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Hold On To Your Employer Handbooks: Part 3

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This is the final part of a three-part series regarding federal agency challenges to a wide variety of employer policies. In this part, we discuss the U.S. Equal Employment Opportunity Commission's enforcement actions as well as its proposed rule on wellness programs, as well as the EEOC's updated guidance on pregnancy accommodations after Young v. United Parcel Service Inc., 135 S.Ct. 1338 (2015). Finally, we discuss the dress code policies following EEOC v. Abercrombie & Fitch Stores Inc., 135 S.Ct. 2028 (2015), and recent decisions by the National Labor Relations Board regarding restrictions on union insignia.

Wellness Program Policies

The EEOC has recently focused on the way the Americans with Disabilities Act's medical examination and inquiry provisions — forbidding an employer to require certain examinations and asking certain questions — interact with employer wellness programs. The EEOC has both brought enforcement actions and submitted a proposed rule for notice and comment.

In an employment context, the ADA protects disabled individuals from discrimination and retaliation and requires employers to provide reasonable accommodations to those individuals. Toward the end of nondiscrimination, the ADA also includes restrictions on employers regarding what medical examination they can require and what inquiries they can make as to whether the employee has a disability and the nature or severity of any disability. The only inquiries that are permitted under the ADA are those that are "job-related and consistent with business necessity." 42 U.S.C. §12112(d)(4)(A).

However, the statute contains a carveout from the prohibition on examinations and inquiries for "voluntary medical examinations, including voluntary medical histories, which are a part of an employee

health program available to employees at the work site." 42 U.S.C. §12112(d)(4)(B) (emphasis added).

EEOC Enforcement Actions

In the last year, the EEOC has brought several enforcement actions in which it alleged that an employer's wellness program violated the ADA's medical examination and inquiry restrictions. Of those, perhaps the most concerning for employers with wellness programs was EEOC v. Honeywell International Inc., No. 0:14-cv-04517 (D.Minn. Oct. 27, 2014).

On Oct. 27, 2014, in Honeywell, the EEOC filed for a preliminary injunction to stop the company from penalizing employees who did not participate in its wellness program. The wellness program that Honeywell had implemented included biometric testing and the EEOC argued that it violated the ADA's medical examination and inquiry because it was not job-related or consistent with business necessity. Further, the EEOC argued that the wellness program did not fall into the ADA's carveout for wellness programs because the program's penalties made it involuntary. The EEOC also claimed that Honeywell was in violation of the Genetic Information Nondiscrimination Act because its wellness program asked for employee's spouses to undergo biometric testing "genetic information" through biometric testing of employee's spouses.

If Honeywell employees chose not to participate in the wellness program, they became ineligible for the company's health savings account, which would cost them between $250 and $1,500 annually. Employees who decline to participate are also charged $500, which goes toward their annual health contribution. Lastly, employees who choose not to participate in the wellness program are presumed to be smokers, and smokers are assessed a $1,000 tobacco surcharge annually on Honeywell's high-deductible health plan. However, Honeywell offered alternatives that can permit nonparticipants in the wellness program to avoid the tobacco surcharge.

On the EEOC's motion for a preliminary injunction, the U.S. District Court for the District of Minnesota ruled for Honeywell because it determined that there was no threat of irreparable harm to employees. However, it did not deal with the merits of the case and focused instead on the fact that "great uncertainty persists in regard to how the [Affordable Care Act], ADA and other statutes such as GINA are intended to interact."

EEOC Proposed Rule

After the Honeywell court sought clarity in the law, the EEOC issued proposed regulations on April 16, 2015, to provide guidance as to whether the ADA permits employers to offer incentives to employees to participate in wellness programs. In addition to offering guidance on the ADA, the EEOC's proposed rule provides guidance under the Health Insurance Portability and Accountability Act, as amended by the ACA.

In the proposed rule, the EEOC proposes to amend 29 CFR Part 1630 in part to change the definition of "employee health program" and "voluntary," and to describe "incentives offered for employee wellness programs that are a part of a group health plan" and how that overlaps with voluntariness. EEOC Amendments to Regulations under the Americans with Disabilities Act Proposed Rule (April 16, 2015). These definitional changes are accompanied by proposed interpretive guidance. Regarding the definition of employee health program, the EEOC explains that, "[i]t is not sufficient for a covered entity merely to claim that its collection of medical information is part of a wellness program; the program ... must be reasonably designed to promote health or prevent disease." For the EEOC, conducting a health

risk assessment or biometrically screening employees may meet this standard if it would, for example, enable an employer to design specific programs that would help it to treat or manage conditions that are prevalent in the workplace. On the other hand, a program that collects employee health information without providing follow-up advice or a program that requires an overly burdensome amount of time for participation in order to obtain a reward would not be considered reasonably designated to promote health or prevent disease. Finally, a program would not be reasonably designed if it places substantial costs of examinations on employees or if its primary purpose is to shift costs from the entity to targeted employees based on their health.

Regarding the voluntariness requirement, the EEOC guidance states that “voluntary” means that “covered entities may not require employees to participate in such programs, may not deny employees access to health coverage under any of its group health plans or particular benefits packages within a group health plan for nonparticipation, may not limit coverage under their health plans for such employees ... and may not take any other adverse action against employees who choose not to answer disability-related inquiries or submit to medical examinations.” Employers may also not retaliate against or in any way intimidate employees who do not participate. Further, in order to be voluntary, “an employer must provide employees with a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure.”

For the EEOC, “limited incentives” do not render a wellness program involuntary. However, for a program that asks for information, conducts examinations or requires participants to meet a standard, those incentives may not exceed 30 percent of the total cost of employee-only coverage (or 50 percent specifically for a smoking cessation program). Further, employers must provide reasonable accommodations so that employees with disabilities can earn any offered incentives. Finally, employers must ensure that they keep any employee medical information confidential.

During the 60-day period for comment on its proposed rule, the EEOC received about 340 comments. Of those comments, the most discussed are the ones from Republican members of Congress, who believe that the EEOC’s 30 percent rule is not as clear as the rule in the ACA; the EEOC comments do suggest that the 30 percent requirement would be satisfied if the part of the reward associated with the health risk assessment and biometric screening — the covered portions — does not exceed 30 percent of the cost of employee coverage, even if the entire reward is more.

Pregnancy Policies

The EEOC has recently updated its enforcement guidance on pregnancy discrimination and related issues in response to the U.S. Supreme Court’s decision in Young v. UPS, 135 S.Ct. 1338 (2015). In Young, the Supreme Court ruled 6-3 that the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer which accommodates nonpregnant employees with work limitations to provide work accommodations to pregnant employees who are similarly not able to work. This holding overruled the Fourth Circuit’s determination that the PDA did not require UPS to make accommodations for a pregnant employee’s lifting restriction, even though it offered light-duty accommodations to other workers.

Peggy Young, the petitioner, picked up and delivered packages as a part-time driver for UPS. Young’s doctor told her that she could lift as much as UPS required. UPS determined that she could not work while under such a lifting restriction, so Young stayed home without pay for most of her pregnancy. Young claimed that UPS should have accommodated her, as it accommodated other drivers with similar

restrictions. Young argued that UPS discriminated against pregnant employees because it permitted light duty in cases of injury for other workers, but not pregnant individuals.

In a majority opinion drafted by Justice Stephen Breyer, the Supreme Court held that pregnant workers can apply the McDonnell-Douglas framework to show disparate impact. (Interestingly, after rejecting both of the parties' interpretations of the PDA, the Supreme Court discussed the EEOC's interpretation of the PDA, and, quite interestingly, found it unpersuasive. In dismissing the EEOC's view, the Supreme Court questioned its "thoroughness.")

In response to this holding, the EEOC issued updated guidance to reflect the availability of the McDonnell-Douglas burden shifting analysis. The updated guidance describes: "According to the Supreme Court's decision in Young v. United Parcel Services Inc., a PDA plaintiff may make out a prima facie case of discrimination by showing 'that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" The guidance further reflects that making this showing is not "onerous" and that a plaintiff "could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought."

Then, "[o]nce the employee has established a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for treating the pregnant worker differently than a nonpregnant worker similar in his or her ability or inability to work." Expense or convenience will not suffice. Further, even if the employer can make the requisite showing, a pregnant worker may still show that the reason is pre-textual. Young explains that:

The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather — when considered along with the burden imposed — give rise to an inference of intentional discrimination.

As the EEOC states, "An employer's policy of accommodating a large percentage of nonpregnant employees with limitations while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees." The EEOC reiterated that the Young court "noted that a policy of accommodating most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations would present a genuine issue of material fact."

In a post-Young world, employers should look closely and critically at their policies and should, of course, proceed with caution as they deal with pregnancy-related accommodation issues.

Dress Code Policies

Employers would do well to review their dress code policies. Overly strict or broad dress codes could lead to issues under the EEOC's guidance on religious garb, the Supreme Court's recent decision in EEOC v. Abercrombie & Fitch, 135 S.Ct. 2028 (2015), and recent decisions by the NLRB regarding restrictions on union insignia.

EEOC Guidance on Religious Garb and EEOC v. Abercrombie

In March 2014, the EEOC issued guidance — a short fact sheet and a longer Q&A — on religious discrimination and an employer's obligation to accommodate workers' religious observances unless such an accommodation would cause undue hardship to the employer's business.

As the fact sheet says:

In most instances employers covered by Title VII of the Civil Rights Act of 1964 must make exceptions to their usual rules or preferences to permit applicants and employees to follow religious dress and grooming practices. Examples of religious dress and grooming practices may include: wearing religious clothing or articles (e.g., a Christian cross, a Muslim hijab (headscarf), a Sikh turban, a Sikh kirpan (symbolic miniature sword)); observing a religious prohibition against wearing certain garments (e.g., a Muslim, Pentecostal Christian or Orthodox Jewish woman's practice of not wearing pants or short skirts), adhering to shaving or hair length observances (e.g., Sikh uncut hair and beard, Rastafarian dreadlocks or Jewish peyes (dreadlocks)).

The list of religious dress and grooming practices that may need accommodating may be a helpful tool for employers after the Supreme Court's decision in EEOC v. Abercrombie & Fitch. There, the Supreme Court ruled that an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" — in Abercrombie, wearing a hijab — even if the employer does not have actual knowledge of a need for a religious accommodation.

In this case, the EEOC charged that Abercrombie Kids failed to hire Samantha Elauf for a sales position because she wore a hijab in observance of her religious beliefs. Elauf's wearing of the hijab violated Abercrombie's "Look Policy" that governs its employees' dress, and which prohibits the wearing of "caps." Abercrombie argued that it could not be liable because Elauf had not made a request for a religious accommodation during the interview process, and therefore it could not be held liable.

Justice Antonin Scalia rejected Abercrombie's argument that an applicant cannot show disparate treatment if he or she has not shown that an employer has "actual knowledge" of the need for an accommodation. For the Supreme Court, Title VII does not have a knowledge requirement. "An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive." (emphasis added). On the other hand, the Supreme Court found that if an employer has a motive of evading accommodation, that employer may violate Title VII "even if he has no more than an unsubstantiated suspicion that accommodation would be needed." Reiterating his familiar view on statutory interpretation, Justice Scalia noted that to follow Abercrombie's approach and require actual knowledge would be to "add words to the law to produce what is thought to be a desirable result." That, he said, "is Congress' province."

The Abercrombie decision should serve as a warning to employers. Regardless of how much information an employer has about the potential need for an accommodation, an employer may not deny employment on the basis of a perceived need for an accommodation.

This decision underscores that employers need to be more attuned to its employees' religious beliefs. Reviewing the EEOC's guidance — and examples of religious dress and grooming practices — can help an employer be aware of dress and grooming that may be religiously motivated. In addition, flexible dress

code policies which permit some individualism — policies unlikely to require accommodation — may help employers avoid thorny issues. Further, an employee's hiring policies should clarify that no decisions will be made that are motivated by a desire to avoid an accommodation.

NLRB Decisions on Union Insignia Restrictions

The NLRB has recently made a few decisions making very clear that employers can violate federal labor law by having overly broad dress code policies that unlawfully restrict its employees' right to wear union insignia.

As discussed above, on June 2, 2015, in Pacific Bell Telephone Co., 362 NLRB No. 105 (June 2, 2015), the NLRB held that the employer violated federal labor law by prohibiting technicians from wearing buttons and stickers containing phrases like, "WTF Where's the Fairness," "FTW Fight to Win" and "Cut the Crap! Not My Healthcare." The NLRB affirmed an earlier administrative law judge ruling in determining that these phrases weren't so vulgar and offensive as to lose protection under the National Labor Relations Act. For the NLRB, the companies —which do business as AT&T — also did not demonstrate special circumstances that would outweigh the employees' protected rights. The suggestion of profanity — or "double entendre" — of the "WTF Where's the Fairness" button was not enough to render the buttons unprotected "where an alternative, nonprofane, inoffensive interpretation is plainly visible."

On June 4, 2015, in Wal-Mart Stores Inc., NLRB ALJ No. 13-CA-11422 (June 4, 2015), an NLRB administrative law judge found that Wal-Mart violated federal labor law with an overly broad dress code policy that restricted an employee's right to wear union insignia. Wal-Mart's dress code policy stated that "Wal-Mart logos of any size are permitted. Other small, nondistracting logos or graphics ... are also permitted." A volunteer coalition, Organization United for Respect at Wal-Mart, filed an unfair labor practice charge with the NRLB regarding the restriction. The administrative law judge found that Wal-Mart violated Section 8(a)(1) of the NLRA by failing to show that the limitations placed on wearing logos — including union insignia — were justified by special circumstances. Wal-Mart argued that this policy existed in order to avoid customers finding themselves distracted by non-Wal-Mart logos. The administrative law judge determined that Wal-Mart did not demonstrate that the logos caused an issue with confusion or customer distraction.

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