs under HIPAA.

Given the uncertain status of the proposed regulations, there is no action for employers to take at this time. However, the "de minimis" standard announced in these regulations for incentives should cause employers to consider how such a standard would impact their existing wellness programs. It is anticipated that the EEOC will provide updates on the status of the proposed regulations in the near future.

Employers with questions concerning the regulations regarding wellness programs may consult with any of the attorneys at Wimberly Lawson for further information and guidance.

A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

forth in 29 CFR 1904.7.

Perhaps recognizing that the vaccine is not a panacea to the pandemic, the Guidance also recommends that employers not make a practice of distinguishing between workers who have been vaccinated and those who have not, particularly with respect to wearing face coverings and remaining physically distant.

The updated Guidance is only partially responsive to President Biden's EO because that EO also directed OSHA to consider developing emergency temporary standards (ETS) on COVID-19, "including with respect to masks in the workplace" - and if OSHA determines ETS are necessary, they are to issue them by March 15, 2021. If OSHA develops ETS, they would (unlike the Guidance) have the same status as formal regulations, would be enforceable, and would take effect immediately. How long they would last is uncertain at this point.

The Presidential EO also directs OSHA to focus enforcement efforts on violations that implicate the risk of COVID-19 in the workplace or which indicate violation of the anti-retaliation principles.

In light of OSHA's activity and updated Guidance, and the increased focus from the new administration on workplace safety, employers are advised to consult with counsel to ensure all OSHA-related programs are up to date, and that employee safety training is documented and effective. The best way to prevent an OSHA issue is to prevent workplace accidents and address potential hazards before they become problems.

"WE'RE MOVING!"

Effective March 1, 2021, our Nashville, Tennessee office will move to the following new address (phone and fax remain the same):

Wimberly Lawson Wright Daves & Jones, PLLC
545 Mainstream Drive, Suite 413
Nashville, TN 37228
Telephone: 615-727-1000
Fax: 615-727-1001

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