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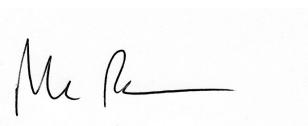
MESSAGE FROM THE CHAIR

Our Winter 2011 Labor and Employment Law Observer covers topics of interest to in-house counsel, human resources professionals, and corporate management. These articles include:

- Ten important points about GINA, the Genetic Information Nondiscrimination Act;
- The NLRB's views on Facebook postings and blogging by employees;
- Issues in transitioning injured veterans back into the workplace;
- A discussion of the U.S. Immigration and Customs Enforcement's IMAGE program;
- The legality of unpaid internship programs under the FLSA; and
- The growing importance of e-discovery.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.



Mark J. Foley

Chair, Labor & Employment



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GETTING TO KNOW GINA

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits the intentional acquisition of genetic information about employees and applicants, became effective on November 21, 2009. Many employers took little notice.

Since then, the Equal Employment Opportunity Commission (EEOC) issued final regulations clarifying employer's obligations under GINA. These regulations went into effect on January 10, 2011. Employers must begin taking specific, affirmative steps to comply with GINA.

This article highlights the major provisions of GINA and what employers must do to comply with the law.

10 IMPORTANT POINTS ABOUT GINA

1. What is GINA? GINA is a law aimed at protecting individuals from discrimination, harassment, and retaliation because an employer or potential employer believes the individual has an increased risk of acquiring a medical condition sometime in the future.

2. What employers are covered by GINA? GINA applies to private employers with 15 or more employees. GINA also covers all federal and state government employers, employment agencies, labor organizations, and joint labor-management training and apprenticeship programs.

3. What constitutes "genetic information" under GINA? Genetic Information, as defined by GINA, is very broad. It includes: (a) an individual's family medical history; (b) the results of an individual's or family member's genetic tests; (c) the fact that an individual or an individual's family member sought or received genetic services; and (d) genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Examples of genetic tests include amniocentesis and carrier screening tests to determine risk for sickle cell anemia or cystic fibrosis. Not all medical tests, however, are covered by GINA. For instance, tests for the presence of drugs or alcohol, cholesterol tests, and HIV tests are not considered genetic tests.

"Family members" also is broadly defined and encompasses many types of nonblood relationships. For purposes of GINA, family members include all dependents of an individual as the result of marriage, birth, adoption, or placement for adoption and all relatives of the individual or the individual's dependents, to the fourth-degree. Therefore, family members include everyone from children to great-great grandchildren, spouses, parents to great-great-grandparents, aunts, uncles, nephews, nieces, siblings and half-siblings, first cousins, and first cousins, once removed.

4. What does GINA specifically prohibit? GINA prohibits employers and potential employers from: (a) requesting, requiring, or purchasing genetic information; (b) disclosing genetic information, except in very limited circumstances; (c) discriminating against applicants and employees based on genetic information; and (d) retaliating against applicants and employees who refuse to provide genetic information, who file a charge of discrimination, participate in a GINA discrimination investigation or proceeding, or who otherwise oppose discrimination under GINA. Simply put, an employer may never use genetic information to make an employment decision.

5. Are there exceptions to GINA's prohibition on acquiring genetic information? Yes. Employers may acquire genetic information in the following circumstances without violating GINA:

- **Inadvertent acquisition:** Employers do not violate GINA if they inadvertently acquire genetic information. Examples include when a manager or supervisor accidentally overhears a conversation about genetic information or learns of genetic information through a casual conversation with the employee. However, no exception covers situations in which a manager or supervisor intentionally listens to a third-party conversation where genetic information is being discussed, or where the manager or supervisor probes an employee with questions that may likely elicit more genetic information.

Inadvertent acquisition of genetic information also may include receipt of genetic information via a social media site. If the site has restricted access, the inadvertent acquisition exception only applies where a supervisor or manager is given access to the social media site

by an employee and the employee discloses genetic information on that site. Employers may not access sources from which they are likely to acquire genetic information, such as on-line discussion groups focusing on genetic testing.

- **Acquisition from a commercially and publically available source:** Employers do not violate GINA if they acquire genetic information from sources such as newspapers, magazines, television shows, books, and the Internet. Employers may not, however, search the Internet or other commercially and publically available sources with the intent of locating an individual's genetic information.
- **FMLA and related certifications supporting an employee's leave to care for a family member with a serious health condition:** Employers may acquire genetic information as part of a Family and Medical Leave Act (FMLA) certification for an employee's leave to care for a family member for a serious health condition. Likewise, acquisition of genetic information is permitted if an employer is requesting medical information to support an employee's request for leave to care for a family member under state or local law, or the employer's policies.
- **As part of a voluntary wellness program, if certain conditions are met:** Employers may acquire genetic information about an employee or the employee's family members in conjunction with the offering of health or genetic services as part of a voluntary wellness program. The employee receiving these services, however, must first give knowing, voluntary, written authorization for the acquisition of genetic information. Employers also may offer a financial incentive to employees who complete a health risk assessment that includes questions about family or medical history, as long as the employer advises employees that provision of family medical history is voluntary and does not affect receipt of the financial incentive.
- **As part of a genetic monitoring program, if certain conditions are met:** In limited situations, employers may use employees' genetic information to determine if employees are being affected by harmful substances in the workplace. If an employer is engaging in genetic monitoring or plans to do so, the employer should consult an attorney for guidance on how to comply with GINA regulations.

- **As part of DNA testing for law enforcement purposes, if certain conditions are met:** Employers that engage in DNA testing for law enforcement purposes as a forensic laboratory, or for purposes of human remains identification, may collect their employees' genetic information in certain circumstances, such as for quality control.

6. Should an employer take any steps to avoid inadvertent acquisition of genetic information? Yes. The GINA regulations state that when an employer is requesting health-related information from an employee, such as to support a request for a reasonable accommodation or for sick leave, the employer generally must warn the health care provider not to provide genetic information. The warning may be in writing or oral, if the employer typically does not make requests for health-related information in writing.

Significantly, the GINA regulations contain sample warning language, as follows:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information.

"Genetic Information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

If an employer provides a warning, such as the above, the warning provides the employer a "safe harbor." This means that any acquisition of genetic information in response to the request for health-related information will be considered inadvertent and will not violate GINA.

What happens if an employer has not provided a GINA-related warning to a health care provider and inadvertently acquires genetic information? In such situations, the employer will not have violated GINA if the request for health-related information was not made in a way that would likely result in the receipt of genetic information. For example, the EEOC states that if an employer requests a doctor's note to support an employee's absence from work due to the flu, the doctor's provision of an individual's family medical history taken as part of the employee's medical examination would not be considered a GINA violation. As a best practice, however, employers should include a GINA-related warning whenever requesting medical information from or about an applicant or employee.

7. Does GINA restrict what information an employer may request under the Americans with Disabilities Act (ADA) and/or how it should be requested? Yes. Employers no longer can obtain family medical history or conduct genetic tests of applicants once a job offer has been made, even if such history or tests are required of all post-offer job applicants. Furthermore, when an employer requests a health care provider to provide any employment-related medical information about an applicant or employee (such as when requesting information as to whether an employee or applicant is disabled, to support a request for a reasonable accommodation, or in connection with a fitness for duty examination), the health care provider must be advised not to provide genetic information as part of any examination, history intake, etc. Finally, if an employer learns that its company doctor or other health care provider over which it has some control is collecting genetic information, the employer must take measures to prevent this from happening in the future, such as not using that health care provider's services.

8. Does GINA impact administration of FMLA? Yes. The GINA regulations state that employers generally must provide warnings to health care providers when requesting employment-related medical information. Therefore, employers should provide a GINA-related warning in the FMLA forms used for an employee's own serious health condition, requests for a second or third medical opinion, and requests for a return-to-work certification.

The EEOC has commented that no GINA-related warnings need to be attached to the Department of Labor's FMLA

Forms, as they are not likely to elicit genetic information. However, to date, the EEOC has not issued formal, written guidance to this effect. Accordingly, the recommended approach at this time is to include a GINA-related warning as part of all FMLA forms used for an employee's own serious health condition.

9. Do employers have any confidentiality obligations under GINA? Yes. Employers must treat any genetic information in their possession in the same way that other medical information is treated. This means that employers must keep genetic information in medical files, separate and apart from employees' personnel files. Employers are not required, however, to go back and remove genetic information that was placed in personnel files prior to November 21, 2009, when GINA went into effect. Finally, all medical information, including genetic information, must be treated confidentially.

10. What remedies are available under GINA? Aggrieved individuals may seek the same remedies under Title II of GINA that are available under Title VII of the Civil Rights Act of 1964, as amended. These remedies include injunctive and equitable relief (such as hiring, reinstatement, promotion, backpay), compensatory and punitive damages, and attorneys' fees and costs. Employers also may be fined up to \$100 for each separate offense of willfully failing to post a GINA notice in places where other employment notices are customarily posted.

STEPS FOR EMPLOYERS TO COMPLY WITH GINA

1. Post a GINA notice. Employers must post a GINA notice where they post other employment notices. A sample notice may be found at http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

2. Use GINA's safe harbor warning. Employers should include a GINA-related warning when requesting employment-related medical information from applicants, employees, and/or their health care providers. For instance, GINA-related warnings should be used when an employer requests medical information related to: (a) a pre-employment medical exam; (b) an FMLA or other leave due to the employee's own serious health condition; (c) a return to work certification or a fitness for duty exam; (d) an employee's potential or known ADA disability; and (e)

information about possible reasonable accommodations. Employers need not provide a GINA-related warning in conjunction with an employee's request for leave to care for a family member with a serious health condition, as acquisition of such information is expressly permitted under GINA.

3. Train supervisors and managers on GINA's requirements. It is important to train supervisors and managers on GINA's requirements. In particular, these individuals need to understand what they can and cannot do when they inadvertently obtain genetic information, and what actions would be considered unlawful, intentional acquisition of genetic information. Furthermore, all employees should be trained on GINA's nondiscrimination, nonharassment and nonretaliation requirements.

4. Keep all GINA-related information confidential, in a medical file. Employers must take steps to keep any GINA-related information that comes into their possession after November 21, 2009 separate from an employee's personnel file. All such information must be placed in confidential, medical files and only be accessed or disclosed on a strict need-to-know basis and in accordance with GINA requirements.

For further guidance on how to make your workplace GINA-compliant, contact Debra S. Friedman in our Philadelphia office at 215.665.3719 or dfriedman@cozen.com.

IMPROVING EMPLOYER "IMAGE" WITH THE DEPARTMENT OF HOMELAND SECURITY

WHAT IS IMAGE?

Initiated in July of 2006 and administered by Immigration and Customs Enforcement (ICE), IMAGE is a voluntary partnership between ICE and private sector employers. IMAGE, or ICE Mutual Agreement between Government and Employers, is a program in which employers self-police their hiring practices and share pertinent information with ICE. As the police arm of DHS, ICE is charged with enforcing our nation's immigration laws and extols IMAGE on its website,

stating that "[IMAGE] is designed to foster cooperative relationships and to strengthen overall hiring practices." According to ICE, IMAGE was developed as an initiative to ensure employer self-compliance and prevent or reduce any hiring or retention of unauthorized workers. While IMAGE does not promise 100 percent accuracy in preventing unauthorized employment, ICE touts the program as enhancing fraudulent document awareness through education and training.

IMAGE=SAFE HARBOR?

While IMAGE participation may be a mitigating factor in the determination of any civil penalty for hiring unauthorized workers, IMAGE does not provide any safe harbor for employers. Pursuant to the Immigration and Nationality Act (INA) 274A, employers who knowingly hire, recruit or continue to employ unauthorized workers can be subject to fines, penalties and other sanctions. The word "knowingly" includes actual and constructive knowledge: if the employer should have reasonably known an individual was unauthorized, the company and key management may be held liable. Although participation in IMAGE is not a defense *per se*, good faith compliance and completion of the I-9 Employment Verification form is a statutory defense. Nevertheless, IMAGE membership is encouraged by ICE in the government's attempts to prevent unauthorized work in the first place.

IMAGE REQUIREMENTS

As part of the IMAGE program, employers must agree to receive training, oversight, and direction from ICE as to its hiring practices and policies. Specifically, employers seeking to participate in IMAGE must agree to:

- Allow ICE to review hiring and employment practices and policies and recommend to companies ways to correct compliance issues.
- Permit ICE to identify schemes used to circumvent hiring and employment processes and help to educate employers on common schemes.
- Work collaboratively with ICE whenever ICE discovers minor and isolated potential misconduct.
- Complete a self-assessment questionnaire.

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- Enroll in E-Verify (voluntary online system run by the Department of Homeland Security that permits employers to determine new employees' eligibility to work in the United States).
- Enroll in the Social Security Number Verification Service (online system run by the Social Security Administration to check social security numbers; the system is not designed to determine immigration status).
- Adhere to IMAGE Best Practices detailed by ICE, see <http://www.ice.gov/image/best-practice.htm>.
- Undergo an I-9 audit conducted by ICE.
- Sign an official IMAGE partnership agreement with ICE.

In turn, ICE would agree to attempt to minimize any business disruptions resulting from a company's self-disclosure of possible violations and keep the related information confidential to the extent permitted by law.

CONSIDERATIONS BEFORE JOINING IMAGE

To date, there are approximately 80 "full" members of IMAGE, some of whom may have agreed to participation after already being subject to ICE investigations or sanctions. Tyson Foods, Inc. joined in January 2011 as a full compliance member, the biggest corporation to do so. In late 2001, Tyson executives were indicted for allegedly conspiring to smuggle illegal immigrants to work at the company. After the executives were acquitted, the company has been steadily working to improve its public and governmental credibility as a law-abiding corporation, first signing onto E-Verify and now participating in IMAGE. Trade associations can also become "endorsee" partners by signing an endorsement agreement stating that they support and highly recommend the use of the IMAGE. Associations need not comply with the specific IMAGE requirements.

Critics of IMAGE state that joining could actually open up a Pandora's box of headaches: threat of immediate enforcement by ICE such as termination of a percentage of workforce; threat of civil and criminal penalties for workers who are later found to be unauthorized; even potential violations of fiduciary duty to the company's stockholders for voluntarily exposing the company to liability. Critics maintain that compliance with all I-9 requirements will not prevent a company from inadvertently employing unauthorized workers, because the I-9 only requires the

employer to verify that the identity and authorization documents appear on their face to be genuine and related to the new hire. Moreover, enrollment in E-Verify is a system still vulnerable to fraud, misuse, and errors. For a full report on the problems with E-Verify, see *General Accounting Office* reports at <http://www.gao.gov/new.items/d111146.pdf>. Moreover, E-Verify may not be used for existing employees, only new hires, which may defeat the purpose of joining the program to check compliance. Given the fact that IMAGE participation does not provide any safe harbor or defense against liability, employers may be reluctant to expose the company and its employees to government scrutiny.

BEST PRACTICES FOR THE BEST IMAGE

For the majority of employers who have not signed onto IMAGE, best practices to ensure compliance with immigration laws are to ensure proper completion of I-9 forms for every employee hired on or after November 6, 1986. Moreover, employers should not put their heads in the sand if evidence arises that an employee may be unauthorized. Employers must investigate reasonable cases, and terminate any employees found to be unauthorized. On the other hand, employers should be aware that over-zealously investigating an employee, using the I-9, form or other means, may result in liability for unfair employment practices or document violations. Employers who ask for specific documents on the I-9 form, or require documents beyond those listed on the firm, can be sanctioned for document abuse. The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practice will investigate suspected cases of document abuse, as well as enforce INA 274B, the statute that prohibits employment discrimination that is based on an individual's national origin or citizenship status. Whether employers consider IMAGE participation or not, they must walk the tightrope between compliance mandated by ICE and employee rights cautioned by the OSC.

For more information on IMAGE and E-Verify, contact Elena Park in our West Conshohocken office at 610.941.2359 or epark@cozen.com.

NLRB CONTEMPLATING CHANGES TO BARGAINING UNITS FOR NON ACUTE HEALTH CARE FACILITIES

In our last *Observer*, we advised you of several pro-Labor decisions by the National Labor Relations Board (NLRB) and the NLRB's acting general counsel. And in an *Alert* that we distributed in December, we advised you of the NLRB's proposed requirement that all private sector employers subject to the National Labor Relations Act (NLRA) post a notice informing employees of their rights under the NLRA. Continuing this pro-labor march, on December 22, in a rather unusual move, the NLRB issued a "Notice and Invitation to File Briefs," soliciting interested third parties to file briefs in connection with *Specialty Healthcare and Rehabilitation Center of Mobile*, a case that has been pending before the NLRB since February 2009. At issue in that case is the composition of the appropriate bargaining unit. (The United Steelworkers filed a petition seeking to represent a unit limited to certified nursing assistants, while the nursing home took the position that the only appropriate unit consists of all nonprofessional service and maintenance employees.)

In 1989, the NLRB adopted a rule for determining appropriate bargaining units in acute care facilities, such as hospitals. Under that rule, the presumption is that eight specific and separate units are appropriate: physicians, other professionals, registered nurses, technical employees, service workers, skilled maintenance, business office clericals, and guards. With respect to nursing homes and other nonacute care facilities, the NLRB decided that it would determine the appropriate units on a case-by-case basis by adjudication, i.e., through the normal representation case hearing process.

Under the case-by-case approach, the NLRB has generally applied its "community of interest" standard, grouping employees by, among other things, similarity of wages and hours, extent of common supervision, frequency of contact with other employees, areas of practice, and patterns of bargaining. As a result, nursing home units have frequently been "wall-to-wall," combining some skilled nursing staff with nonprofessional service and maintenance employees

such as CNAs, dietary aids, cooks, and clerks. The rationale for such wall-to-wall units has been that nonacute health care facilities that provide long-term care, rather than medical treatment of a specific illness, are more functionally integrated than acute health care facilities. More specifically, nonacute health care facilities have a broader focus on the day-to-day general well-being of patients, and use staffing models that involve employees of varying skill levels working somewhat interchangeably in providing services.

Explaining the reason for its December 22 notice, the NLRB, with an emotional dissent, cited substantial changes in the long-term care industry over the past 20 years, including changed consumer preferences relating to the form and location of long-term care; a drastic reduction in the average length of stays in acute care hospitals; and a proliferation of facility-like residential alternatives to nursing homes. The NLRB's solicitation of briefs suggests a strong receptiveness to departing from the wall-to-wall approach. Since it is far easier for a union to organize smaller groups of employees, especially where they are more homogeneous (as in the eight units for acute health care facilities), a departure from the wall-to-wall approach would likely be a significant boost to the unionization of the nursing home industry.

For more information on the topics covered in this article, contact Jeffrey L. Braff in our Philadelphia office at 215.665.2048 or jbraff@cozen.com or Andrew J. Rolfes also in our Philadelphia office at 215.665.2082 or arolfes@cozen.com.

EMPLOYER RESTRICTIONS ON FACEBOOK POSTINGS CRITICAL OF COMPANY COULD VIOLATE NATIONAL LABOR RELATIONS ACT

On October 27, the Hartford Regional Office of the National Labor Relations Board (NLRB) issued an unfair labor practice complaint against American Medical Response of Connecticut, Inc. (AMR), alleging that AMR violated the National Labor Relations Act (NLRA or Act) by terminating an employee for criticizing, on her Facebook page, her AMR supervisor. In a press release, the NLRB Office of the

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General Counsel asserts that the employee's Facebook postings constituted protected concerted activity, and that AMR's blogging and Internet posting policy contains unlawful provisions, which provisions, in and of themselves, constitute interference with employees' exercise of their right to engage in protected concerted activity.

The employee's Facebook postings, which she composed at home, and which elicited supportive responses from her co-workers, included: "Love how the company allows a 17 to be a supervisor," referring to AMR's code for a psychiatric patient. The employee also referred to her boss as a "scumbag as usual."

The problematic portions of AMR's blogging and Internet posting policy were:

Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company, in any way, including but not limited to any Company uniform, corporate logo or an ambulance, unless the employee receives written approval ... in advance of the posting;

Employees are prohibited from making disparaging comments or discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers, and/or competitors.

A hearing on this case was scheduled for February 8, but the matter was settled the day before, with AMR agreeing to revise its policy. (The discharge resolved through a separate, private agreement between AMR and the former employee.) However, the mere issuance of the complaint raises significant issues.

EXISTING LAW

The NLRA makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 are limited. Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Thus, while Section 7 rights are not limited to the right to

join or assist labor organizations, or to bargain collectively, the other protected activities, whether in a union or nonunion setting, must be "concerted" and "with the purpose of collective bargaining or other mutual aid or protection." The NLRB has made clear that for an activity to be concerted, it must be undertaken by two or more employees, or by one employee on behalf of others. And it is well established that activity by a single employee for that individual's own personal benefit is not concerted activity protected by Section 7.

With respect to the Facebook postings, there is little doubt that the comments in the postings, if made directly to a fellow employee, would fall within the NLRB's interpretation of protected concerted activity in that they would be deemed to constitute communications about terms and conditions of employment for the purpose of mutual aid or protection. But here, the statements were merely posted on the employee's Facebook page. Do they still fall within the definition of concerted activity? Furthermore, even assuming for the sake of argument that the postings are concerted activity, do they lose the protection of the Act because of their potential reach, i.e., far beyond any fellow employees? Indeed, AMR asserts that it learned about the postings from a customer.

As for AMR's blogging and Internet posting policy, the NLRB uses a two-step inquiry to determine whether the mere existence of a rule (independent of its actual use) violates the Act because it "reasonably tends to chill employees in the exercise of their Section 7 rights." First, a rule is unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict such activities, its existence will only be unlawful upon a showing that employees would reasonably construe the language in the rule to prohibit Section 7 activity.

REVIEW YOUR SOCIAL MEDIA POLICY

A December 4, 2009 Advice Memorandum from the NLRB's Office of the General Counsel concluded that a social media policy with similar prohibitions to that contained in the AMR Policy was not unlawful where the particular rules at issue were part of a list of plainly egregious conduct, such as employee conversations involving the employer's proprietary information, explicit sexual references, disparagement of race

or religion, obscenity or profanity, and references to illegal drugs, and where the preamble to the policy explained that it was designed to protect the employer and its employees rather than to “restrict the flow of useful and appropriate information.” Accordingly, the advice memorandum concluded that the social media policy contain “sufficient examples and explanation of purpose for a reasonable employee to understand that it prohibits the online sharing of confidential intellectual property or egregiously inappropriate language and not Section 7 protected complaints about the Employer or working conditions.”

In our last *Observer*, we encouraged the implementation of social media policies. Especially in light of the complaint issued against AMR, prudent employers, whether unionized or not, will review their policies to ensure that they are consistent with the advice memorandum discussed above.

For further guidance or assistance on issues related to the NLRA, contact Jeffrey L. Braff in our Philadelphia office at 215.665.2048 or jbaff@cozen.com or Andrew J. Rolfes also in our Philadelphia office at 215.665.2082 or arolfes@cozen.com.

UNPAID INTERNSHIP PROGRAMS: NEXT ON THE DEPARTMENT OF LABOR'S WATCH-LIST?

Many companies have a long-standing practice of engaging college students as unpaid interns. Indeed, many colleges require students to complete an internship as a prerequisite to graduating, and many companies hire former interns as entry-level employees after they graduate. Thus, these internship programs can provide benefits both to the interns and to the companies who engage them. What could be wrong with that? According to the U.S. Department of Labor, these arrangements could run afoul of the Fair Labor Standards Act (FLSA or the Act). And the Department of Labor's Strategic Plan for Fiscal Years 2011-2016 makes clear that it intends to devote significant resources in the coming years to ensuring that vulnerable workers, such as young workers and others not likely to file a complaint, receive all appropriate wages and overtime pay.

Under the FLSA, “employees” must be paid at least minimum

wage for all regular hours worked, and nonexempt employees must be paid overtime for all hours worked in excess of 40 per week. Companies argue that unpaid interns are not employees, and therefore are not covered by the FLSA. But this argument is muddled by the Act's broad and vague definitions of employee (any individual employed by an employer) and employ (to suffer or permit to work). If an intern meets these definitions, then he or she could be covered by the FLSA and therefore entitled to wages.

To help companies determine whether their unpaid internship programs pass muster, the U.S. Department of Labor has released a fact sheet that articulates six criteria which must be met in order for an unpaid internship to be lawful in the for-profit sector. Nonprofit and public employers are subject to different treatment than for-profit, private employers. For example, public employers are permitted to have unpaid “volunteers” in certain circumstances, while private employers are not.

According to the Department of Labor, all six of the following factors must be satisfied for an individual to properly be treated as an unpaid intern, rather than as an employee, under the FLSA:

- the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- the internship experience is for the benefit of the intern;
- the intern does not displace regular employees, but works under close supervision of existing staff;
- the employer that provides the training receives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
- the intern is not necessarily entitled to a job at the conclusion of the internship; and
- the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

These factors were derived from a 1947 case, *Walling v. Portland Terminal Co.*, 330 U.S. 148, in which the U.S. Supreme Court decided whether trainees are considered employees under the FLSA. Specifically, the Court considered whether individuals engaging in a week-long



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unpaid training program for rail yard brakemen were employees under the FLSA who should have been paid for their work. The Court held that the FLSA's broad definition of "employ" as to "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." The Court further noted that the FLSA's definitions of employ and employee "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."

Applying the factors identified in *Portland Terminal Co.* to interns, the Department of Labor's fact sheet explains that "[t]he more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training." By contrast, "if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the intern's work." The Department of Labor also has noted that "[i]f the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees entitled to compensation under the FLSA."

In analyzing the Department of Labor's criteria, it is important for companies to recall that they constitute mere guidance, which courts can adhere to (or deviate from) as they see fit. Thus, although the Department of Labor takes the position that all six factors must be satisfied in order to avoid an employer-employee relationship under the FLSA, some courts do not take such a strict stance on the issue. Employers should note, though, that even those courts which deviate from the Department of Labor's criteria still adhere to the overarching ideas behind them, making it unwise for an employer to assume that a court will reject the Department of Labor's guidance altogether.

For example, some courts employ a "totality of the

circumstances" test, under which the Department of Labor's criteria are considered to be relevant but not determinative. Other courts look to whether the individual or the company principally benefits from the work performed, while others have opted to adhere to the Department of Labor's criteria. Unfortunately, there is a dearth of case law offering concrete guidance to employers on the issue of treatment of unpaid interns. Thus, companies are navigating uncertain territory when they set out to determine whether their unpaid internship program passes muster under the FLSA. Additionally, it is important for companies to remember that its state's laws might impose even stricter requirements than the FLSA.

To determine the extent to which an unpaid internship program satisfies the Department of Labor's criteria, a company must carefully analyze all of the activities its interns engage in, and must evaluate the extent to which the company relies upon those interns in its daily operations. The more indispensable a company's interns are to its operations, the more likely it becomes that those interns will be considered employees under the FLSA who must be paid for their hours worked. Companies should conduct this analysis with the involvement of counsel to increase the possibility that its efforts will be protected from disclosure if the Department of Labor later comes calling.

For further guidance on the issues discussed in this article, contact Emily S. Miller in our Philadelphia office at 215.665.2142 or esmiller@cozen.com.

ADA REASONABLE ACCOMMODATIONS NOT LIMITED TO THOSE NECESSARY TO ENABLE EMPLOYEE TO PERFORM ESSENTIAL JOB FUNCTIONS

It is well established that, absent proof of “undue hardship,” an employer is obligated to provide modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position. Indeed, the litigation regarding ADA reasonable accommodations generally focuses on: whether the individual seeking the accommodation is a qualified individual with a disability; what are the essential functions of the job; whether the accommodation offered by the employer would enable the individual to perform the essential functions of the position; whether the parties engaged in the interactive process in good faith; and/or whether the accommodations sought by the individual would pose an undue hardship on the employer.

The recent case of *EEOC v. Life Technologies Corp.* involved a profoundly deaf employee, Douglas Scrivner, who worked as a material handler (picking prepackaged products and sending them to a pack station) for Life Technologies (LTC), a global biotech corporation with about 9,000 employees and \$3 billion in annual sales. Scrivner considered American Sign Language (ASL) to be his primary language, but he had some proficiency in lip reading, reading, and writing. The lawsuit was a challenge to LTC’s failure to provide Scrivner with an ASL interpreter for all of the numerous meetings that he was required to attend. (Some occurring daily, some weekly, some monthly, some quarterly, and some “as needed.”)

LTC’S DEFENSE

LTC’s defense was that it had provided ASL interpreters for many meetings (40 in three years), written notes and handouts of the content covered for other meetings, and opportunities for Scrivner to meet one-on-one with his supervisor to ask questions through the exchange of written notes. In a motion for summary judgment, LTC argued that these accommodations enabled Scrivner to perform all of the essential functions of his position, which was confirmed

by the fact that Scrivner had: never been disciplined; a good safety record; and received every merit increase for which he was eligible.

In response, the EEOC (on Scrivner’s behalf), citing its own regulations, Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act argued that the ADA requires accommodations that do more than simply allow the employee to perform the essential functions of the job. Rather, the accommodations must also permit the employee to have “full access to the benefits and privileges of employment” as are enjoyed by other similarly situated employees without disabilities. In this case, the EEOC asserted that this requirement was not satisfied because Scrivner seldom understood what was going on in meetings; he was unable to do more than guess at how to do his job; and, as a result, he experienced frustration and anger to the point that he became sick from the stress.

EEOC REGULATIONS UPHELD

To prevail on summary judgment, LTC had to persuade the court that the EEOC’s regulations exceeded the scope of the EEOC’s authority. Not surprisingly, given the substantial deference that courts must grant to administrative agencies when determining the validity of a regulation, LTC lost its argument, i.e., the court found the EEOC’s regulation to be valid.

In light of this decision and the EEOC’s regulations, in assessing whether an accommodation is reasonable, employers should consider not only whether it enables the employee to perform the essential functions of the job, but also whether it enables the employee to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

VIDEO REMOTE INTERPRETATION

With respect to individuals who are profoundly deaf, this case is interesting for another reason. A second defense presented by LTC was the undue hardship attributable to the accommodation requested by Scrivner (an ASL interpreter for all meetings), entailing a cost of more than \$50,000 a year (nearly twice Scrivner’s salary), and substantial administrative difficulties due to the irregular scheduling of many of the meetings. The court rejected this defense based

upon representations by the EEOC regarding a vendor who could provide video remote interpretation through video conferencing, without advance scheduling, at a cost of \$3 per minute, with only a 15-minute minimum. (Apparently this solution did not surface until the summary judgment stage of the litigation, a fact about which the court criticized the parties, suggesting a failure (particularly on the part of Scrivner and the EEOC) to engage in the interactive process in good faith.)

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INJURED VETERANS RETURNING TO THE WORKFORCE: HOW TO MAKE THE TRANSITION SUCCESSFUL AND AVOID LEGAL PITFALLS

With more and more troops returning from Iraq and Afghanistan, employers may need guidance on complying with their legal obligations to integrate newly returned veterans into the workforce. The need for guidance may be particularly acute when employers are working with veterans who have suffered traumatic brain injuries (TBI) and/or post-traumatic stress disorder (PTSD). These two conditions are often misunderstood, which can lead to employer missteps.

TBI AND PTSD: INJURIES WITH SOMETIMES SUBTLE SYMPTOMS

A TBI is a physical injury to the brain. A TBI disrupts the function of the brain and results from a penetrating head injury, or a blow or jolt to the head. Some TBIs are mild and of short-term duration; others are more severe and may have long-lasting effects. The RAND Corporation estimates that approximately 19 percent of veterans of the Iraq and/or Afghanistan wars have suffered a TBI. Symptoms may vary, but common ones include fatigue, sleep disturbances, dizziness, balance problems, sensitivity to bright light, headaches, memory problems, irritability, and/or poor concentration.

PTSD is a mental disorder that occurs after an individual experiences or witnesses an extremely traumatic or life-

threatening event and responds with intense fear or helplessness. Onset of PTSD may be immediate, or may present itself weeks, months, or even years after an event. According to the U.S. Department of Veterans Affairs, between 11 and 20 percent of veterans of the Iraq and/or Afghanistan wars experience PTSD. As with TBI, symptoms vary widely, but some common ones are poor concentration, being hyper-alert to real or perceived dangers, feeling on edge, depression, irritability, and/or difficulty falling or staying asleep.

Sometimes veterans have been diagnosed with a TBI and/or PTSD, and sometimes the conditions go undiagnosed. Therefore, when veterans with either or both of these conditions seek employment or reemployment, employers may be faced with some challenging issues and need to be prepared to address them.

FEDERAL LAWS PROTECTING VETERANS

A brief overview of three major federal laws protecting veterans in the workplace provides a general framework for identifying the scope of an employer's obligations to veterans with a TBI or PTSD.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

The Uniformed Services Employment and Reemployment Rights Act (USERRA) covers all employers, regardless of size. USERRA prohibits discrimination against individuals based on their military status or obligations and also provides certain reemployment rights for those individuals who leave their jobs to serve in the uniformed services. Significantly, employers may have obligations pursuant to USERRA to train, retrain, and/or otherwise accommodate veterans returning to the workforce, including but not limited to those who have a TBI or PTSD.

THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) covers employers with 15 or more employees and prohibits employment discrimination against qualified individuals based on disability, perceived disability, and/or a history of a disability. Covered employers also must provide reasonable accommodations to qualified individuals with a disability, if

the accommodations would allow the individual to perform the essential functions of the job in question. While not every impairment is a disability covered under the ADA, many veterans with a TBI and/or PTSD may be covered by this law.

THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT

A third federal statute, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), requires federal contractors with at least one federal contract of \$100,000 or more to take certain actions to employ and advance veterans. For instance, federal contractors must notify appropriate employment service delivery systems of most of the contractors' available jobs, with few exceptions, and the employment service delivery system in turn must give priority referrals to veterans. Federal contractors covered by this statute also must ask veterans who have been offered employment if they wish to self-identify as a disabled veteran, recently separated veteran, Armed Forces service medical veteran, and/or a veteran who served during a war or in a campaign or expedition for which a campaign badge has been authorized. Additionally, federal contractors covered by VEVRAA must report the employment of the covered categories of veterans on an annual basis to the U.S. Department of Labor.

SOME DO'S AND DON'T'S

Employers should keep in mind that if an employment inquiry would be inappropriate for a nonveteran applicant, then it generally would be inappropriate for a veteran applicant as well. For example, while an employer may ask an applicant if he/she can perform the essential functions of the job, with or without accommodations, it is unlawful for an employer to ask an applicant for medical information. Similarly, an employer cannot ask a veteran returning from a combat zone in Iraq if he/she had or has a TBI, PTSD, or any other medical condition.

Furthermore, an employer cannot require a veteran applicant or employee to undergo a medical exam unless it requires medical exams for all applicants or employees under the same circumstances and the medical exam is

job-related and consistent with business necessity. For instance, if an employer believes that a veteran employee with a disclosed diagnosis of PTSD is exhibiting workplace behavior that puts the employee's or others' safety at risk, the employer may require a medical exam if the employer would mandate an exam for anyone exhibiting similar behaviors. An employer may not, however, require a medical exam of a veteran because the employer is concerned that any individual with PTSD may be likely to exhibit violent conduct. Such misguided beliefs cannot form the basis for a medical exam.

Employers also cannot treat veterans with a TBI or PTSD differently than others when performance issues arise. For example, if an employer observes sub-par work performance, the employer may take corrective action against the employee, whether or not the employee is a veteran and/or has a TBI or PTSD. However, if an employer knows a veteran's TBI or PTSD symptoms may be interfering with the employee's performance, the employer must explore reasonable accommodations before disciplining the employee.

Finally, employers may terminate the employment of veterans for any legitimate nondiscriminatory reason. In doing so, employers must apply the same employment standards to veterans (with or without disabilities) and nonveterans to avoid legal exposure based on veteran status and, if applicable, the veteran's disability.

SOME POTENTIAL ACCOMMODATIONS FOR VETERANS WITH TBI AND/OR PTSD

A veteran with a TBI or PTSD may request an accommodation. If the veteran's medical condition rises to the level of a disability under the ADA, the employer must engage in an interactive process to determine what, if any, reasonable accommodations would enable the veteran to perform the essential functions of the job. Moreover, even if the veteran's condition is not an ADA-covered disability, the employer may be required pursuant to USERRA to provide training or retraining if it would help the employee perform the job. However, if a veteran does not disclose the fact that he/she has a TBI or PTSD, and the employer is not otherwise aware of it, the employer is not required to offer potential

accommodations. Finally, not all veterans with a TBI or PTSD need accommodations.

Employers should ask the veteran what accommodations, if any, the veteran believes will help. Involving the veteran in the process is important for a successful dialogue and finding potential solutions and is required by law. Significantly, employers need not implement a veteran's suggestion for an accommodation if the accommodation would cause an undue hardship to the employer and/or if other, effective reasonable accommodations are available.

Some possible accommodations for employees with a TBI may include, but are not limited to, provision of a work environment with low levels of noise and/or light, regular breaks, access to handicapped parking and guardrails, additional time to learn tasks, time management devices, and tasks without much variation. For employees with a PTSD, possible accommodations may include, but are not limited to, provision of both written and verbal instructions, ability to take breaks as needed, schedule reminders, and white noise machines to reduce potential distractions. In all instances, employers must make individualized assessments of appropriate accommodations, as not all veterans experience the same symptoms or difficulties in dealing with a TBI or PTSD.

In sum, employers need to know the legal landscape about veteran employment and reemployment so that they can best assist these individuals in their transition to civilian employment. Employers who put in this effort likely will be

rewarded with employees who have valuable work and life skills that can be put to good use in any workplace.

EMPLOYER RESOURCES FOR VETERAN ISSUES

There are many resources available to assist employers in how to transition veterans back into the civilian workforce while avoiding legal pitfalls. Some of the resources include:

- U.S. Department of Veterans Affairs Vocational Rehabilitation and Employment website: www.vetsuccess.gov
- The Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury: www.dcoe.health.mil
- America's Heroes at Work, a U.S. Department of Labor project to help veterans with a TBI or PTSD: www.americaheroesatwork.gov
- Job Accommodation Network: www.askjan.org
- The U.S. Equal Employment Opportunity Commission's Guide for Employers on Veterans with Service-Connected Disabilities and the Americans with Disabilities Act (ADA): www.eeoc.gov/facts/veterans-disabilities-employers.html

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THE ART OF WAR AND E-DISCOVERY

LESSON 1: BE PREPARED

What can a guy who lived in China in the fifth century B.C. teach us about e-discovery? A lot, as it turns out.

Sun Tzu was an ancient Chinese military general, strategist, and philosopher who wrote the *Art of War*. Not only is this book influential on military strategy, it is now widely read for its insights on business strategy. The lessons of *The Art of War* are simple, but have deep and fundamental ramifications. These lessons relate not only to military strategies and tactics, but to all facets of life. The *Art of War* is organized by lessons. The first lesson is "Be Prepared" and is especially important for businesses who have become entangled in the morass of e-discovery.

Specifically, in Lesson 1, Sun Tzu writes, "*The art of war teaches us to rely not on the likelihood of the enemy's not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the fact that we have made our position unassailable.*"

The same is true for businesses dealing with e-discovery. The question is not **if** you will have to deal with e-discovery, but **when**.

Employers should determine their e-discovery capabilities and sources of information. If you have already been sued or expect to be sued in the near future, do so immediately. Ideally, the prepared employer will perform this self-examination before litigation ever arises. To be prepared, determine where electronically stored information (ESI) is located, whether the company backs up data, and who has access to ESI. Seize the advantage by getting your own house in order before pursuing e-discovery aggressively from the other side.

Working with its counsel, employers should then create a plan for the collection of potentially relevant data:

- First, identify all potential players, and prioritize key players. Players are those individuals, referred to as "data custodians," who may have key information stored on electronic sources. Reviewing the key players' data first may uncover critical information and assist in developing new strategies.
- Second, interview potential players and IT Staff.

Understand how the company network is structured and how each individual creates and saves his or her data. Be aware that, no matter how good your IT staff is, it will likely lack the capabilities to manage your e-discovery needs. Employers must know the capabilities of its IT staff, as well as those areas where outside help is needed.

- Third, determine where the data is physically located. Data can be located on site, at multiple office sites, or at storage locations. Cloud computing adds an additional level of complexity; the company's IT department should know where all company data is stored. It can be helpful to develop a "data map" listing and describing the locations where the company's data is stored, the IT chain of command, and the types of devices the company uses to store data.
- Fourth, create a chain of custody to document where, when, and how each piece of ESI was discovered. This will help ensure that metadata is preserved and not inadvertently altered. Outside counsel and third-party vendors can help immensely with this process.

A critical component of the e-discovery process is the issuance of a litigation hold. Taking the following steps helps ensure an effective litigation hold:

- Implementing litigation hold policies and procedures before issuing a hold actually is necessary.
- When a party becomes *reasonably aware of anticipated litigation*, it should issue the litigation hold. Actually issuing the litigation hold involves suspending routine document and data destruction. In this step, parties also should save or suspend recycling of back-up



tapes. Parties then should notify archival facilities to suspend destruction and to preserve ESI. Again, the prepared employer's IT department will know where the data is located and will have procedures in place for implementing the requirements of the hold.

- Parties cannot implement a successful litigation hold unless they monitor compliance and send periodic reminders and updates. Remind custodians that a litigation hold is in place, and describe the consequences for failing to comply with the hold. Send written documentation of the hold to custodians every few months to ensure that, in the event data preservation efforts are questioned, evidence of compliance efforts is available.
- Employers should also consider getting bit-stream images for key and departing employees; obtaining certifications from IT personnel to establish chain-of-custody; and, for larger companies, forming an ESI discovery/document-retention team.
- Notify custodians and players of the members on the team. For consistency and accuracy, direct all questions and inquiries to the team.

Applying Sun Tzu's first lesson to e-discovery can save employers time, money, and a major headache if they are prepared *in advance* of litigation. An employer confident in its e-discovery readiness and procedures gains an immediate advantage over an adversary in litigation, and can often use that advantage to leverage a more favorable settlement or to win the case outright.

As Sun Tzu wrote, "He who is prudent and lies in wait for an enemy who is not, will be victorious."

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For more information on e-discovery, including current news and articles, visit Cozen O'Connor's E-Discovery Law Review online at www.ediscoverylawreview.com.

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