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Healthcare Employment Law IN Brief

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Unequal Pay Costs Employer $250 Million +

In *Velez v. Novartis Pharmaceuticals*, a jury awarded over $250 Million to a class of female sales employees who claimed that they were paid less than their male counterparts. Statistical analysis was used in an effort to show that females systematically received lower performance ratings than men in comparable jobs.

Studies continue to suggest that women earn less than men in comparable jobs. Class action wage and hour litigation is red hot, and the *Novartis* case is likely to result in even more claims. This is a wake-up call for employers to audit compensation practices to identify the reasons for pay disparities among employees in comparable jobs. Because you never know what you will find, consider working with an attorney to protect aspects of the audit with the attorney/client privilege.

E-Spying by Government: Supreme Court Weighs In

In *City of Ontario, California v. Quon*, the U.S. Supreme Court held that a governmental employer did not violate the Fourth Amendment or federal law when it reviewed text messages that an employee sent on a pager provided to him by his employer. Although *Quon* arguably applies only to governmental entities like State and many County hospitals, because Indiana recognizes invasion of privacy claims in the private sector, non-governmental employers also may find that it provides useful lessons.

The Court assumed that the employee had a reasonable expectation of privacy in the text messages. Despite a policy stating that the employer may monitor messages at any time, the employee's supervisor suggested he might follow a different practice.

The following factors were significant in the Court finding the search reasonable: (i) the employer conducted the search to determine whether the existing character limits were sufficient to ensure that officers were not paying hidden work-related costs (in other words, the search was for a work-related purpose); (ii) although perhaps not the least intrusive method of serving its purpose, the search was not excessively intrusive (the employer redacted all messages transmitted during off-work hours and scrutinized only two months of messages); (iii) even though the employee had a reasonable expectation of privacy in his messages, he should have assumed that his messages would be reviewed in certain circumstances (as a law enforcement officer, he should have known that the messages might be needed in legal proceedings, and he should have known they could be subject to open records requests); and (iv) there was no reason for the employer to expect to find the very personal messages it found.

In light of *Quon*, employers should consider: (i) notifying employees, in writing, when/how their technology use will be monitored; (ii) training supervisors to not say or do anything contrary to the policy; (iii) carefully consider the reason for reviewing an employee's personal e-mails, text messages, *etc.* *before* engaging in such review; and (iv) carefully consider the nature of the review, keeping in mind that courts will compare the nature of review to the reason for review (and to the employee's privacy interests) when determining whether the search was reasonable.

To Pay or Not to Pay

In *Rutti v. Lojack Corp.*, the Ninth Circuit Court of Appeals reversed a judgment for the employer on the employee's claim that he should be paid for time spent each day after work sending data concerning the day's events to his employer over a modem at his home. Confirming that this off-the-clock activity was directly related to the employee's primary job duties, the Court determined that the employee would have to be paid for the time unless it was so minor as to be characterized as *de minimis* (no specific length of time on a daily or aggregate basis was established). The case was sent back to the lower court for additional findings.

I mention this case because it serves as a reminder that healthcare employers must pay close attention to hourly-paid nurses and other non-exempt employees who finish charting or who transition work to the next shift after clocking out. Healthcare workers are "givers" and often gladly "volunteer" to complete such work after clocking out. The problem is, the FLSA prohibits employees

from volunteering to provide the services that they were hired to perform, and an employer cannot accept the benefits of an employee's work without paying for it.

This is another wage and hour area ripe for audits and potential class treatment, especially if the off-the-clock work occurs on a regular basis.

Health Care Reform: Keeping Your Current Coverage

You may recall from previous presentations or newsletters that grandfathered plans do not have to comply with some of the new consumer protections established by the Patient Protection and Affordable Care Act (PPACA). The Departments of Treasury, Labor, and Health and Human Services recently issued an interim final rule that provides guidance on how plans may keep or lose their grandfathered status.

The interim final rule, which is subject to public comment until August 16, 2010, defines "grandfathered health plan coverage" as "coverage provided by a group health plan, or a health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as along as it maintains that status under the rules of this section)." The rule requires any plan claiming to be a grandfathered health plan to include a disclosure of the grandfather status. Sample language is provided. Plan administrators must be available to explain which protections of the PPACA apply and which protections do not apply and what might cause a plan to lose its grandfathered status. The plan administrator needs to understand the healthcare reform law well enough to answer complex questions.

Changes that cause a plan to cease grandfather status include: (i) elimination of benefits; (ii) increase in percentage cost sharing requirements; (iii) increase in fixed-amount cost sharing requirements, other than co-payments; (iv) increase in fixed-amount co-payments; (v) decrease in contribution rate by employers and employee organizations; and (vi) change in annual limits.

The rules contain complex formulas for calculating the value of permissible changes in copayments, deductibles, *etc.* Employers who made changes before the rules came out have a limited opportunity to review/modify them.

Firearm Law Takes Effect

As of July 1, 2010, employers no longer may prohibit employees who legally possesses a firearm or ammunition from bringing the weapon and ammunition onto the employer's parking area as long as the weapons/ammunition are stored out of plain sight in a locked vehicle.

This new law specifically exempts a number of employer locations, including child caring institutions, private secure facilities, group homes, child care centers, and the employee's personal vehicle if the employee is a direct support professional who uses that vehicle to transport developmentally disabled individuals.

Employers should review their workplace violence and other policies to make sure that they are in compliance.

FMLA Developments: Who is a Son or Daughter?

The Department of Labor recently issued an Interpretation of the FMLA wherein it attempts to provide guidance regarding whether employees who do not have a biological or legal relationship with a child may take FMLA leave for birth, bonding and to care for the child.

FMLA regulations make clear that "son or daughter" includes biological, adopted, foster, and step children, as well as legal wards and a child of a person standing *in loco parentis*. Although the Department acknowledges that a current FMLA regulation defines *in loco parentis* as "includ[ing] those with day-to-day responsibilities to care for and financially support a child," the Department interprets this regulation as stating that an individual does not have to assume both daily care and financial responsibility to qualify as being *in loco parentis*. One or the other is sufficient.

The Department points out that nothing prohibits an individual from having more than two parents (for example, a person may have two biological parents and additional people that stand *in loco parentis*).

The next time an employee asks for time off relating to birth, bonding, or to care for someone with a serious health condition, don't assume the employee is not entitled based on traditional notions about parent-child relationships. Ask for information about the relationship before deciding whether the reason qualifies.

***This briefing does not constitute legal advice. Please see an attorney about any particular matter.**

Greg is a partner and a member of the firm's Employment and Labor and Healthcare Groups. Since 1994, he has counseled, trained, and represented Indiana hospitals, physician practices, long term care facilities, and other healthcare employers and human services organizations in dealing with a wide variety of employment matters. *07.08.2010*