Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management September 2004

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Employers Are NOT Prevented by HIPAA from Obtaining an Employee's Job-Related Health Info

Many of our clients have been frustrated by the legal obstacles they encounter when trying to obtain needed medical information about employees who claim to be suffering from physical or mental disabilities. While there are a number of laws and regulations which employers must observe in obtaining such information, they are still legally entitled to obtain it. Moreover, employers are permitted to discipline employees if they fail or refuse to cooperate in this process. The following is an overview of the steps employers must take to obtain job-related health information about an employee.

Health Insurance Portability and Accountability Act (HIPAA) and Workers Compensation

The Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA) changed the way that "protected health information" (PHI) may be used and disclosed by "covered entities". Generally speaking, a "covered entity", such as a physician, cannot disclose PHI about a patient without the patient's prior written authorization. However, the Privacy Rule exempts health information that is required as part of a "lawful process", such as a workers' compensation proceeding. Specifically, the Rule permits covered entities to disclose PHI to employers, and other persons or entities involved in workers' compensation systems, without the individual's authorization "to the extent necessary to comply with laws relating to workers' compensation". 45 CFR §164.512(*l*).

The bottom line is ...

While there are a number of laws which employers must observe in obtaining an employee's job-related health information, they are still legally entitled to obtain it and can discipline employees if they fail or refuse to cooperate in this process.

In other words, an employer would be entitled to PHI from a physician involved in the employee's workers' compensation or disability benefits claim (without an employee's authorization) to the extent necessary to comply with New York's Workers' Compensation Law (WCL). For example, New York's WCL Section 13-a (4)(a) and its associated regulations (12 NYCRR Section 325-1.3) require health care providers to regularly file medical reports of treatment with the Workers' Compensation Board and the carrier **or** employer. Thus, filing an Attending Doctor's Report (Form C-4) with the accompanying narrative is a "lawful process" in compliance with New York's Workers' Compensation Law. Similarly, WCL Section 13-f requires that medical records be provided to the Board and the carrier **or** employer before they will be required to pay for any medical services. Thus, under these circumstances, the employer could obtain the information from the physician without the employee's authorization. Please note, however, that if only your Workers' Compensation carrier – and **not** the employer – receives these medical reports, then employer would **not** be entitled to the information without the employee's prior written authorization.

Obtaining Medical Information Not Required to be Disclosed to Employer Under Workers' Compensation Law

An employer will need to follow a different process if it is attempting to get information

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Employers Are NOT Prevented by HIPAA from Obtaining an Employee's Job-Related Health Info (cont'd)

from an employee's doctor under any of the following circumstances: (1) determining whether an employee (or immediate family member) has a "serious health condition" as defined under the Family and Medical Leave Act (FMLA); (2) determining whether the employee has a protected "disability" as defined in the Americans with Disabilities Act (ADA) or the New York State Human Rights Law; (3) ascertaining what accommodations a disabled employee needs to perform the essential functions of his/her job; and (4) clarifying work restrictions. In order to satisfy the requirements of the HIPAA Privacy Rule under these circumstances, an employer will need to either get a HIPAA-compliant written authorization from the employee to communicate directly with the employee's physician, or require the employee to obtain the required information from the physician. If the employee fails or refuses to cooperate in this process, there is nothing in the Rule that prohibits an employer from disciplining the employee.

Employers should be aware, however, that even when the requirements of HIPAA are satisfied, both the FMLA and ADA provide additional rules that must be observed when obtaining necessary medical information about an employee. We will address these issues in the next edition of *Employment Law Matters.*

If you have any questions about HIPAA or how to obtain job-related medical information about an employee, please contact our office at 315-437-7600.

Are You Complying with the CAN-SPAM Act?

The Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 (or CAN-SPAM Act) places restrictions on when and how unsolicited e-mail can be used for advertising purposes. Basically, CAN-SPAM is an opt-out law. For most purposes, permission of the e-mail recipient is not required, but if a recipient wants to unsubscribe or opt-out, you must stop sending e-mails or be subject to severe penalties. In short, CAN-SPAM:

- Prohibits fraudulent or deceptive subject lines, headers, return addresses, etc.
- Makes it illegal to send e-mails to e-mail addresses that have been harvested from websites.
- Criminalizes sending sexually-oriented e-mails without clear markings.
- Requires that you have a working unsubscribe system that makes it easy for recipients to unsubscribe or opt out of receiving your e-mails.
- Requires most e-mailers to include their postal mailing address in the message.
- Implicates not only spammers, but those who procure their services. Indeed, if you fail to prevent spammers from promoting your products and services you can be prosecuted.
- Includes both criminal and civil penalties and allows suits by the Federal Trade Commission (FTC), State Attorney General, and Internet Service Providers.

The bottom line is ...

If you wish to send such commercial e-mail simply make sure your "unsubscribe" or "opt-out" system works.

The CAN-SPAM Act applies to essentially all businesses in the U.S. that use e-mail. It defines a "commercial electronic mail message" -- which is regulated by this law -- as any e-mail message "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)" (Sec. 3(2)). This would appear to cover nearly any promotional e-mail (e.g., e-mail newsletters as well as stand-alone promotional e-mails). The Act's definition of commercial e-mail does exclude "a transactional or relationship message" (Sec. 3(2)(B)), covering e-mails contacting customers about their accounts, product upgrades, ongoing services, etc.

The bottom line for businesses who use email advertising is: if you wish to send such commercial e-mail simply make sure your unsubscribe system works.

If you have any questions about the CAN-SPAM Act, please contact us at 315-437-7600.

Allegations of Gender Discrimination Against Men Costs Employer

The U.S. Equal Employment Opportunity Commission (EEOC) recently announced the settlement of a sex discrimination lawsuit under Title VII of the 1964 Civil Rights Act for $360,000 against Jillian's of Indianapolis IN Inc., on behalf of a class of male employees. Jillian's operates a nationwide chain of family dining/entertainment facilities in about 25 states with more than 5,000 employees.

The suit, filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, alleged that Jillian's maintained sex-segregated job classifications on a nationwide basis and failed to hire and/or transfer a class of male employees to lucrative server positions and other so-called "female" job classifications because of their sex. The EEOC alleged that the company's actions were intentional and demonstrated a reckless indifference to the rights of the class of men. Under the terms of the three-year Consent Decree settling the case, Jillian's agreed to:

- Pay $350,000 in damages to Indianapolis class members - estimated to be at least 100 men - and $10,000 in administrative expenses to advertise for and locate Indianapolis class members;
- Hire/place employees at all its facilities without regard to sex, and prepare sex-neutral job descriptions; and,
- Train its managers nationally on Title VII's prohibition against sex-based hiring/placement and include a notice of non-discrimination in its employment advertising.

If you have any questions about this case, call us at 315-437-7600.

How to Protect Your Confidential Customer Lists

In New York State, in order for a company to legally protect its customer lists, the company must either have established a contractual right to do so, or treated the customer list as a "trade secret."

In order to create a contractual right to protect a customer list, a company must have entered into a contract with the individuals who had access to the customer list in which those individuals agree not to divulge the contents of that list to third parties or use the list themselves. If such an agreement exists, divulging or using the customer list would be considered an actionable breach of contract.

A "trade secret" is generally defined as a formula, process, device, or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it. This includes customer lists. However, a trade secret, like any other secret, is something known only to a few people and kept from the general public, and not susceptible to general knowledge. Six factors which courts use to determine whether a trade secret exists are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by the business's employees and others involved in the business; (3) the extent of the measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

If there has been voluntary disclosure of the information by the company, the trade secret protection evaporates. This often occurs with customer lists when a company provides lists of its clients to potential customers for reference purposes. Once the list has been divulged, its trade secret status dissolves.

Companies that wish to protect this information, it should take great care in guarding the secrecy of their customer lists and obtain appropriate non-disclosure/non-competition agreements from those people to whom the information is disclosed.

Our attorneys have extensive experience in drafting and enforcing non-disclosure/non-competition agreements.

Please feel free to contact our office at 315-437-7600 if you have any questions regarding non-competition/non-solicitation agreements and/or trade secrets.

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 7:45 AM to 9 AM at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

DATE	TOPIC
September 9, 2004	"Red Flag Audit": Common Employment Law Mistakes. Are You Making Them?
October 14, 2004	What You Don't Know About Employee Documentation
December 9, 2004	Employment Law: The Year in Review

HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- ❑ A comprehensive audit of your HR policies, practices and procedures.
- ❑ Advice for complying with employment laws.
- ❑ More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/ supervisors, including:

- ❑ Minimizing the Risk of Employment Litigation
- ❑ Preventing Workplace Harassment
- ❑ Leadership and Influence
- ❑ Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057