Treating the Cause, Not the Symptom: How to Avoid 10 Employment-Related Liabilities in the Health Care Industry

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Companies of all shapes and sizes continually grapple with how to foster and maintain a productive, respectful work environment. Part and parcel of this objective is ensuring that the workplace complies with the various federal and state statutes that govern, among other things, how employees must be treated, how much they must be paid and how their complaints must be addressed. These laws often have particular implications for certain industries, and health care is no exception. In this article, we identify 10 employment-related concerns health care providers should be aware of, and how health care employers can minimize their risk of non-compliance.

1. Disability Accommodation

The Americans with Disabilities Act of 1990 (ADA) is a watershed civil rights law that prohibits discrimination based on disability. Under the ADA, employers must provide reasonable accommodations to qualified employees with disabilities, unless doing so would pose an undue hardship. This includes providing on-the-job-accommodations (e.g. making facilities accessible, installing telecommunications for the deaf and allowing a training exam to be taken orally), as well as reasonable amounts of unpaid leave related to a disability. Failure to provide such an accommodation or failure to engage in an interactive process before denying an accommodation can expose an employer to liability. Supervisors should be aware of the obligation to provide reasonable accommodations and inform Human Resources (HR) if they believe an employee may need one. The maxim ?better-safe-than-sorry? applies here. If, for example, an employee is frequently tardy but makes a comment to his or her supervisor that the tardiness may be related to a disability or health condition, the supervisor should inform HR, and HR should engage with the employee to determine if he or she needs an accommodation and, if so, if a reasonable and effective accommodation is available.

2. Interaction Between the ADA and FMLA

The Family and Medical Leave Act of 1993 (FMLA) requires certain employers to provide employees with up to 12 weeks of unpaid leave per year for qualified medical and family reasons, including

pregnancy, adoption, personal or family illness. Some employers have what are known as ?automatic termination? policies, providing for termination if an employee is not medically able to return to work at the end of this time period. These policies have come under scrutiny and have been held to violate the ADA. The reason is that unpaid leave of a reasonably finite duration has been held to be a ?reasonable accommodation? under the ADA, even if the leave is longer than 12 weeks (in some instances, up to a year or more). Whether an employee is entitled to such additional leave should be determined on an ?individualized basis,? based on factors such as the duration of the additional requested leave and whether the employee is reasonably expected to be able to perform the essential duties of his or her position at the conclusion of the additional leave. Any policy that provides for automatic termination after a set time period is, by definition, not individualized. Employers should, therefore, avoid such policies.

3. Misclassification of Employees as ?Exempt? under the FLSA

The Fair Labor Standards Act (FLSA) establishes a minimum wage, overtime pay and other standards for private sector and government employees. Employees are generally entitled to minimum wage for every hour worked and overtime pay for any time worked over 40 hours in a single workweek, unless one of the specific, enumerated exemptions to the FLSA applies. A common misconception among employers is that simply paying an employee on a salary basis makes them exempt. That is not the case. With few exceptions, to be exempt an employee must (a) be paid at least $23,600 per year ($455 per week), (b) be paid on a salary basis and (c) perform exempt job duties, which are enumerated in certain FLSA regulations. Typically, only employees functioning at a high level and with a significant amount of independent discretion will qualify for these exemptions.

Significantly, the FLSA also exempts certain health care professionals, regardless of how much they are paid or whether they are paid on a salary basis. Under this exemption, the employee must hold a valid license or certificate permitting the practice of medicine and actually be engaged in that practice. This would include physicians, surgeons and certain nursing professionals. For all other employees, employers must be careful to ensure that the employee meets the duties test for at least one exemption before treating the employee as exempt.

4. Wage and Hour Claims Generally

As a corollary to the preceding section, employers should ensure that nonexempt employees are accurately reporting their time and being paid for all time worked. Work performed during breaks, checking emails at home, etc., can add up and expose the employer to liability for unpaid wages and overtime. Failing to pay such wages and overtime exposes an employer to liability, including the possibility of a class action. Lawsuits on this basis are common, and the subject of much commentary (for reference, see ?Can You Sue the Boss for Making You Answer Late-Night Email?,? published by the *Wall Street Journal* a few years ago). In order to avoid liability, employers should have clear policies for clocking in and out, reporting any requests to work off the clock and prohibiting off the clock work, such as unauthorized work from home.

5. Sexual Harassment

In the climate of the #MeToo movement, employers face heightened pressure to respond swiftly (and

strongly) to harassment complaints. Employers must ensure that they have in place a well-defined and easily understood process for employees to report harassment, and that this process is communicated to all employees. In addition, managers must know how to respond to receiving such reports or complaints and how to escalate a complaint to initiate an investigation. Finally, employers must ensure that their investigations and remedial actions are fair, appropriate and don?t expose the employer to unexpected liability (for example, if an employer publicizes that an employee harassed someone and that turns out to be false, that could lead to a defamation claim). One proactive step employers can take is to conduct company-wide sexual harassment training. As the adage goes, an ounce of prevention is worth a pound of cure.

6. Social Media Policies

Many employers have policies governing how their employees may use social media. These policies have come under scrutiny, and to the extent they attempt to prohibit employees from engaging in certain online conduct, some have been found unlawful under the National Labor Relations Act (NLRA). The NLRA protects employees? right to discuss the terms and conditions of their employment (including, but not limited to, wages, working conditions, safety issues, etc.) with co-workers, whether or not the employer is unionized. This includes discussions about working conditions using social media, such as an employee?s Facebook post that is ?liked? by other employees. The key question is whether a reasonable employee could interpret the social media policy as discouraging such activities. For example, a policy that prohibits employees from disparaging their employer or their co-workers on social media would likely be held to violate the NLRA. Social media, and how it is used, is constantly evolving, and employers should regularly review the language of these policies to make sure they are keeping up. Employers should also be cautious when disciplining employees for social media conduct. Employers are advised to seek legal counsel in both endeavors.

7. Independent Contractor Misclassification

Employee misclassification generates substantial losses to federal and state governments in the form of lower tax revenues and results in employees not receiving benefits to which they are entitled by law. As a result, the federal Department of Labor, IRS and certain state agencies have all increased enforcement efforts to weed out employees improperly classified as independent contractors. A common misconception is that paying a person as a ?Form 1099? (the IRS tax form used to report payments to independent contractors) automatically makes that person an independent contractor for tax, wage or other purposes. To the contrary, whether an employee is an independent contractor is governed by the nature of the relationship in practice. Generally, independent contractors are individuals who are economically independent, operate their own businesses, are hired to perform a specific task and control how they perform it. For example, an individual who operates his or her own software design business and is hired by a physician group to design a new database, and who will stop working once that task is completed, is an independent contractor. By contrast, an individual who performs the same tasks as W-2 employees, but who works on a part-time basis or as a ?consultant,? is almost certainly an employee. Misclassification can expose an employer to liability for unpaid wages and overtime, unpaid payroll taxes and unpaid income taxes. Because the liability can be significant, employers are encouraged to consult legal counsel to assist in determining whether to treat an individual as an

independent contractor.

8. Background Checks

Understandably, many employers choose to consider criminal history and other background information when making employment decisions, such as hiring, retention, promotion and reassignment. This is especially true in the health care industry, where so-called ?barrier crimes? can preclude employment in certain practice areas, and where employees are tasked with caring for patients and interacting with sensitive personal information on a daily basis. Except for certain restrictions on medical and genetic information, employers may generally run background checks on employees and applicants. There are, however, strict requirements under the federal Fair Credit Reporting Act (FCRA) related to any employer background check conducted through a third-party reporting agency. The FCRA mandates a very specific procedure for obtaining authorization prior to running the background check, for notifying the employee or applicant before and after making any adverse decision based on background information, and for making certain certifications to the third-party reporting agencies. Employers should ensure that any background checks comply with these requirements and consult legal counsel where necessary. In addition, employers should be careful to make sure that they are using criminal history information fairly and in compliance with applicable laws. For example, though certain licensing requirements may necessitate a blanket exclusion of candidates with felony convictions for certain positions in the health care industry, this does not apply to all positions. Employers should undertake an individualized assessment of each individual?s criminal history as it pertains to the specific position.

9. Employee Evaluations and Record Retention

One of the most common roadblocks to effectively defending against discrimination and retaliation claims is an employer?s lack of documentation of an employee?s poor performance. Failure to sufficiently document an employee?s performance prior to termination can make it very difficult to defend against meritless discrimination and retaliation claims. Even if an employee was terminated for perfectly legitimate performance problems, the employer is at a disadvantage in defending a claim if it has little to no documentation of the supposed performance issues (or, worse, if the employee?s evaluations were all positive). Employers must document performance issues and any steps taken to correct them, including any progressive discipline or counseling. Employers must ensure that evaluations are accurate and, whenever possible, should provide employees the opportunity to correct performance issues before implementing more severe forms of discipline, such as termination.

10. Retaliation

Retaliation claims are especially costly to defend, because the employee?s initial burden to state a retaliation claim (and survive dismissal) is much lower than other types of discrimination claims. Generally, to state a retaliation claim against an employer, an employee need only allege that he or she engaged in protected conduct, that he or she was treated adversely thereafter and that the adverse action was taken because of the protected activity. Protected conduct may include, but is not limited to, bringing a harassment complaint, requesting a disability accommodation or taking FMLA leave. Further, many types of actions may be deemed ?adverse,? not just formal discipline. Simply excluding the employee from meetings or giving him or her less favorable assignments may constitute adverse

actions. Courts routinely refuse to dismiss retaliation claims at an early stage, because the mere fact that an adverse action occurs soon after a protected activity is enough for a court to ?infer? causation. Therefore, employers should ensure that they have clear anti-retaliation policies that are communicated to employees and that they encourage employees to report suspected retaliation. Supervisors, in particular, should understand and acknowledge anti-retaliation policies and be mindful to document non-discriminatory reasons for adverse employment decisions.

If you have any questions about any of the topics or issues addressed in this article, please contact Amanda Weaver at aweaver@williamsmullen.com or (804) 420-6226, or Aaron Siegrist at asiegrist@williamsmullen.com or (804) 420-6307.

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