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No Tricks, We Treat You to Five Developments in the Intersection of Health Care and Employment Law

Almost ten months into the Trump Administration, the executive and legislative branches have been preoccupied with attempting to repeal and replace the Affordable Care Act ("ACA") – but each attempt has thus far proved fruitless. While the debate rages over the continued viability of the ACA, as we stated in our previous *Take 5*, employers should remember that obligations to comply with Section 1557 (the non-discrimination provision of the ACA) and the final rule implementing that provision remain. But there have been developments regarding which characteristics are protected by Section 1557. In this *Take 5*, we explore whether Section 1557 continues to cover gender identity and transition services.

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Although the health care debate has received the bulk of the media attention, other legal developments also promise to have significant impact on health care employers. For instance, the Equal Employment Opportunity Commission ("EEOC") appears to have set its sights on the accommodation of disabled workers in the health care industry, and recent decisions regarding employees' rights to use medical marijuana may impose new burdens on employers. These and other developments are discussed in this edition of *Take 5*:

1. **Will The Affordable Care Act's Non-Discrimination Regulations Continue to Cover Gender Identity and Transition Services?**
2. **Restrictive Covenants – How Effective are Non-Competes and Non-Solicits in the Health Care Industry?**
3. **Navigating the Interactive Process: Best Practices for Complying with the ADA**
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1. Will The Affordable Care Act's Non-Discrimination Regulations Continue to Cover Gender Identity and Transition Services?

By Frank C. Morris, Jr. and Maxine Adams

Section 1557 of the Affordable Care Act ("ACA") prohibits covered entities from discriminating on the basis of characteristics protected under several statutes, namely Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 794 of Title 29. 42 U.S.C. § 18116. In 2016, the Department of Health and Human Services ("HHS") published final regulations implementing Section 1557. The regulations prohibit discrimination in providing or administering health care coverage for gender identity or gender transition services. 45 C.F.R. § 92.207. On December 31, 2016, a Northern District of Texas judge found that the regulations may have failed to incorporate exceptions for religious exemptions in violation of the Religious Freedom Restoration Act ("RFRA"), thereby potentially violating the Administrative Procedure Act by contradicting existing law. The court granted a nationwide injunction prohibiting enforcement of Section 1557 relating to gender identity. Despite the injunction, parties continue to argue that the text of Section 1557 protects gender identity and transgender services because it incorporates various anti-discrimination statutes. See *Prescott v. Rady Children's Hospital-San Diego*, 2017 U.S. Dist. LEXIS 160259 (S.D. Cal. Sept. 27, 2017).

Given the Trump Administration's ACA strategy, it appears quite possible that HHS regulations implementing Section 1557 will be revisited and re-written to exclude protections for gender identity and transgender services. After the failed attempts to repeal and replace the ACA, the Administration altered its strategies, resulting in President Trump's October 12, 2017 Executive Order directing agencies to amend guidance and regulations associated with the ACA to alter how the existing law is implemented. While this Executive Order is aimed at relaxing Health Insurance Rules, it signals a continued focus on contracting ACA requirements.

Moreover, the Administration's other recent actions demonstrate a shift away from inclusion of gender identity and transgender status as protected for various purposes. For instance:

- On August 25, 2017, President Trump signed a memorandum directing the Pentagon to ban transgender individuals from openly serving in the military due to asserted "national security considerations." However, on October 30, 2017, a D.C. federal judge partially enjoined the policy, reverting to the status quo prior to the August memorandum, because the court determined that a number of factors strongly suggest that the policy violates the Fifth Amendment.
- More recently, Attorney General Jeff Sessions issued a letter to the U.S. Attorneys' offices and agency heads stating that Title VII of the Civil Rights Act of 1964's sex discrimination protections do not extend to transgender individuals. This demonstrated a sudden reversal of the Department of Justice's ("DOJ") position (as set forth in former Attorney General Eric Holder's December 2014 order) that "sex" includes gender identity and protected transgender individuals.
- The Attorney General's letter aligned with the DOJ's position in *Zarda v. Altitude Express* (and contradicted the EEOC's position) that sexual orientation is not covered under Title VII. *Zarda* was heard on September 26, 2017 by the full complement of active judges of the U.S. Court of Appeals for the Second Circuit.
- On October 6, 2017, Attorney General Sessions issued a directive for federal agencies to review regulations to ensure as much accommodation as possible for those who

believe their religious freedoms are being violated, and contended that the RFRA applies to corporations, companies and private firms, in addition to individuals.

These actions will likely encourage federal agencies to scale back regulations prohibiting discrimination on the basis of sexual orientation, gender identity and transgender status. Given the current climate surrounding the ACA, and the Administration's position that current anti-discrimination statutes do not prohibit discrimination on the basis of gender identity and transgender status, a revision of Section 1557 regulations to exclude protections for gender identity and transgender services seems likely. As *Prescott v. Rady Children's Hospital* illustrates, however, a change in policy by the Administration likely will not deter individuals and advocacy groups from continuing to contend that Section 1557 does provide rights to health care benefits for gender identity and gender transition services. Health care providers, insurers, and employers should closely monitor this issue and consult with counsel as further developments occur to ensure compliance with Section 1557 and its implementing regulations.

2. Restrictive Covenants – How Effective are Non-Competes and Non-Solicits in the Health Care Industry?

By Kevin J. Ryan and Brian E. Spang

Restrictive covenants, including covenants not to compete and non-solicitation agreements, are common contractual provisions in many industries. The health care industry is no exception. But how effective are these restrictive covenants?

Like many legal questions facing employers, the simple answer is: "it depends." Restrictive covenants -- such as covenants not to compete and non-solicitation agreements -- are governed by state law. In the employment context, some states expressly permit restrictive covenants so long as they are reasonable as to time and geography (e.g., Florida); some states purport to "abhor" restrictive covenants, but will enforce them if the restrictions are reasonable and narrowly construed (e.g., Illinois); and a few states expressly prohibit most restrictive covenants in most employment circumstances (e.g., California). Restrictive covenants are generally enforceable in other circumstances, such as an acquisition of a professional practice or a professional corporation. This distinction stems from the consideration paid by the buyer to the seller for the sale of the business. Courts have generally agreed with purchasers that the restrictive covenants were part of the purchase price, ensuring that the seller could not accept the purchase consideration and then open a competing business. Non-solicit provisions prohibiting the solicitation of customers, patients, and/or employees are viewed more favorably (or, in some states, with less disfavor) than non-compete provisions. Non-solicitation covenants are more tolerable than non-competition covenants because they do not prohibit the individual from practicing his or her profession. Even so, state law and the factual circumstances may differ as to how broadly a non-solicitation covenant may be enforced. For example, one recurring question is whether an entity may permissibly prohibit an individual from soliciting the entity's entire customer or patient base, or only those customers or patients with which the individual had contact. The former may be appropriate for a smaller practice, but not for a larger, regional practice.

But what about the health care industry specifically – are the rules any different or more specialized than in the general employment context? Again, unfortunately, definitive answers are elusive, because enforceability in the health care industry also varies state to state. Narrow rules apply to health care professionals in most (but not all) states based on a public policy argument that the public should not be prevented from having access to a health care

professional. This is particularly true for certain physician specialists in particular geographic areas underserved by that specialty. Other important considerations include whether professional services are involved, and whether the company trying to enforce a restrictive covenant is a corporation authorized under state law to provide professional services.

Restrictions on the corporate practice of medicine ("CPOM"), or the employment of certain licensed professions (such as physicians) by a general business corporation, must also be considered. The CPOM prohibition exists in certain states for dentists, optometrists, psychologists, veterinarians, and physical therapists. In some states (e.g., New York), the CPOM prohibition applies to nearly all licensed professionals. As a result, health care management companies are often created to provide business services to health care providers, who then provide all of the clinical services. Many states prohibit or will not enforce restrictive covenants by a management company against a health professional based on the management company's CPOM prohibition. The theory is that it is impossible for the management company and the licensed professional to compete because the management company is prohibited by law from performing professional services. Courts, however, have enforced restrictive covenants that prohibited the licensed professional from performing management services that competed with the management company.

Restrictive covenants are an important tool in protecting a company's interest in its customers, patients, employees, and information. Enforceability of restrictive covenants varies from state to state, and is subject to particular scrutiny across numerous issues in the health care industry. Health care entities looking to enter into restrictive covenants should carefully review state law with counsel familiar with these unique matters.

3. Navigating the Interactive Process: Best Practices for Complying with the ADA

By Denise Merna Dadika

Four recent lawsuits filed by the Equal Employment Opportunity Commission ("EEOC") against health care employers underscore the federal agency's intent to continue to ensure that employers are complying with the Americans with Disabilities Act's ("ADA") mandate to reasonably accommodate workers with disabilities.

EEOC v. Wesley Health System, LLC (S.D. Miss.)

In July 2017, the EEOC filed suit against Wesley Health System (the hospital) for allegedly refusing to provide a reasonable accommodation to a registered nurse who required a lifting restriction following a three-month leave of absence. According to the EEOC, the hospital refused to allow the nurse to return to work and terminated her employment without first engaging in the interactive process to determine whether the nurse was qualified to do her job. Thereafter, the nurse applied for an open position that did not require heavy lifting for which she purportedly was qualified, but the hospital selected another candidate.

EEOC v. Senior Care Properties Inc. (E.D.N.C.)

In September 2017, the EEOC filed suit against Senior Care Properties Inc., a residential rehabilitation facility, alleging it denied a reasonable accommodation for a certified nursing assistant ("CNA"). The complaint alleges that the CNA suffered an arthritis flare up and, as a result, required light duty for four weeks. Instead of providing the employee light duty, the complaint alleges, the employer placed the CNA on an unpaid leave, offered no other

accommodations, and fired the CNA at the conclusion of the leave -- despite the CNA's ability to return to work full duty -- for exceeding the Company's two-week leave policy.

EEOC v. St. Vincent Hospital and Health Care Center, Inc. (S.D. Ind.)

In September 2017, the EEOC filed suit against St. Vincent Hospital for allegedly failing to accommodate an employee's indefinite lifting restrictions. Specifically, the complaint alleges that the hospital failed to transfer an employee to a vacant position for which she was qualified and, instead forced her to take a leave of absence and ultimately terminated her employment.

EEOC v. Prestige Senior Living, LLC (E.D. Cal.)

Among the four cases is the EEOC's lawsuit against Prestige Senior Living, LLC, an assisted living facility, for allegedly maintaining a policy requiring employees to be 100% healed/100% fit for duty before returning to work in violation of the ADA.

In light of the recent lawsuits filed by the EEOC, health care employers should follow these strategies for effectively navigating the interactive process in compliance with the ADA:

Formalize the Accommodation Process: Create a written policy and process for requesting accommodations. A formal policy and process will demonstrate an employer's commitment to accommodating individuals with disabilities and should provide for a consistent approach when requests are made. The policy should instruct employees to direct accommodation requests to Human Resources professionals, who have more experience with the ADA and better understand the employer's process.

Train Supervisors: Even with a formal policy and procedure in place, employees will inevitably speak with their supervisor when seeking a reasonable accommodation. Make sure your supervisors understand the requirements of the ADA and know how to recognize a request, or a demonstrated need, for a reasonable accommodation. Employers should instruct supervisors to immediately report all accommodation requests to HR, not to make any inquiries, comments, or decisions about an employee's request, and to maintain the confidentiality of all employee medical information.

Take a measured approach: Never say never when initially presented with a request. Even if the request is unreasonable, employers should gather and consider all the relevant facts before making a decision and responding to the employee.

Communicate: The interactive process requires an employer to engage in an open and meaningful dialogue with the employee requesting an accommodation. To fully understand an employee's request and limitations and identify possible accommodations, it is best to speak with the employee, preferably in person, instead of communicating in writing. Keep in mind that you likely will need to have multiple conversations with an employee during the interactive process. That said, all communications should be documented by memorandum or follow-up email.

Make an Individualized Assessment: One size does not fit all when providing a reasonable accommodation. What might be reasonable for one employee may not be reasonable for another. Also, just because you have not provided the accommodation requested in the past does not mean it cannot be a reasonable accommodation. Each request will present different factors that must be considered, including an employee's essential and non-essential job

functions. This analysis should not be limited to an employee's job description, but should include a discussion with the employee's supervisor, and possibly a co-worker who performs the same job, to fully understand the frequency and importance of the duty(ies) at issue. In addition, employers are entitled to, and should require, medical documentation to understand the employee's impairment, the nature, severity, and duration of the impairment, and any resulting limitations. Requests for medical information should be limited to the information truly needed to assess the accommodation requested. Finally, policies or practices that impede the interactive process, including 100% healed policies, will be found to violate the ADA.

Be creative and flexible: Keep in mind that you do not need to provide the accommodation requested by the employee, an alternative accommodation may be provided so long as it is effective. In addition, even when an employee does not propose an accommodation, the employer still has an obligation to engage in a meaningful dialogue with the employee to determine whether a reasonable accommodation can be made. Finally, as demonstrated by the EEOC's recent lawsuits, when it is determined that an employee cannot perform the essential functions of the employee's current job, employers should consider transferring an employee to a vacant position for which he or she is qualified or provide an employee a leave of absence as a reasonable accommodation. Employers should exhaust all possibilities before terminating an employee who requests an accommodation.

Thoroughly analyze undue hardship: Employers relying upon the undue hardship defense as a basis for denying an accommodation must affirmatively show that the requested accommodation will create significant difficulty or expense for the employer. Factors that should be analyzed include loss of productivity, increased workload on co-workers and management, impact on patient care and safety, and increased costs for the organization. In most circumstances, cost alone will not constitute an undue hardship. Employers who conduct a cursory review of the potential undue hardship factors are inviting EEOC scrutiny.

Document the process: Be sure to document the employee's request and all steps taken and communications had in response to the request, including the accommodation offered and provided, the reasons for denying the accommodation request, and/or the undue hardship analysis. The documentation serves as a personnel record and will also be critical in defending any future claims.

Follow-up: After providing an accommodation, check in with the employee and supervisor to understand if the accommodation provided is working.

Health care employers who take the time and effort to follow these practices will be better equipped to handle accommodation requests and will be in a better positon to defend failure to accommodate claims.

4. A Growing Trend In Favor of Medical Marijuana Users in the Employment Context

By Nathaniel M. Glasser and Carol J. Faherty

Given the safety-sensitive nature of the industry, many health care employers mandate drug testing of their employees and/or applicants. A movement in favor of employees who use medical marijuana may be emerging, and employers must now become familiar with medical marijuana laws in each of the states where they conduct business to avoid running afoul of this new trend.

Prior to the wave of recent cases in 2017, employers were able to successfully defeat claims of wrongful termination brought by employees who were medical marijuana users under individual state laws. For example, courts in California, Colorado, Montana, Oregon, and Washington – all states that have decriminalization laws that do not contain express employment protections – found in favor of *employers* against sympathetic employees under the theory that the federal Controlled Substance Act ("CSA"), 21 U.S.C. § 801 *et seq*., which classifies marijuana as an illegal controlled substance, preempts the applicable state laws. Recently, however, a number of courts – all in states that have enacted employment protections as part of legislation legalizing medical marijuana use – have found in favor of *employees* using medical marijuana, and have explicitly held that federal law does not preempt the applicable state law. These recent decisions have compelled employers who operate in these states to reevaluate whether to conduct drug testing for marijuana and, if so, how to address positive tests from employees or applicants.

The first notable case indicating this change of direction was *Callaghan v. Darlington Fabrics*, in which the Rhode Island Superior Court held that an employer's enforcement of its neutral drug testing policy to deny employment to an applicant because she held a medical marijuana card violated the anti-discrimination provisions of the state medical marijuana law (the Hawkins-Slater Act). Significantly, the Rhode Island court found that plaintiff's status as a medical marijuana cardholder signaled to the employer that she could not have obtained the card without a debilitating medical condition that constituted a disability and that the allegations therefore supported a claim of disability discrimination premised on a disparate treatment theory. The court also held that the CSA did not preempt the Hawkins Slater Act because the purpose of the CSA did not conflict with the state employment and anti-discrimination law.

Similarly, in *Barbuto v. Advantage Sales and Marketing LLC*, the Massachusetts Supreme Judicial Court held that a qualifying patient who was terminated from her employment as a result of her lawful marijuana use may state a claim of disability discrimination under the state's anti-discrimination statute. The court found that, in some circumstances, an employer may have an obligation to accommodate the off-duty use of marijuana for medicinal purposes. Like the Rhode Island court, the Massachusetts court concluded that the CSA does not make it *per se* unreasonable to accommodate a medical marijuana user.

Consistent with this developing line of cases, in *Noffsinger v. SSC Niantic Operation Company, LLC*, the U.S. District Court for the District of Connecticut recently ruled in favor of a job applicant who was a medical marijuana user after her employment was terminated upon testing positive for marijuana in connection with her job application. The court concluded that medical marijuana users are protected under Connecticut's Palliative Use of Marijuana Act ("PUMA") from being terminated or refused employment based solely on medical marijuana use. The court found that PUMA did not conflict with the CSA, the Americans with Disabilities Act, or the Food, Drug and Cosmetics Act because those federal laws are not intended to preempt or supersede state anti-discrimination laws. This decision is particularly notable because it is the first federal decision to determine that the CSA does not preempt a state medical marijuana law's anti-discrimination provision.

Takeaways

Twenty-nine states plus the District of Columbia have enacted legislation legalizing medical and/or recreational marijuana use. Employers operating in multiple jurisdictions must pay particular attention to the medical marijuana statutes in each state they operate.

Health care employers operating in states that prohibit discrimination against and/or require accommodation of medical marijuana use must be aware of the increased risk of enforcing zero tolerance drug testing policies against certified medical marijuana users. While obvious safety considerations arise when health care workers use or may be under the influence of marijuana, employers in these states must take additional precautions when administering drug testing policies. Health care employers operating in these jurisdictions should review their drug testing policies and consider whether to continue testing for marijuana and, if so, how they will address positive tests for marijuana use.

5. ERISA Withdrawal Liability: Make Sure to Look Before You Leap Into Mergers and Acquisitions

By Michael F. McGahan and Mark M. Trapp

Faced with pressures to hold down costs, health care institutions are seeking economies of scale through a growing number of mergers and acquisitions. When reviewing a prospective merger or acquisition, institutions should take care to perform a thorough due diligence review of labor issues. High among those issues should be a determination of whether any of the employees of the target entity are represented by a union and, if so, whether the employer is required to contribute to a multi-employer pension plan under the collective bargaining agreement. The acquiring entity must then determine whether the pension fund is "underfunded" under ERISA because the transaction may trigger "withdrawal liability" for the selling entity (and potential successor liability to the purchaser for that withdrawal liability), or a merger partner may bring in that contingent liability with it.

Under ERISA, the purpose of "withdrawal liability" is to impose on employers liability for their proportionate share of the pension plan's underfunding, triggered by the employer's partial or complete withdrawal from the pension plan. A complete withdrawal occurs when the employer "permanently ceases to have an obligation to contribute under the plan" or "permanently ceases all covered operations under the plan," such as when the business closes down, negotiates a new collective bargaining agreement without an obligation to contribute to the fund, or sells its assets to an employer that does not assume the existing collective bargaining agreement. A partial withdrawal occurs when an employer experiences a 70 percent decline in its contributions, or when it ceases to have an obligation to contribute under one (but not all) of its collective bargaining agreements or one (but not all) of its facilities, and continues to perform work for which it previously would have been obligated to contribute.

In recent years, many multi-employer pension funds have become severely underfunded, leading to potential withdrawal liability of many millions of dollars for employers who cease or substantially reduce their participation in such funds. Generally, withdrawal liability is imposed upon the employer that had the contractual obligation to contribute to the pension fund. However, although the general federal common law rule of successor liability holds that a buyer of assets is not liable for the debts and liabilities of the seller, in recent years courts have expanded an exception to that common law doctrine and increasingly hold buyers responsible for the seller's withdrawal liability.

For example, withdrawal liability cases before the Seventh Circuit have imposed successor liability on the showing of two elements: (i) notice of the potential liability prior to the purchase and (ii) substantial continuity in the operation of the business before and after the sale. Where a purchaser intends to run essentially the same business, using the same equipment, facilities

and employees, and to target the same customers, courts are increasingly receptive to holding the purchaser liable as a successor for any unpaid withdrawal liability of the seller.

If the prospective acquiring entity is willing to continue contributions to the pension fund, it can avoid potential withdrawal liability through use of ERISA's Section 4204 asset sale provisions. Under this provision, the purchaser agrees to continue the required contributions to the pension plan under the collective bargaining agreement and -- upon compliance with the statute -- complete or partial withdrawal of the employer from the multi-employer plan does not immediately occur by virtue of the sale. But this process does not eliminate the potential withdrawal liability; it only eliminates the transaction as a trigger for incurring it. The prospective purchaser becomes a contributing employer to the pension fund and thus takes on the obligation to pay withdrawal liability should it close, bargain out of the obligation to contribute to the pension fund, sell its assets, or even if its employees vote to decertify the union.

Before entering into such an agreement, a prospective purchaser should fully analyze the potential financial impact of taking on such a potentially large contingent liability, including the long-term viability of the pension fund involved.

Potential purchasers should be mindful of all the aspects of potential successor liability as they structure and enter into asset purchase transactions. Specifically, they should:

- perform careful due diligence regarding a target's multi-employer pension plan obligations and potential withdrawal liability;
- consider structuring the transaction to account for any withdrawal liability, either through indemnification provisions or a reduction of the purchase price, if due diligence uncovers potential withdrawal liability;
- perform careful due diligence on the financial status of the pension fund involved before entering into an ERISA 4204 agreement, and of the major contributing employers to that pension fund to make a judgment on the long-term viability of the fund.

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