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Ideas & Trends

AUGUST 6, 2014
ISSUE NO. 761

INSIDE

NEW EXECUTIVE ORDER

Expect lawsuits challenging LGBT executive order regs

It is "very safe to predict that there will be lawsuits to enjoin and set aside" the OFCCP's upcoming regulations to implement an executive order signed by President Obama last week which bans discrimination and requires affirmative action by federal contractors on the basis of sexual orientation and gender identity, according to attorney and former OFCCP official John C. Fox of Fox, Wang & Morgan P.C. In an interview with Wolters Kluwer, Fox provided his expert analysis of Executive Order (EO) 13672, signed by the President Obama on July 21, 2014. Objections to the new requirements will not only come from religious institutions and religiously oriented federal contractors who believe that the President did not go far enough to protect religious beliefs in the wake of last month's Supreme Court ruling in *Burwell v Hobby Lobby Stores, Inc*, but also from federal contractors who are "weary of the cost burdens of OFCCP," he anticipates.

Aside from EO 13672, there is currently no federal law to protect employees working outside the federal government against discrimination in the workplace on the basis of sexual orientation or gender identity. When he signed EO 13672, President Obama reiterated his calls for Congress to pass the Employment Non-Discrimination Act (ENDA), a bill that would bar employment discrimination based on actual or perceived sexual orientation or gender identity. On November 7, 2013, ENDA cleared the Senate (S. 815) with a bipartisan 64-32 vote. Yet, soon after, House Speaker John Boehner stated that he will not bring the bill up for a vote in the Republican-controlled House of Representatives (H.R. 1755). "With the exception of the 109th Congress, a bill to protect the employment rights of at least gay and lesbian applicants and employees has been introduced and failed passage in each and every year of the last 40 years," Fox observed, adding that ENDA "is legislatively dead in this 113th Congress."

How does the new EO change EO 11246? President Lyndon B. Johnson issued the initial version of EO 11246 in September 1965. It prohibits federal contractors and federally-assisted construction contractors and subcontractors, with more than $10,000 in government contracts annually, from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin and it also requires covered federal contractors to take affirmative action to ensure equal employment opportunity for employees in those protected categories. Fox explained that EO 13672 amends four specific provisions of EO 11246 to now insert and compel "sexual orientation" and "gender identity" (aka Lesbian, Gay, Bisexual & Transgender (LGBT)) compliance obligations by:

1. making discrimination on the basis of "sexual orientation" and "gender identity" unlawful pursuant to EO 11246;

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2. requiring the contractor to take "affirmative action" to ensure that applicants and employees are treated without regard to "sexual orientation" and "gender identity;"
3. requiring covered contractors to add to their solicitations for employment that the contractor will consider qualified applicants for employment without regard to "sexual orientation" and "gender identity;" and
4. requiring bidders for a covered federal contract to state in a "Compliance Report" that the bidder's employment policies and practices do not unlawfully discriminate based on "sexual orientation" and "gender identity."

When can we expect the OFCCP's proposed regulations? The new EO also requires the Secretary of Labor to propose regulations to implement the requirements of the amendments to EO 11246 within 90 days of July 21, 2014, the date EO 13672 was signed. That means the proposed regulations are due to be published on or before October 19, 2014, which is before the November mid-term elections, Fox pointed out.

When will contractors have to comply with the new requirements? Due to the notice and comment requirements of the federal regulatory process, it will likely take several months after the proposed regulations are published for the OFCCP to issue final regulations. EO 13672 delays the effective date of the protections for sexual orientation and gender identity until the first day a contractor has "entered into" a covered federal contract *after* the effective date of OFCCP's finalized regulations implementing the amendment, Fox explained. Thus, compliance will likely not attach, at the earliest, before the middle of 2015 when the OFCCP's regulations might first become legally effective, or for many years later if a company does not enter into a new federal contract promptly thereafter. However, Fox pointed out that a federal contractor enters into a "new" federal contract every time a contractor "alters" or "amends" or "extends" an existing federal contract.

What might affirmative action requirements for LGBT workers entail? Significantly, the amendments to EO 11246 provide that the upcoming OFCCP regulations must require federal contractors to take *affirmative action* based on sexual orientation and gender identity. "While that does not necessarily mean that [the] OFCCP will establish employment 'goals' for 'sexual orientation' and 'gender identity,' [the] OFCCP has many other 'positive steps' or 'good faith efforts' it could order up," Fox said. Such requirements will "undoubtedly" include outreach and recruitment and accommodation-like tolerance systems, such as training, regarding LGBT applicants and employees, he predicted.

Are goals for LGBT employment likely? Goals for LGBT employment, such as those currently required in affirmative action plans for women and minorities, "are highly *unlikely* because there are no databases available reporting the number or percentage of available LGBT applicants for employment or promotion," according to Fox.

Moreover, "unlike the OFCCP's recent newly innovated approach to build an availability database for 'protected veterans' (for which there also are no reliable databases), I predict that the OFCCP will bow to personal privacy concerns of LGBT applicants and employees and will accordingly be loath to require, at this time, covered federal contractors to compel LGBT applicants to self-identify to assist the OFCCP to start building a documented in-the-field availability database," Fox stated.

Importantly, there is a provision in ENDA, "which specifically prohibits the EEOC and the Secretary of Labor from compelling employers, federal contractors and other entities [that] the bill covers to collect or produce 'statistics on actual or perceived sexual orientation or gender identity,'" Fox pointed out. Specifically, Section 9 of ENDA states: "The Commission and the Secretary of Labor shall neither compel the collection of nor require the production of statistics on actual or perceived sexual orientation or gender identity from covered entities pursuant to this Act."

What about potential lawsuits? Whatever the specific regulatory requirements will be, Fox predicts that there will be lawsuits to challenge the new requirements for two main reasons. First, he believes that "numerous religious institutions and religiously oriented federal contractors will object" that EO 13672 and the OFCCP's upcoming

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HR Compliance library—Ideas & Trends (USPS 680-810)(ISSN 0745-0613), a Wolters Kluwer editorial staff publication, is published monthly by Wolters Kluwer, 4025 W. Peterson Ave., Chicago, Illinois 60646. Periodicals postage paid at Chicago, Illinois, and at additional mailing offices. POSTMASTER: SEND ADDRESS CHANGES TO HR COMPLIANCE LIBRARY—IDEAS & TRENDS, 4025 W. Peterson Ave., CHICAGO, IL 60646. Printed in U.S.A.

implementing regulations do not go far enough to protect religious beliefs in light of the Supreme Court's recent ruling in *Burwell v Hobby Lobby Stores, Inc* — where the Court held that the Affordable Care Act's contraceptive coverage regulations violate the religious rights of closely held private corporations.

Although many observers anticipated that President Obama would add a more sweeping religious exemption, EO 13672 does not contain any exemption for religious organizations beyond that made to EO 11246 by President George W. Bush in 2002 that allows religiously affiliated contractors to favor individuals of a particular religion when making employment decisions. Specifically, President Bush amended EO 11246, via EO 13279, to provide that a government contractor that is a "religious corporation, association, educational institution, or society" is exempt from the bar on religious discrimination in Section 202 of EO 11246 "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." The language of this exemption mirrors the language in Title VII that exempts religious organizations from Title VII's bar on religious discrimination (See Title VII, Section 702 (42 USC §2000e-1)). Nevertheless, religious organizations that are government contractors subject to the requirements of EO 11246 are still required to comply with the other nondiscrimination and affirmative action rules set forth in EO 11246.

Second, in Fox's view, EO 13672 "is clearly illegal pursuant to the constitutional precedent established in *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579 (1952))." That case requires the President "to either trace his authority to act to a specific power rooted in the Constitution or one the Congress has delegated to him to enforce," Fox explained. "Since the Congress refuses to pass LGBT protective legislation year-in and year-out, the President's claim to Congressional authority to act is at its lowest possible ebb."

Will federal contractors actually sue? While there are factors that push against federal contractors actually rising up to strike down the OFCCP's proposed LGBT regulations, Fox says that he has a "strong sense" that these new requirements will be the "the straw that broke the camel's back."

"[E]nough federal contractors are weary of the cost burdens of [the] OFCCP that there are many now ready to pour their monies into trade associations to fight this latest cost burden (as most federal contractors will see it) on federal contracting," he said.

Nevertheless, there are three factors that push against any lawsuit by federal contractors. First of all, "federal contractors are a notoriously complacent and resilient group of companies which typically seek to maximize their efficiency and shy away from litigation." Second, "18 states (and the District of Columbia) already have some form of protection for sexual orientation and/or gender identity," Fox noted. "Employers in those states have already made the transition to not discriminate based on [these categories]. Absent onerous "affirmative action" requirements, federal contractors operating in those states will wonder what all the fuss is about."

Third, "the President is well aware his popularity is currently ebbing." According to Fox, Obama is "now a 'Lone Ranger' in Washington [who is] unable to rally support on Capitol Hill for most of his current political agenda" and the President is also aware "that his influence may take another large step down after the November election." Indeed, the President "transparently signaled as much" by ordering the OFCCP to publish proposed regulations implementing EO 13672 within 90 days — *before* the mid-term elections — and not within the 120 day period he recently ordered for the OFCCP "to use as a publication runway" for his "two other sex-based initiatives" issued this past April — *i.e.,* EO 13665 which amended EO 11246 to prohibit federal contractors from retaliating against employees who choose to discuss their compensation and a Presidential Memorandum instructing the Secretary of Labor to establish new regulations requiring federal contractors to submit to the Department of Labor summary data on compensation paid to their employees, including data by sex and race.

"To publish a proposed regulation in 120 days is a Herculean task. To publish proposed regulations in 90 days is a strong sign of not just concern, but panic and desperation," Fox asserted. "Like Thor without his Hammer, the President knows he is losing his superpowers and others could soon overcome his will."

Concerns will likely center on OFCCP burdens, not LGBT protections. "[The] OFCCP will thus likely be smart enough to craft its regulations very 'narrowly' to provide as little provocation as possible while still planting the seed of protection for LGBT [workers]," he stated. "If so, many sage political pundits in Washington will then advise contractor lobbyists to wait for the next Administration and reshape [the] OFCCP when the next President is wielding The Hammer."

"But, on balance, contractors are currently very weary of [the] OFCCP," Fox said. "[I]t is my strong sense that ultimately, when reports of needed new budget dollars to comply with [the] OFCCP's latest requirements start again flooding up corporate tower elevators to the offices of CFOs and CEOs, many are going to react poorly. A number of them will say, I predict, 'enough is enough,' and will call their Washington D. C. trade associations to pledge litigation money to stop

further cost burdens given the high likelihood of success to stop these regulations even if the company is not otherwise ideologically opposed to LGBT protections."

Fox is the President and a founder of Fox, Wang & Morgan P.C. He leads large and complex litigation matters in state and federal courts, in cases involving wage-hour and discrimination class actions, trade secret claims, employment contract disputes, wrongful termination, corporate investigations, and the use of statistics in employment matters. Fox previously served as Executive Assistant to the Director of the OFCCP, where he was responsible for all enforcement and policy matters. ■

Source: *"Expect lawsuits challenging LGBT executive order regulations, expert predicts," was written by Cynthia L. Hackerott, J.D. and published in the July 29, 2014 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

BENEFITS

Implement cost-cutting strategies now to avoid ACA's excise tax in 2018

In 2018, the *Patient Protection and Affordable Care Act* (ACA) will impose a 40 percent excise tax on high-cost employer-sponsored health plans. This so-called "Cadillac" tax applies to employer-sponsored plans that cost more than $10,200 for employee-only coverage and $27,500 for family coverage in 2018. Health insurance issuers and sponsors of self-funded group health plans will have to pay the 40 percent tax on any dollar amount beyond these caps, which is considered "excess" health spending. In an interview with Wolters Kluwer, Tracy Watts, senior partner at Mercer, spoke about how the excise tax will impact employers and what strategies employers can use over the next few years to avoid being subject to the ACA's excise tax.

Almost 30 percent of large employers (those with 500 or more employees) will be subject to the excise tax in 2018, if they make no changes to current plans, and this increases to 40 percent by 2022.

Cadillac tax overview. As stated above, in 2018, employer-sponsored health plans that cost more than $10,200 for employee-only coverage and $27,500 for family coverage will be subject to the excise tax. In coming years, this figure will be adjusted for inflation. And, higher thresholds ($11,850 individual; $30,950 family) exist for pre-Medicare retirees and workers in high-risk professions, such as law enforcement officers and firefighters, among others.

The tax applies to both fully-insured and self-funded plans. For fully-insured plans, the insurer will be responsible for paying the tax; for self-insured plans, the plan administrator (usually the employer) will be responsible for payment. For both fully-insured and self-funded plans, employers will be responsible for calculating, for each tax period, the amount of excess benefit subject to the tax for any applicable employer-sponsored coverage offered to employees. Under the ACA, the aggregate value of all employer-sponsored health insurance coverage generally should be calculated in the same manner as the applicable premiums for the tax year for the employee determined under the rules for COBRA continuation coverage.

Applicable employer-sponsored coverage subject to the excise tax is defined in the ACA as coverage under any group health plan made available to the employee by an employer which is excludable from the employee's gross income, or would be so excludable if it were employer-provided coverage, including coverage in the form of reimbursements under a health flexible spending account (FSA) or a health reimbursement arrangement (HRA), employer contributions to a health savings account (HSA), and coverage for dental, vision, and other supplementary health insurance coverage if bundled with the group health plan. The ACA specifically excludes some coverage from the excise tax calculation, such as stand-alone dental or vision coverage; fixed indemnity health coverage purchased with after-tax employee dollars; disability benefits; long-term care; and other such insurance coverage, such as workers compensation or automobile insurance.

Because guidance has yet to be issued on the Cadillac tax, "we are not 100 percent clear on exactly what is included in the medical cost calculation," noted Watts. Some things that might be included, or not, depending on guidance from the IRS could be: EAPs; or employee contributions to HSAs, if made through pretax deductions, she noted.

Impact on employers. According to data from Mercer's *2013 National Survey of Employer-Sponsored Health Plans*, "almost 30 percent of large employers (those with 500 or

more employees) will be subject to the excise tax in 2018, if they make no changes to current plans, and this increases to 40 percent by 2022," said Watts.

While ACA lawmakers included the excise tax in the ACA to generate revenue to pay for ACA expenses, it has not been "popular with employers," according to Watts. "When we asked employers which feature of the ACA they are most concerned about, the excise tax in 2018 has consistently been the number one concern in every survey of employers Mercer has conducted since the law was passed in 2010. In a survey Mercer conducted in the summer of 2013, almost one-third of employers said they were already making changes to their medical plan in anticipation of the excise tax in 2018."

However, it is unlikely that employers will decide to drop coverage due to the Cadillac tax. "Only about 6 percent of employers with more than 500 employees said they will drop coverage within the next five years and send their employees to the public Marketplace. However, that number jumps to 23 percent for those employers with 50 to 199 employees," said Watts. She provided three important reasons why employers will be unwilling to drop coverage and send employees to the ACA-created Marketplace: (1) employees highly value employer-sponsored benefits; (2) the public Marketplace remains a huge unknown; and (3) large employers would be subject to the employer mandate tax penalty ($2,000 per person penalty for not offering health coverage), while also losing the tax deduction they receive from providing health benefits in the first place.

Strategies to avoid excise tax. There are several strategies for employers to start implementing now that can help them avoid paying the excise tax in 2018. According to Mercer's Health Care Reform Survey 2014, employers are considering taking the following actions to minimize the impact of the excise tax:

- Raising deductibles or other cost-sharing provisions (48 percent);
- Adding or improving wellness programs (47 percent);
- Implementing a consumer-driven health plan (CDHP) (27 percent);
- Increasing enrollment in existing CDHPs (22 percent);
- Dropping high-cost plans (33 percent);
- Using high-performance network (34 percent); and
- Offering coverage through a private health exchange (33 percent).

Shifting costs to employees. The most basic cost cutting strategy that employers have been using for years is to pass along increasing costs to employees by raising deductibles, copayments and coinsurance. According to a recent survey from Towers Watson and the National Business Group on Health, employees contribute 42 percent more for health care than they did five years ago, compared to a 32-percent increase for employers. And these increases are likely to continue: over the next three years, more than 80 percent of employers plan to continue to raise the share of premiums paid by employees, and they anticipate increases in all coverage tiers, according to Towers Watson/NBGH. However, using this strategy alone likely will not reduce an employer's plan cost by enough to avoid the Cadillac tax.

Wellness programs. Wellness programs have evolved into one of employers' top strategies for controlling health care costs. To help increase participation in wellness plans, Watts recommends "adding or increasing the reward/penalty that can be used in wellness programs (other than participation-only programs) due to the ACA provisions allowing higher incentives."

CDHPs. According to Mercer's *2013 National Survey of Employer-Sponsored Health Plans*, nearly two-thirds of all large employers and about one-third of small employers plan to offer a CDHP within the next three years. The average annual cost per employee for a HSA-eligible CDHP was $8,482 in 2013, compared with $10,196 for an average PPO plan. Therefore, adding a CDHP or increasing enrollment in a CDHP could really help an employer avoid paying the excise tax in 2018, noted Watts.

Other strategies. Some other strategies to help lower costs are increasing voluntary benefits offerings and limiting plan eligibility by excluding spouses who are eligible for

Study shows video communications highly effective for employee benefits enrollment

Aggregate results of 18 large employer case studies compiled by Flimp Media reveal exceptionally high employee engagement and response rates to video communications regarding benefits enrollment. The 18 employers utilized video email postcards sent to 126,390 employees announcing 2013 and 2014 annual benefits open enrollment. The results were as follows:

- 78.64 percent of Employee recipients opened and watched the digital video postcard content;
- The average employee spent 3.5 minutes engaged with their video postcard message; and
- On average, engaged employees initiated 1.03 responses for each video postcard view.

coverage through their own employer. Mercer found that of employees enrolled in the Mercer Marketplace (Mercer's private exchange) 24 percent bought voluntary supplemental health policies. This increased to 35 percent of employees electing the $1,500 or $2,500 deductible plan. In addition, Mercer's Health Care Reform Survey 2014 found that 8 percent of employers have excluded spouses who have other coverage available in 2014, and 11 percent are considering it for 2015. In addition, 12 percent of employers impose a spousal surcharge in 2014 for spouses who have other coverage available, and 16 percent are considering this for 2015.

According to a report released in April 2014, the Congressional Budget Office estimates that the Cadillac tax will result in $120 billion extra revenue through 2024. A loss of the Cadillac tax revenue would cause some ACA funding challenges, noted Watts. "While a lot can happen between now and 2018, we still do not have any guidance yet, and as such, it is important for employers to plan as if the excise tax will take effect as scheduled," she concluded. ■

Source: *Originally published on July 29, 2014 in the Employee Benefits Management Newsletter, Issue No. 566, a Wolters Kluwer Law & Business publication.*

ACCOMMODATIONS

EEOC informal discussion letter points to best practices for reasonable accommodation request policies and forms

An EEOC informal discussion letter underscores the difficulty that employers face in handling reasonable accommodation requests by employees with impairments and offers up some good practice pointers along the way. The difficulty lies in both the broad range of impairments that workers may experience, as well as the perhaps infinite set of reasonable accommodations that potentially could keep the employee on the job. In this particular instance, the agency responded to an inquiry about a "Sample Reasonable Accommodation Policy" written by a law firm and some sample forms that were intended for informational, educational, or training purposes.

The careful treatment in the letter of the various issues related to the sample policy and set of forms and questionnaires submitted for review is well worth the read. For example, regarding the sample policy, EEOC Legal Counsel Peggy R. Mastroianni notes that the law in the area of reasonable accommodation continues to develop, "making it risky to conclude, as the policy does, that certain things never (or almost never) have to be provided as reasonable accommodations."

The difficulty lies in both the broad range of impairments that workers may experience, as well as the perhaps infinite set of reasonable accommodations that potentially could keep the employee on the job.

Employee leave. The sample policy here stated that an employer is not required to permit "unscheduled (or erratic, unpredictable, intermittent) or excessive absenteeism or tardiness as a reasonable accommodation." This formulation, however, could lead to the inappropriate denial of a reasonable accommodation for two reasons, according to Mastrioanni.

First, the sample policy failed to distinguish between unscheduled and excessive absenteeism, and it is highly unlikely that an employer could deny unscheduled leave in all cases. An employee with epilepsy, for example, may have one or two seizures a year that required her to take unscheduled leave of one day each time. The fact that the leave is unscheduled, or could be characterized as erratic, unpredictable and intermittent, does not mean the employer can deny it. Under these circumstances the employer would be required to grant leave as a reasonable accommodation unless it could show undue hardship, Mastrioanni said.

Second, the sample policy neglects to explain when leave needed as a reasonable accommodation will be considered "excessive" — this omission increases the possibility that requests will be handled inconsistently and leave will be denied inappropriately. The question of whether leave granted as a reasonable accommodation is "excessive" must be determined by consideration of whether it imposes an undue hardship, according to Mastrioanni.

Working from home. The EEOC attorney also found fault with the sample policy's statement that "working from home is 'generally' not a reasonable accommodation 'except in extraordinary circumstances.'" Some courts have found a legal obligation to provide telework as a reasonable accommodation to be limited, Mastrioanni acknowledged, but she also noted that the law is far from settled.

The EEOC has recognized that telework may be a form of reasonable accommodation and has provided guidance for employers and employees in determining whether it will be an effective form of reasonable accommodation. The suggestion in the sample policy that working from home is not required except in extraordinary circumstances could thus lead an employer to violate the ADA, Mastroianni cautioned. The employer and employee should work together to determine whether teleworking would enable performance of the job's essential functions, she said. However, an employer is not require to provide telework as a reasonable accommodation if it is not necessitated by the disability or if another reasonable accommodation can be provided that will effectively meet an employee's limitations.

Regarding the need for a reasonable accommodation, Mastroianni suggested that a form could inquire as to how an accommodation would assist the individual to apply for a job, perform the job's essential functions, or enjoy equal access to the benefits and privileges of employment.

Mitigating measures. As to the sample policy's treatment of mitigating measures, Mastroianni disagreed with its statement that, "if an employee can control an impairment with medication or assistive devices and thereby perform essential job duties, no reasonable accommodation would normally be needed or reasonable." "[P]eople with many types of disabilities and who use many different kinds of mitigating measures still may require reasonable accommodation because the mitigating measure either does not eliminate all disability-related limitations or because it imposes limitations," she pointed out. By way of example, she cited a person with a prosthetic arm who may require a device to assist with lifting and an individual with diabetes who may need more frequent breaks to monitor blood glucose and insulin levels.

Mastroianni also cautioned that the sentence at issue "can be read to mean that if an employee currently does not use medication or another mitigating measure, but an employer believes the employee could benefit from one, the employer may not have to provide a reasonable accommodation." Similar implications arose from inquiries in the forms accompanying the sample policy. There is wide variation in the effectiveness of medications and other mitigating measures. One employee's need for a reasonable accommodation may be eliminated by the use of a particular medication or other mitigating measure, while another employee's may not. The choice of whether to use a mitigating measure lies with the individual, Mastroianni said. "An employer cannot base a denial of a reasonable accommodation on its belief that the individual ought to be using a particular mitigating measure instead," she warned.

Best practices. The EEOC letter closes with what can be viewed as a few best practices, keeping in mind this observation by Mastroianni: "The wide range of disabilities, employers, jobs, workplaces, and reasonable accommodations makes it exceedingly difficult to develop a form with questions that almost everyone requesting accommodation would need to answer." She also pointed out that the longer the form used by the employer, the greater the likelihood that many requestors or their health care professionals will be asked questions that both violate the ADA and do not serve the employer's interest in obtaining relevant information in terms of making an informed decision about the request for reasonable accommodation.

For those employers who use forms to gather information about the need for a requested reasonable accommodation, Mastroianni suggested that they ask in plain English, the "few questions that will help to determine whether the requestor has a disability and needs a reasonable accommodation," also noting that when the individual's disability is obvious, he or she should be asked to answer only those questions on the form addressing why a reasonable accommodation is needed.

As to the existence of a disability, the form could ask for information about:

- the nature of the requestor's impairment and its expected duration;
- the kind of activities, including major bodily functions, that the impairment affects and the way in which the activities are affected; and
- the use of mitigating measures and the extent to which they eliminate or control the impact of the medical condition.

The EEOC attorney also pointed to the helpfulness of giving examples to explain terms with specific legal meanings, suggesting that where a form inquires about an impairment's effect on "major bodily functions" or other "major life activities," examples could be offered such as normal cell growth; endocrine, neurological, or brain function; standing; lifting; and concentrating. Likewise, examples of mitigating measures may be provided, such as medication, physical therapy, assistive devices, and behavioral modifications.

Regarding the need for a reasonable accommodation, Mastroianni suggested that a form could inquire as to how an

accommodation would assist the individual to apply for a job, perform the job's essential functions, or enjoy equal access to the benefits and privileges of employment.

Consider the purpose. She also suggested that employers consider the purpose behind each question on a form, particularly whether the answer will provide information concerning the existence of a disability, the need for a reasonable accommodation, or both. Careful scrutiny should be given to any question that does not address at least one of these issues; employers should ask whether the information requested is necessary to permit a determination of the need for a reasonable accommodation, especially if it is a disability-related question.

Finally, employers should consider asking an appropriate management official handling the request, such as an HR director, to review the form before giving it to a particular applicant or employee to determine whether certain questions should be eliminated as irrelevant to the particular request, or if other questions should be asked. ■

Source: *"EEOC informal discussion letter points to best practices for reasonable accommodation request policies and forms," written by Pamela Wolf, J.D. and originally published in the May 7, 2014 edition of Employment Law Daily (www.employmentlawdaily.com), a Wolters Kluwer Law & Business publication.*

FMLA

Management attorney offers guidance on "tough FMLA situations"

The FMLA is a "confounding statute," said Penelope J. Phillips, a partner at Minneapolis management-side firm Felhaber Larson. Phillips presented a session on "7 Tough FMLA Situations — And How Best to Handle Them" on Monday, May 19 at the Minnesota CLE's Upper Midwest Employment Law Institute in St. Paul, Minnesota. "Note that the title says `situations,' not `answers,'" she pointed out, only half in jest, "because with the FMLA there aren't really `answers.'" Nonetheless, she offered practical steps on navigating a number of common, and particularly thorny, FMLA problems.

Missed deadlines, breached call-in procedures. How can employers respond when an employee fails to adhere to FMLA deadlines and the organization's established notice and call-in procedures? The FMLA regulations distinguish between foreseeable and unforeseeable leave, and there are necessarily different notice standards for each. "My experience is most people don't take planned leave," Phillips said. "It's usually unforeseeable leave — and I use that word loosely." But in either case, she reminded attendees, "you can require your employees to follow your established call-in procedures."

Under the statute, employers can require employees to comply with the "usual and customary notice and procedural requirements for requesting leave," absent extenuating circumstances. That may mean a written notice setting forth the reasons for the leave, expected duration, and anticipated start of the leave period. Even where leave is unforeseeable, an employer can mandate that employees call a designated number or specific individual to request leave (where practicable). And if the employee fails to follow established procedures — for example, calling in at least one hour before the start of one's shift — then the employer may delay or deny leave, and refuse to count the employee's absences as FMLA-qualifying. Phillips advised employers to ensure their front-line supervisors are sufficiently trained so that they don't inadvertently waive the notice requirement or give "mixed signals" as to whether adherence to the notice policy will be expected. Call-in policies "should be enforced and applied consistently for all forms of absences," she urged.

Phillips also recommended that employers prepare a routine list of probative questions that employees are to be asked when they call in to report an absence in order to clearly discern whether the absence is FMLA-covered. The standard inquiry should include the specific reason for the absence; what job duties the employee cannot perform; whether the employee will be seeing a doctor for the injury or illness; whether the employee previously suffered from the condition, had previously taken leave for it, and when; when the employee first learned he or she would need to be absent; and the expected return date or time.

Infinite "intermittent" leave. How can an employer address intermittent leave that never ends? It's a very common problem, Phillips notes; once an employee uses up the eligible 480 hours in a year, he or she gets a fresh leave entitlement as a new FMLA year commences. However, if an employer has reason to doubt the validity of the initial certification, it can ask for a second opinion (at the employer's expense), and can seek a (binding) third opinion if the first two are at odds.

Failing that, the employee who takes intermittent leave of indefinite duration may well be deemed unqualified at a certain point. "The Eighth Circuit says if you are perpetually gone from work such that you're turning a full-time job into a perpetually part-time job, you are not complying with the spirit of the statute," Phillips said. She noted at least one employer that has taken the stance

that "if you need intermittent leave, and there is no end date, you are no longer eligible for FMLA leave. At that point it's an ADA issue, and we don't know whether we can accommodate you."

"It's a very aggressive position," she acknowledged. "But they're so frustrated with the situation that they run the risk of creating a retaliation claim. At some point you have to say enough is enough. You don't want to be unsympathetic to people with chronic health conditions, but the FMLA wasn't intended to require the creation of a permanent part-time job."

Phillips recommended that employers obtain a new FMLA medical certification at the beginning of each FMLA year. Not a recertification, she stressed — a new certification. "That means you can get a second medical opinion, which you can't do with recertification." She also advised employers to "follow up on changed or suspicious circumstances." Employers can seek recertification more frequently than 30 days if circumstances have changed significantly (such as the duration or frequency of the employee's absences, the nature or severity of the illness, or complications from the illness). More frequent recertification can also be requested if the employee requests an extension of FMLA leave or if the employer has received information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the FMLA certification (when, for example, the employee on leave for knee surgery plays in the company softball game).

What of the employee who seems to need intermittent leave only on Mondays and Fridays, and only during the summer months? "Send a letter to the healthcare provider and ask whether the employee's condition is consistent with his or her pattern of attendance," Phillips advised. An employer also has some control over when an employee schedules a planned treatment. "You can ask your employee to schedule physical therapy, for example, at a time that is least disruptive to the company," she noted. Finally, an employer might consider the temporary transfer of an employee to a post that can be more readily accommodated during the period of recurring intermittent leave.

Designating, calculating leave usage. Calculating FMLA-qualifying leave, particularly intermittent leave, can be cumbersome. "You're always going to get the person who's going to screw it up," Phillips observed. "It's so important to allocate leave properly and also to make sure the employee understands what she has to do."

Employers must allow FMLA leave to be taken in the smallest increment of time allowed for any other type of leave (as long as the smallest increment is no more than one hour) and also must allow leave increments to be taken during the same time of day allowed for other kinds of leave (such as the beginning of shift, for example). Only the amount of leave actually taken may be counted against FMLA leave entitlement; also, the time an employee is not regularly scheduled to work may not count as FMLA leave. Required overtime not worked due to an FMLA-qualifying reason may be counted as FMLA leave, but voluntary overtime may not be counted.

An employer may retroactively designate an employee's time off as FMLA leave, provided that appropriate notice is given, and only if the failure to timely designate leave did not harm the employee. (To state an actionable FMLA claim, an employee would have to show he was somehow prejudiced by the employer's lack of notice.) "I tend to take an aggressive approach and retroactively designate," Phillips explained. How far back can an employer go? Phillips suggested 90 days as the outer limit in retroactively designating leave.

Family care leave. Leave to care for a family member raises its own set of challenges. She reminded employers that FMLA leave includes providing psychological comfort to a family member with a serious health condition, in addition to caring for the individual's medical or hygienic needs. It also includes situations where an employee needs to fill in for others who are providing care to the family member, or to arrange for such care (for example, when transferring a family member to a nursing home). On the other hand, the employer should ensure that the requested leave is actually covered under the Act. "If an employee is taking leave to care for his kids because his wife, their usual caretaker, has a serious health condition, that's not covered FMLA leave," Phillips said.

Restricted return to work. An employee who returns from FMLA leave with restrictions may also be a qualified individual with a disability under the ADA, presenting another layer of complexity. The FMLA and ADA can overlap when an employee seeks additional leave in excess of the 12-week FMLA entitlement; returns to a part-time schedule or a light-duty position; or when an employer requests a fitness-for-duty certification. The overlap requires employers to grapple with questions such as which physician (employee's or employer's) must administer a fitness-for-duty exam; whether reinstatement to the exact same job is required or whether an equivalent position would suffice; or whether group health plan coverage must be maintained during an extended leave.

When presented with an FMLA/ADA overlap issue, Phillips advises employers to perform the FMLA analysis first. "The FMLA is a much stricter law; there are so many more restrictions on what an employer can and cannot do. And then start thinking about the ADA, and whether the work restriction is a reasonable accommodation. I always take

the position that you assume a disability without conceding it — and without saying that's what you're doing"

Keeping the job open. Can you fire an employee who is unable to return to work after exhausting FMLA leave? An employer typically is not required to hold a position open in such cases. However, "additional leave is a reasonable accommodation under the ADA," Phillips reminded, so an employer must consider whether the employee is a qualified individual with a disability and therefore statutorily entitled to further leave, or to reassignment to a vacant post (provided such accommodations would not present an undue hardship to the employer).

Certification rights and responsibilities. "Understand what you have the right to do," Phillips told employers. "If you have a vague, insufficient or incomplete certification, you have the right to request a more definite statement. If you don't believe the certification was filled out by the medical provider — if the form looks like it was completed in your employee's handwriting, for example — you can authenticate. You can seek second or third opinions. Use them." And if the resubmitted certification does not correct the deficiencies, an employer may deny FMLA leave.

On the other hand, she noted, employers must be careful to ensure that a request for further information on the medical certification is not construed as interference with an employee's FMLA rights.

More tough situations. Further reflecting the "confounding" nature of the FMLA and the complexities of administering the statute, Phillips was inundated with questions — some broadly framed ("Can you force employees to take full-time FMLA leave?" No, an employee need only take the leave actually required. "What about employees getting emails and work-related calls while out on leave?" *Not good,* she cautioned.) Other queries were based on particular and in some cases intricate scenarios.

"Ninety-nine percent of employees who take leave are using it properly," Phillips contended. "But no one ever calls their lawyer about employees who are using it properly." ■

Source: *Management attorney offers guidance on "tough FMLA situations," written by Lisa Milam-Perez, J.D. and originally published in the May 22, 2014 issue of Employment Law Daily (www.employmentlawdaily.com), a Wolters Kluwer Law & Business publication.*

HR QUIZ

Must a group health plan offer participants a second chance at reward for quitting smoking?

Q Issue: *Your group health plan charges participants a tobacco premium surcharge but also provides an opportunity to avoid the surcharge if, at the time of enrollment or annual re-enrollment, the participant agrees to participate in (and subsequently completes within the plan year) a tobacco cessation educational program. One of the participants, a tobacco user, initially declined the opportunity to participate in the tobacco cessation program, but would like to join in the middle of the plan year. Is the plan required to provide the opportunity to avoid the surcharge or provide another reward to the individual for that plan year?*

A Answer: No, if a participant is provided a reasonable opportunity to enroll in the tobacco cessation program at the beginning of the plan year and qualify for the reward (i.e., avoiding the tobacco premium surcharge) under the program, the plan is not required (but is permitted) to provide another opportunity to avoid the tobacco premium surcharge until renewal or reenrollment for coverage for the next plan year. Nothing, however, prevents a plan or issuer from allowing rewards (including prorated rewards) for mid-year enrollment in a wellness program for that plan year.

Standard for obtaining a reward. If a qualified plan participant's doctor advises that an outcome-based wellness program's standard for obtaining a reward is medically inappropriate for the participant, the plan must provide a reward for satisfying a reasonable alternative standard that accommodates the recommendations of the doctor. Sample language, found in ERISA Reg. §2590.702(f)(6), may be used to satisfy the requirement to provide notice of the availability of a reasonable alternative standard. This language may be modified if it includes all required content found in paragraphs (f)(3)(v) or (f)(4)(v) of the regulations.

Source: *FAQs about Affordable Care Act Implementation (Part XVIII) and Mental Health Parity Implementation, January 9, 2014, http://www.dol.gov/ebsa/faqs/faq-aca18.html.*

HR NOTEBOOK

CPI for all items rises 0.3% in June as gasoline prices rise; food inflation eases

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.3 percent in June on a seasonally adjusted basis, the U.S. Bureau of Labor Statistics (BLS) reported July 22. Over the last 12 months, the all items index increased 2.1 percent before seasonal adjustment.

In contrast to the broad-based increase last month, the June seasonally adjusted increase in the all items index was primarily driven by the gasoline index. It rose 3.3 percent and accounted for two-thirds of the all items increase. Other energy indexes were mixed, with the electricity index rising, but the indexes for natural gas and fuel oil declining. The food index decelerated in June, rising only slightly, with the food at home index flat after recent increases.

The index for all items less food and energy also decelerated in June, increasing 0.1 percent after a 0.3 percent increase in May. The indexes for shelter, apparel, medical care, and tobacco all increased in June, and the index for household furnishings and operations rose for the first time in a year. However, the index for new vehicles declined after recent increases, and the index for used cars and trucks also fell.

Real average hourly earnings unchanged in June

Real average hourly earnings for all employees was unchanged from May to June, seasonally adjusted, the BLS reported June 22. This result stems from a 0.2 percent increase in the average hourly earnings being offset by a 0.3 percent increase in the CPI-U. Real average weekly earnings was unchanged over the month due to both real average hourly earnings and the average workweek being unchanged.

Real average hourly earnings declined 0.1 percent, seasonally adjusted, from June 2013 to June 2014. The decrease in real average hourly earnings, combined with an unchanged average workweek, resulted in a 0.1 percent decline in real average weekly earnings over this period.

Most HR professionals enter the field by chance, according to survey

In a new study of the human resource profession, XpertHR found that most HR professionals (84.8 percent) did not begin their careers as human resource professionals. And more than half of the respondents felt that their reasons for entering the profession were heavily influenced by chance and external forces rather than an active desire to work in HR. The survey also found that only one in 10 (11.3 percent) were attracted to HR because it was a well-respected profession, with fewer still (10 percent) seeing it as offering good opportunities for career advancement. Only 3.9 percent came in to HR because it pays well.

Not surprisingly, some HR professionals are more actively seeking a new role than others. Just one in ten (10 percent) of respondents said they never scan the job market for new career opportunities. LinkedIn is now the dominant player in the HR jobs market, with two in three HR job seekers (66.7 percent) using it to look for new career opportunities while the once-dominant professional and trade journals are used by just one in four (23.7 percent).

The research shows that six in 10 HR professionals (61 percent) would, if they could start their career over, still choose HR as a career. But this leaves a significant and perhaps worryingly large proportion who either definitely would not do so (8.7 percent) or don't know (30.3 percent).

The majority of respondents hold at least a college degree or higher, with 51.5 percent having a bachelor's degree and 28.1 percent holding a doctoral or professional degree (a PhD, JD or DBA). Despite their relatively high level of academic achievement, nearly four in 10 (39.4 percent) do not have a professional HR qualification of any kind. Among those who do, the most commonly held qualifications are the industry standard certifications of Professional in Human Resources (42.1 percent) and Senior Professional in Human Resources (22.1 percent) with just two respondents (1.4 percent) having the less common Global Professional in Human Resources. Smaller numbers claimed certification through a variety of bodies in compensation and benefits (7.9 percent) or payroll (0.7 percent).

More than seven in 10 respondents (71.4 percent) are members of the Society for Human Resource Management (SHRM), and 10 percent belong to the reward-oriented WorldatWork. ■