TOWNE, RYAN & PARTNERS, P.C.

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Labor and Employment Law Update

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Dear Client,

We are writing to update you on several recent changes and emerging trends in Labor and Employment Law. We have compiled an overview of the key takeaways and encourage you to read through this overview carefully. Please call us if you have any questions or would like to discuss how these changes may affect your business operations.

In this update:

- New Rules for Employee Wellness Programs
- Overtime Pay for Service Advisors at Auto Dealerships
- Are Guns Allowed on Company Property?

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NEW RULES FOR EMPLOYEE WELLNESS PROGRAMS

The United States Equal Employment Opportunity Commission (EEOC) has published new rules under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) affecting employee wellness programs. Employers who offer wellness programs should carefully review these new guidelines alongside their current wellness programs to ensure continued compliance with the ADA and GINA.

Background on Wellness Programs

Many employers offer wellness programs which are designed to increase participants' overall health and, in turn, reduce healthcare costs. As healthcare costs go down, health insurance carriers – and employers who sponsor health insurance plans – save money.

Many wellness programs provide incentives to encourage individuals to make healthy lifestyle choices, follow good dietary habits and engage in fitness activities. Some wellness programs do not collect participants' medical information. Other wellness programs do require applicants to provide medical information, including data related to disabilities, health status information and/or family medical history, in order to participate in the program. The new EEOC rules apply to the latter type of wellness programs which collect participants' data.

Background on the Laws

The ADA prohibits covered employers (employers with 15 or more employees) from making employment decisions (hiring, termination, promotion, etc.) based upon an individual's disabilities, and to make reasonable accommodations to otherwise qualified employees and job applicants who have disabilities. The ADA also requires that employers make wellness programs available to all employees regardless of whether the employee is disabled, provide reasonable accommodations so that employees with disabilities can participate, and keep employees' medical information confidential.

Likewise, under GINA, covered employers (also employers with 15 or more employees) are prohibited from using employees' health status or genetic information – data about the "manifestation of a disease or disorder in family members of an individual" – to make employment decisions or as a basis for allowing access to benefits, including wellness programs.

New ADA Requirements for Wellness Programs

The new EEOC rule in connection with the ADA applies to wellness programs which make a disability-related inquiry or which requires participants to undergo a medical examination. Employers may offer ***limited incentives*** to encourage employees to participate in these wellness programs as long as (1) the program is "reasonably designed to promote health or prevent disease" and (2) employees' participation in the wellness program is voluntary.

Reasonably Designed. A wellness program will meet the "reasonableness" standard if it is designed to have a reasonable chance of improving health or preventing disease, is not overly burdensome, is not a subterfuge for violating the ADA or other laws prohibiting discrimination, and is not deemed to be "highly suspect" in its methods.

Voluntary Participation. For participation in a wellness program to be considered "voluntary", an employer may not require participation, deny or limit access to health insurance or benefits for non-participants, or retaliate against an employee who does not participate or who is deemed ineligible.

Written Notice Requirement. One of the most important aspects of the EEOC's new rules under both the ADA and GINA is the requirement that employers provide employees with proper written notice of their rights under the employer's wellness plan. The content of the notice will differ from employer to employer, based upon both the specific terms of the wellness plan being utilized and the nature of the employer's business.

Permitted Incentives. Employers may offer a variety of incentives to encourage employee participation in ADA-compliant wellness programs which ask disability-related questions or require medical examinations, including financial incentives, prizes and time-off awards. The incentives are limited, however, to the following:

- Where the wellness program is only available under one particular group health plan, the incentive may not be more than 30% of the total cost of self-only coverage under that plan.

- Where the employee's participation in the wellness program does not require enrollment in any of the employer's health plans, the incentive may not be more than 30% of the lowest self-only plan offered by the employer.

- Where the employer offers a wellness program but does not offer a health plan, the incentive is limited to 30% of the total cost to a 40-year-old non-smoker with self-only coverage under the second lowest cost Silver Plan available through the Exchange in the location of the employer's principal place of business.

Confidentiality. The ADA has long prohibited the disclosure of employees' medical information. In addition, the new rule provides that (1) an employer may only receive medical information in aggregate form which is not likely to identify specific individuals, except as necessary to administer the wellness program, and (2) the program may not incentivize an employee's agreement to the sale, exchange, transfer or disclosure of medical information or the waiver of confidentiality protections under the ADA.

New GINA Requirements for Wellness Programs

The EEOC's new rules under GINA differ depending upon the type of information being sought and the person who is providing the information. Employees, as well as their spouses and children, are welcome to participate in employer-sponsored wellness programs, but employers may only offer inducements to encourage participation under very limited circumstances.

Genetic Information. Genetic information is defined as data relating to the "manifestation of a disease or disorder in family members of an individual." Employers are prohibited from offering inducements of any kind in exchange for genetic information from its employees, their spouses and their children.

Current or Past Health Status Information. Employers are similarly prohibited from offering inducements to employees or their children in exchange for health status information. However, employers ***may*** offer limited inducements to an employee whose ***spouse*** provides information about his/her own current or past health status.

Prohibition Against Discrimination and Retaliation. Employers are prohibited from retaliating against any employee whose spouse does not provide his/her health status information requested by an employer wellness program. An employee may not be denied access to health insurance benefits due to the spouse's failure to provide health status information.

Reasonably Designed. Similar to the ADA's reasonableness standard, the health or genetic services offered by an employer will be deemed to be reasonably designed under GINA if it is not overly burdensome, has a reasonable chance of improving health or preventing disease, is not a subterfuge for violating GINA or other laws prohibiting employment discrimination, and is not deemed to be "highly suspect" in its methods. Conversely, a wellness program is not reasonable if its intent is to shift costs onto employees based upon their health status, is used only to predict the employer's future health costs, is overly burdensome in the amount of participation required, is unreasonably intrusive, or requires the participant to endure significant costs of medical exams. Importantly, a wellness program will also be deemed unreasonable under GINA if it collects health information from participants, but fails to use the aggregate data to address commonly identified conditions among participants.

Written Authorization. An employer requesting health status information from an employee's spouse must obtain prior, knowing, written and voluntary authorization before the spouse completes a health risk assessment.

Permitted Inducements. The requirements for inducements to a spouse under GINA are the same as incentives which may be offered to employees under the ADA, as described above.

Confidentiality. In addition to the confidentiality requirements under the ADA described above, GINA prohibits disclosure of genetic information that would allow employees or their family members to be individually identified.

Questions? Please feel free to contact us with any questions or concerns, or to schedule an appointment to discuss the effect these changes might have on your business operations. We would be happy to review the terms of your current wellness plan to ensure compliance with the new regulations and draft a legally compliant Notice custom-tailored to your company's wellness plan.

OVERTIME PAY FOR AUTOMOBILE SERVICE ADVISORS?

On January 9, 2017, the U.S. Court of Appeals for the Ninth Circuit made an important ruling affecting auto dealerships. The Court ruled in Navarro v. Encino Motorcars, LLC that service advisors are entitled to overtime pay under the Federal Labor Standards Act (FLSA).

For background, as you probably know, the FLSA requires that employers generally pay overtime ("time and a half") to employees who work in excess of forty (40) hours in a given workweek. The FLSA also specifies several categories of employees who are exempt from the overtime pay requirement. The overtime exemption at issue in Navarro v. Encino Motorcars, LLC applies to "any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. 213(b)(10). It is well settled that employees with the job titles "salesman", "partsman" and "mechanic" are not entitled to overtime pay under the FLSA.

In Navarro v. Encino Motorcars, LLC, the dealer did not pay overtime to its employees with the job title "service advisor" and attempted to define those employees as "salesmen" and "mechanics", as they sell repair services to customers. The Ninth Circuit Court of Appeals rejected that argument, finding instead that because service advisors are neither primarily engaged in selling automobiles, nor do they service automobiles themselves, they are not covered by the exemption and, therefore, are entitled to overtime pay.

Importantly, this decision is only binding on employers who do business in the states that comprise the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), as well as the Territories of Guam and the Northern Mariana Islands. Two other Circuit Courts of Appeals – the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina and South Carolina) and the Fifth Circuit (Louisiana, Mississippi and Texas) – have made the ***opposite*** determination, finding that service advisors ***are*** exempt from overtime pay requirements. The Second Circuit Court of Appeals, which includes New York, Connecticut and Vermont, has not yet ruled on this issue. The U.S. Supreme Court has also not yet resolved this conflict between the laws in different parts of the country.

Going forward, auto dealers could be subject to more lawsuits by service advisors and other employees with job titles other than "salesman", "partsman" or "mechanic" who have not received overtime pay.

ARE GUNS ALLOWED ON COMPANY PROPERTY?

The possession and carrying of firearms has become a growing topic of controversy in recent years, as the federal government and certain states, including New York, have enacted more stringent gun control laws. The legal landscape has left many wondering if guns are allowed in the workplace and if employees may store guns in their vehicles while parked on company property. Those questions are answered by the laws of each individual state.

At the outset, it should be noted that no state has enacted a law which would require an employer to allow guns in the actual work area.

More than 20 states, the most recent being Ohio, have enacted statutes which give employees the right to store legally owned guns in their vehicles when parked in workplace parking areas, even when the parking area is located on company property. Many of these laws impose specific requirements to ensure that the firearm is properly secured while it is being stored in the employee's vehicle. Interestingly, many of the states which allow employees to store guns in their vehicles do not consider the company's parking lot to be part of the "workplace".

New York, as well as almost 20 other states, have no statute addressing the storage of firearms in employees' vehicles, and there does not appear to be any pending legislation in New York addressing the issue. Therefore, it is arguably within the rights of a New York employer to ban guns anywhere on company property, including company parking lots.

However, while there is no statute addressing the issue, it is possible that different judges across New York State could come to different conclusions, depending on the geographic and demographic makeup of the county where the employer is located. Until the New York State Legislature acts, the question of whether an employer may and/or should prohibit firearms on its property, including its parking lots, will require careful analysis of the relevant factors, such as the number of pistol permits granted in the community where the company is located and the nature of the company's business.

Please feel free to contact us if you would like to discuss these factors or if we can be of service in drafting a policy addressing guns at your workplace.