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How “Well” Is Your Company’s Wellness Program?

Employer wellness programs are generally designed to incentivize employees to adopt a healthier lifestyle in exchange for financial rewards. Participation requirements vary widely from program to program, but employees who participate are often subject to medical examinations and disability-related inquiries that may otherwise be impermissible under the Americans with Disabilities Act (ADA). Those examinations and inquiries are allowed under the ADA, however, if participation in the program is “voluntary.”

In the waning months of 2014, the EEOC took aim at three employer wellness programs run by Honeywell International, Inc., Orion Energy Systems, Inc. and Flambeau, Inc., alleging that the programs lacked the crucial “voluntary” element. Each program required employees to submit to certain medical examinations—such as biometric testing or a blood draw—and to answer health-related questions. According to the EEOC complaints, employees who refused or failed to participate incurred a range of “severe consequences,” such as canceled medical insurance, a directive to pay their full insurance premiums, discipline or termination. The agency determined that such penalties rendered the programs involuntary and, therefore, impermissible under the ADA. In the Honeywell action, the EEOC further claimed that the company violated the Genetic Information Nondiscrimination Act by penalizing an employee when his wife refused to participate in the medical examinations, which could have revealed certain family medical history information.

The EEOC’s position on wellness programs is troubling for a number of reasons. First, while the agency has expressed interest in issuing regulations that will clarify the criteria for establishing a “voluntary” wellness program, no such regulations have issued. Second, certain Health Insurance Portability and Accountability Act (HIPAA) and Affordable Care Act (ACA) statutory provisions, rules and regulations allow for incentive-based wellness programs and permit, in specific circumstances, penalties for nonparticipation. The EEOC’s stance in the three cited suits seemingly runs contrary to this other Federal legal authority.

These cases are all in their early stages, and there is no way to know whether the courts will agree with the EEOC’s litigation position. In any event, employers are cautioned to carefully review and consider the terms of their wellness programs prior to implementation and to evaluate whether modifications are appropriate in light of the recent EEOC actions noted above. If you have any questions on this topic, please contact Philip L. Mowery, Elizabeth N. Hall, Cheryl A. Luce or any Vedder Price attorney with whom you have worked.

Philip L. Mowery
Shareholder
+1 (312) 609 7642
pmowery@vedderprice.com

Elizabeth N. Hall
Associate
+1 (312) 609 7795
ehall@vedderprice.com

Cheryl A. Luce
Associate
+1 (312) 609 7872
cluce@vedderprice.com

Policy Manual Update: DOL Issues Final Rule Revising Definition of Spouse Under the FMLA

On February 23, 2015, the U.S. Department of Labor (DOL) issued a Final Rule updating the Family Medical Leave Act's (FMLA) regulatory definition of "spouse" to include same-sex couples. Previously, the definition of "spouse" did not include same-sex spouses if the employee resided in a state that did not recognize his or her same-sex marriage. Now, eligibility for FMLA protections shall be based on the "place of celebration," or the location where the individual was married. This means that a couple married in Illinois, a state that recognizes same-sex marriage, would be entitled to spousal FMLA leave even if they later reside in a state that does not recognize the union.

The DOL maintains that the Final Rule will reduce the administrative burden on employers that operate in more than one state and remove barriers to the mobility of employees in same-sex marriages. Some other features of the DOL's Final Rule include:

- An employee in a legal same-sex marriage may take FMLA leave to care for his or her stepchild.
- An employee may take FMLA leave to care for a stepparent who is the employee's parent's same-sex spouse.
- An employee in a common law marriage is eligible for FMLA leave to care for his or her spouse as long as the common law marriage became valid in a state that recognizes common law marriage.
- The new rule recognizes same-sex marriages entered into abroad as long as the marriage is valid in the place it was entered into.

Employers should carefully review and, where necessary, revise their FMLA leave policies to ensure they reflect the new FMLA entitlements of employees in same-sex marriages. Additionally, those individuals charged with administration of their employer's leave program should be informed (and, ideally, trained) regarding the new rights and obligations created as a result of the issuance of this Final Rule. If you have any questions on this topic, please contact Kenneth F. Sparks, Emily C. Fess or any Vedder Price attorney with whom you've worked.

Kenneth F. Sparks
Shareholder
+1 (312) 609 7877
ksparks@vedderprice.com

Emily C. Fess
Associate
+1 (312) 609 7572
efess@vedderprice.com

New Technology Clashes with Statutory Requirements:

Why Clicking "I Agree" May Not Be Enough

Since December 2014, retail giant Michaels Stores, Inc. (Michaels) has been hit with two class action lawsuits regarding its background-check process. The lawsuits allege that Michaels violated the Fair Credit Reporting Act (FCRA) by having job applicants click an "I Agree" box consenting to the terms and conditions of an online job application, which include an authorization to obtain a consumer report on the applicant.

Employers utilizing a third party to obtain background checks for use in the hiring process (and other employment decisions) must comply with a number of requirements set forth in the FCRA, including that the employer give job applicants a written authorization form that includes a "clear and conspicuous" notice that a consumer report may be obtained for employment purposes. This disclosure and authorization must be part of a separate or "stand-alone" document consisting of the disclosure and nothing else. The employer must obtain the individual's authorization before a consumer report is procured.

While the FCRA mandates the use of stand-alone, written authorization forms, many employers today use applications that are completed online and submitted electronically. Nothing is printed out. Nothing is signed. Instead, many online applications include an "I Agree" box colloquially known as a "clickwrap" agreement. The box is typically found at the end of the application and must be completed in order for the applicant to apply for the job. The plaintiffs in the Michaels lawsuits contend that the "clickwrap" agreement in the applications they completed does not comply with the FCRA because it is not a "stand-alone" statement; rather, it appears at the end of the application surrounded by allegedly irrelevant information.

Michaels is not the only employer accused of using authorization forms that violate the FCRA. Discount retailer Dollar General Corporation and grocery chain Publix Super Markets, Inc. have recently been hit with similar class actions. These lawsuits serve as a stark reminder that the law often lags behind technological innovations. Accordingly, employers seeking to use "new" technologies to streamline certain human resources processes and/or procedures should carefully consider whether the use of such technologies will affect the employers' compliance with certain outdated or "old-fashioned" legal requirements. In some cases, the legal risks may be outweighed by the operational rewards, but those risks should not be ignored.

If you have any questions about complying with the Fair Credit Reporting Act, please contact Aaron R. Gelb, James R. Glenn or any Vedder Price attorney with whom you have worked.

Aaron R. Gelb
Shareholder
+1 (312) 609 7844
agelb@vedderprice.com

James R. Glenn
Associate
+1 (312) 609 7652
jglenn@vedderprice.com

Whose Time Is It Anyway?

Key Decisions Clarify the Meaning of Compensable Time

Late last year, the U.S. Supreme Court issued an opinion in *Integrity Staffing Solutions v. Busk*, providing some clarity regarding whether employees must be compensated for certain "mandatory" activities engaged in before they start and after they finish their workday. The plaintiffs, contract workers assigned to an Amazon.com, Inc. fulfillment facility, accused their employer, Integrity Staffing Solutions, of violating the Fair Labor Standards Act (FLSA) by failing to compensate them for the time they were required to spend each day going through a theft-prevention security checkpoint before leaving the warehouse. The Ninth Circuit Court of Appeals, when presented with the issue, held that the security screenings were compensable employment activities, reasoning that "the screenings were 'necessary' to the employees' primary work as warehouse employees and done for Integrity Staffing's benefit."

In a unanimous decision, the U.S. Supreme Court concluded that the Ninth Circuit erred in its decision by incorrectly focusing on "whether an employer *required* a particular activity." In its opinion, the Supreme Court relied on the Portal-to-Portal Act, which Congress passed in 1947 to create an exemption for "activities which are preliminary to or postliminary to [one's] principal [employment] activity." The Court explained that "principal activity" under the Act should be interpreted as an activity that is "integral and indispensable to the principal activities that an employee is employed to perform." Elaborating further, the Court explained that "intrinsic elements" of one's principal activities are those activities that "an employee cannot dispense if he is to perform his principal activities."

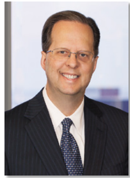
Explaining that although some activities, such as "the time battery-plant employees spent showering and changing clothes because the chemicals in the plant were 'toxic to human beings,'" satisfy the intrinsic-element test, that was not the case with respect to post-shift security screenings. Addressing the nature of the work performed by the employees at issue, i.e., the contract workers assigned to the Amazon.com, Inc. facility, the Court noted that these employees were hired to "retrieve products from warehouse shelves and package those products for shipment . . . [not] to undergo security screenings." Accordingly, the time spent going through the security check was deemed a noncompensable postliminary activity.

The distinction between compensable and noncompensable time was also addressed by a federal district court in *Gibbs v. City of New York*. Claiming that the New York City Police Department violated the FLSA, the *Gibbs* plaintiffs argued that they were entitled to overtime compensation stemming from their attendance at mandatory counseling and treatment sessions that occurred after regularly scheduled work hours. Relying on

Integrity Staffing, the court concluded that "the counseling sessions do not amount to 'work'" and "even if they were 'work' . . ., [the counseling] would amount to noncompensable postliminary activities." As a result, the court granted the city's motion for summary judgment.

While the Court's decision in *Integrity Staffing* was arguably narrowly tailored to address the compensability of time spent in security check points, it (and the *Gibbs* decision) nevertheless helps clarify which types of activities associated with an individual's work qualify as noncompensable preliminary and postliminary activities in contrast to those activities that are intrinsic to an employee's principal activities and for which the employee must be compensated.

These decisions are also a good reminder for employers to periodically review their wage and hour policies to ensure that their employees are paid for all those job duties that are intrinsic to the employees' principal job activities. As we have written about for years, wage and hour class actions are very expensive to defend, even when the employers' position is correct. Vedder Price is very experienced in helping clients with these types of complicated wage and hour issues. If you have any questions about these decisions or wage and hour claims in general, please contact Jonathan A. Wexler, Joseph K. Mulherin, Kaitlyn E. Fallon or any other Vedder Price attorney with whom you have worked.


Jonathan A. Wexler
Shareholder
+1 (212) 407 7732
jwexler@vedderprice.com

Joseph K. Mulherin
Shareholder
+1 (312) 609 7725
jmulherin@vedderprice.com

Kaitlyn E. Fallon
Associate
+ 1 (212) 407 7779
kfallon@vedderprice.com

California Corner

There's a Classification for That: Recent Cases Challenge Whether Application-Based Service Platforms Misclassify Independent Contractors

As the number of services offered to consumers through applications ("app" or "apps") on their tablets and smartphones continue to expand, the companies that are profiting from them are facing a series of lawsuits that may redefine how they (and others) do business. These cases are not the first instance—and will undoubtedly not be the last—where wage and hour laws lag behind technological advances. Mobile apps such as Uber, Lyft and Sidecar have taken a number of markets by storm, revolutionizing the way consumers request, track and pay for taxi and "black car" rides. TaskRabbit, meanwhile, is an app attempting to redefine the way consumers complete their "to do" lists by enabling them to arrange for someone else (the "Tasker") to perform a number of different tasks such as cleaning, shopping or making deliveries. With an ever-growing number of people earning a living by serving as someone else's "private driver" or errand runner, the question being asked is whether these individuals should be classified as employees or independent contractors. The answer may well determine whether certain businesses survive and/or prosper.

Two cases currently pending in the U.S. District Court for the Northern District of California may shed some light on the subject. In *Douglas v. Uber Technologies, Inc.*, a number of drivers are claiming that Uber misclassified them as independent contractors. They are seeking to proceed with a class action on behalf of a significant number of Uber drivers. Similarly, in *Cotter v. Lyft, Inc.*, the plaintiffs are attempting to assert class-wide claims that Lyft violated the applicable wage-and-hour laws by misclassifying its drivers as independent contractors. In both cases, the driver-contractors contend that they are, in fact, employees. Motions for summary judgment have been filed in both cases, but the courts have yet to rule.

What does this mean for California employers? Unless and until the courts (or legislature) decide whether individuals providing a service "brokered" by an app-based platform, the companies offering such services must be mindful of the classifications they settle on and the associated risks they face. The rulings anticipated in cases like *Uber* and *Lyft* will provide employers with insight as to how the courts may apply long-standing legal principles in a rapidly evolving online marketplace. In the meantime, employers should remember that under California law, "control" is one of the most important factors dictating whether an individual is an employee or an independent contractor. California courts will consider a number of other factors when evaluating independent contractor status. The California Industrial Welfare Commission (IWC), meanwhile, issues industry and occupational wage orders that define terms such as "employ," "employee" and "employer."

While the California Supreme Court has not specifically addressed the cases described above, it decided, in January 2015, to review an appellate court's decision in *Dynamex Operations West, Inc. v. Superior Court*, a wage-and-hour class action alleging misclassification of a nationwide class of drivers for a courier and delivery service. The appellate court certified a class based on the "employee-centric" IWC definition of employee, rather than requiring the plaintiff to satisfy the more employer-friendly common-law definitions. Depending on the approach adopted by the Supreme Court here, employers may soon face an explosion of misclassification claims. As the courts rule on these independent contractor decisions, we will continue to provide updates on the status of the California landscape.

If you have any questions or any other California matter, please contact Brendan G. Dolan, Heather M. Sager, Ayse Kuzucuoglu, Lucky Meinz, Brittany A. Sachs or Zachary Scott.

Brendan G. Dolan
Shareholder
+1 (415) 749 9530
bdolan@vedderprice.com

Heather M. Sager
Shareholder
+1 (415) 749 9510
hsager@vedderprice.com

Ayse Kuzucuoglu
Associate
+1 (415) 749 9512
akuzucuoglu@vedderprice.com

Lucky Meinz
Associate
+1 (415) 749 9532
lmeinz@vedderprice.com

Brittany A. Sachs
Associate
+1 (415) 749 9525
bsachs@vedderprice.com

Zachary Scott
Associate
+1 (415) 749 9535
zscott@vedderprice.com

Illinois Pregnancy Accommodation Law

The Pregnancy Accommodation Act, which went into effect on January 1, 2015, dramatically shifted the analysis in Illinois, creating a series of new rights and obligations that employers need to understand and comply with. In follow-up to our recent article about the topic, "New Illinois Pregnancy Accommodation Law Goes into Effect Jan. 1, 2015," Aaron R. Gelb and Elizabeth N. Hall recently recorded a webcast covering some of the key topics of the Act, including:

- Scope of Act
- Making and Responding to Accommodation Requests
- The Interactive Process
- To Do: Posters & Handbooks

For more information, visit:
www.vedderprice.com:80/files/uploads/il-pregnancy-update.wmv

Recent Accomplishments

Steven L. Hamann and **Cara J. Ottenweller** achieved summary judgment and dismissal of a case for a global waste management company. The lawsuit was filed in the United States District Court for the Middle District of Pennsylvania by a former employee who claimed that she was unlawfully discriminated against on the basis of a perceived disability.

James R. Glenn won an arbitration in Kentucky for a national manufacturing company. The arbitrator found that the grievant was discharged for just cause based on unsatisfactory performance.

Thomas J. Wilde won a class action arbitration in Los Angeles for a national manufacturing company. The arbitrator found that the company did not violate the contract with respect to payment of overtime.

J. Kevin Hennessy successfully assisted a major engine manufacturer in opening up an existing labor agreement and obtaining concessions from the union, including conversion of hundreds of bargaining unit employees from union health care to the company health care plan at higher employee contribution rates.

J. Kevin Hennessy and **James R. Glenn** obtained dismissal of NLRB charges filed against a financial services company that alleged the company fired four employees for advocating in favor of a union during a union organizing drive.

Steven P. Cohn presented two training webinars titled, “Creating and Maintaining a Respectful Workplace in a Global Environment” to international associates of a 350 member, non-governmental organization who live and work in about 30 different countries.

Jonathan Maude in our London office successfully defended claims against a global pharma business in connection with allegations of discrimination, whistleblowing, breach of contract and unfair dismissal. A resounding decision in favour of the company and, unusually, costs was decided by the employment tribunal.

Labor & Employment Law Group Members

Chicago

Thomas G. Abram .... +1 (312) 609 7760
Bruce R. Alper .... +1 (312) 609 7890
Nicholas Anaclerio............ +1 (312) 609 7538
Mark I. Bogart................... +1 (312) 609 7878
Michael G. Cleveland........ +1 (312) 609 7860
Steven P. Cohn .... +1 (312) 609 4596
Christopher T. Collins........ +1 (312) 609 7706
Thomas P. Desmond .... +1 (312) 609 7647
Emily C. Fess.................... +1 (312) 609 7572
Aaron R. Gelb, Editor......... +1 (312) 609 7844
James R. Glenn .... +1 (312) 609 7652
Elizabeth N. Hall .... +1 (312) 609 7795
Steven L. Hamann............ +1 (312) 609 7579
Thomas G. Hancuch.......... +1 (312) 609 7824
Benjamin A. Hartsock........ +1 (312) 609 7922
J. Kevin Hennessy .... +1 (312) 609 7868
John J. Jacobsen, Jr. .... +1 (312) 609 7680
Edward C. Jepson, Jr......... +1 (312) 609 7582
Cheryl A. Luce .... +1 (312) 609 7872
Philip L. Mowery .... +1 (312) 609 7642
Joseph K. Mulherin........... +1 (312) 609 7725
Margo Wolf O'Donnell .... +1 (312) 609 7609
Michelle T. Olson............... +1 (312) 609 7569
Andrew Oppenheimer .... +1 (312) 609 7664
Cara J. Ottenweller........... +1 (312) 609 7735
Paul F. Russell................... +1 (312) 609 7740
Robert F. Simon .... +1 (312) 609 7550
Patrick W. Spangler .... +1 (312) 609 7797
Kenneth F. Sparks............. +1 (312) 609 7877
Kelly A. Starr .... +1 (312) 609 7768
Mark L. Stolzenburg .... +1 (312) 609 7512
Theodore J. Tierney.......... +1 (312) 609 7530
Thomas M. Wilde, Chair.... +1 (312) 609 7821
Charles B. Wolf................. +1 (312) 609 7888

New York

Daniel C. Green .... +1 (212) 407 7735
Neal I. Korval .... +1 (212) 407 7780
Marc B. Schlesinger .... +1 (212) 407 6935
Jonathan A. Wexler .... +1 (212) 407 7732

Washington, DC

Amy L. Bess .... +1 (202) 312 3361
Sadina Montani .... +1 (202) 312 3363

London

Jonathan Maude .... +44 (0)20 3667 2860
Esther Langdon .... +44 (0)20 3667 2863

San Francisco

Brendan G. Dolan............. +1 (415) 749 9530
Ayse Kuzucuoglu.............. +1 (415) 749 9512
Lucky Meinz...................... +1 (415) 749 9532
Brittany A. Sachs.............. +1 (415) 749 9525
Heather M. Sager............. +1 (415) 749 9510
Zachary Scott .... +1 (415) 749 9535

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