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New Jersey District Court Holds that Mandatory Alcohol Screening of Alcoholic Employees Is Not Discriminatory

The issue of mandatory or random drug or alcohol screening in the workplace has always been a difficult one for employers. While employers have the right to screen applicants, and to test employees on a “reasonable suspicion” basis, random testing has generally been limited to specific circumstances, such as where employees hold safety sensitive positions. However, in a very important case, the U.S. District Court for the District of New Jersey recently held that under certain circumstances, an employer may require an alcoholic employee to undergo random alcohol screenings as a condition of continued employment. *Byrd v. Federal Express Corporation*, Civil Action No. 05-2648 (March 8, 2008).

In *Byrd*, an employee, having informed his employer that he was an alcoholic, took an extended medical leave of absence under the Family Medical Leave Act (“FMLA”) for treatment, and did not return until after his FMLA leave had expired. Upon his return from the leave, the employee was required to sign a “Statement of Understanding” that required him to undergo periodic random drug and alcohol testing as a condition of continued employment with the employer.

For several years, the employee successfully passed all random tests. However, eventually his screen came back positive. He was suspended with pay but ultimately discharged when the employer concluded that the results were valid. The employee then filed a lawsuit

alleging violations of the New Jersey Law Against Discrimination (“NJLAD”) and the FMLA.

The district court dismissed both claims upon motion, holding, among other things, that the requirement that the employee sign the “Statement of Understanding” upon his return to work did not violate the FMLA because the employee returned to work well after the expiration of his FMLA leave period. Thus, the FMLA did not apply to the conditions of his return to work.

The district court rejected the employee’s contention that the “Statement of Understanding” was discriminatory because it singled out individuals with addiction-related disabilities, holding that random alcohol screenings are not *per se* discriminatory. The district court found it important that the employer adequately informed all employees of the potential for drug screenings in its employment manual, the policy applied to all alcoholics and drug addicts, and the employee consented to the follow-up testing. The district court specifically relied upon the recent Third Circuit case, *Cole v. Exxon Mobile Corp.*, 142 F. App’x 52, 53 (3d Cir. 2005), which held that a random policy directed at alcoholics was not discriminatory because “the policy was tailored specifically to the needs of alcoholics and its provisions for after-care reflect a



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recognition that relapses can be a problem. Also, the policy was neutral in that it applied to all alcoholics. The fact that it did not apply to other forms of disability does not make it unlawfully discriminatory.”

This is an important case because it shows that the law will under circumstances allow

random testing. The key for the employer was a uniformly applied drug and alcohol policy that was clearly set forth in the employee manual. If you have any interest in putting together such a policy, give us a call. We would be glad to help. ■

New York Enacts New Law to Protect Social Security Numbers

Effective January 1, 2008, New York enacted the Social Security Number Protection Law, NY Gen. Bus. § 399-dd. The purpose of this law is to protect an employee’s confidential information. It is designed to limit a company’s publication and dissemination of social security numbers in the ordinary course of business, and requires companies to implement safeguards preventing persons from accessing social security numbers, unless they need the information for a legitimate business purpose. The new legislation defines a social security number as “the number issued by the federal social security administration and any number derived from such numbers,” but expressly excludes numbers that have been encrypted. Employers would do well to read this law carefully; mistakes can result in severe penalties.

Who is Covered?

Any person, firm, partnership, association or corporation, excluding the state or its political subdivisions. This includes employers who only reveal the last four digits of an individual’s social security number in their business practices.

What are the Specific Restrictions?

Companies are prohibited from: (1) making an individual’s social security number available to the general public, (2) intentionally or otherwise printing social security numbers on any card or tag required for an individual to access products, services, or benefits provided by the company, requiring an individual to transmit his/her social security number over the Internet, unless the connection is secure or the number is encrypted, requiring an individual to use his/her social security number to access an Internet Web site, unless a password, PIN number, or other type of authenticating device is also required for the individual to access the Web site; and (3) printing an individual’s social security number on any materials that are mailed to the individual, unless a state or federal law requires the number to be on the document being mailed.

What is Permitted?

Social security numbers may be included in: (1) applications and forms sent by mail; documents that are sent as part of an application or enrollment process; (2) documents being used to establish, amend, or terminate an account, contract, or policy; and (3) documents that are used to confirm the accuracy of a social security number; provided,

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that the social security number is not visible when being mailed.

The legislation further provides that companies must “take reasonable measures to ensure that no officer or employee has access to [social security numbers] for any purpose other than for a legitimate or necessary [business] purpose ... [and] provide safeguards necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of the number.” The statute does not indicate what types of “measures” and “safeguards” a company must implement.

What are the Penalties?

Violations carry a monetary penalty of up to \$100,000 for multiple violations resulting from a single incident, and up to \$250,000 for subsequent violations, where multiple violations result from a single incident. Employers may be able to avoid penalties if they can show that a violation occurred despite the exercise of reasonable care to protect social security number information.

What Should Employers Be Doing?

Employers should thoroughly review all documents and forms upon which social

security numbers might be disclosed or demanded. These requests for information should only be maintained if there is a truly legitimate business reason. Employers should also review their security and confidentiality policies to ensure that only those employees with a need to know have access to social security numbers. It may even be wise to extract social security information from personnel files and keep them in the same manner that medical information is kept. Documents that include social security information should not merely be thrown away when no longer needed. They should be shredded for added protection.

It is also very important that employers draft and enforce a confidentiality policy that specifically tells employees exactly what is and what is not accessible. The policy should also make it clear that employees who violate the policy and obtain confidential personnel information will be disciplined, up to and including discharge. The policy should also include a procedure for filing complaints and investigating violations, and for notifying employees whose information is compromised.

This new law is serious. It has real teeth. Therefore, we urge employers to take it seriously and to upgrade its policies and procedures. Please call us if we can be of help. ■

President Signs Bill Outlawing Genetic Testing Bias

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (“GINA”), which prevents employers and health insurers from using genetic testing to discriminate against workers. The new law prevents health insurers from increasing premiums or denying coverage based on

genetic information. Title II of the Act prohibits covered employers from discriminating against applicants and employees on the basis of genetic information.

To Whom Does Title II Apply?

The Act applies to employers with fifteen or more employees, employment agencies, and labor organizations.

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What Acts are Prohibited?

Covered employers may not discharge, fail or refuse to hire, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of genetic information with respect to the individual. The Act further prohibits the limitation, segregation, or classification of employees in such a way “that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.”

The Act also prohibits the acquisition of genetic information about an employee or his or her family member. However, an employer will not be penalized for genetic information learned (1) by reading a magazine or publication, (2) through health or genetic services offered as part of a wellness program, provided the employee has given prior written authorization and any genetic information disclosed to the employer in connection with the program is in the aggregate so that it does not identify the individual, (3) inadvertently from medical history information, or (4) in response to a request for information to comply with the certification requirements of the Family and Medical Leave Act. Employers may lawfully obtain genetic information to monitor the genetic effects of exposure to hazardous workplace substances, provided they comply with certain disclosure, consent, and monitoring standards.

GINA also protects the confidentiality of genetic information, except that disclosure is permitted disclosure only: (1) in response to a court order, (2) as part of a governmental

investigation, (3) to the employee or a labor organization at the written request of the employee, or (4) in other very limited circumstances specified in the Act.

What are the Penalties?

An aggrieved employee or applicant who believes that an employer has violated Title II may sue the employer and recover compensatory and punitive damages subject to certain statutory caps. However, the Act specifically excludes a cause of action for disparate impact discrimination.

GINA and the FLSA – Perfect Together

GINA also has a hidden treat for unwary employers who violate the child labor provisions of the Fair Labor Standard Act (“FLSA”). This provision increases the maximum employer penalties for violations to \$11,000 for each employee who was the subject of the violation. There is also a new \$50,000 penalty for each violation that causes the death or serious injury of any employee under the age of eighteen. The \$50,000 penalty may be doubled for repeated or willful violations.

What Should Employers Be Doing?

Employers should thoroughly review and update their policies prohibiting employment discrimination. New policies addressing the confidentiality of employee information should also be included in their handbooks or manuals. Employers that sponsor employee wellness programs should also review those programs to ensure that they comply with the confidentiality provisions of the Act insofar as genetic information is concerned. Please call us if we can help. ■

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The Employer's Fiduciary Obligation Under ERISA

In a recent case, the First Circuit Court of Appeals held that an employer did not breach its ERISA fiduciary duties even though the employer's human resources representative gave an employee inaccurate pension information. The estimate given to the employee was high by over \$2000 a month. The plaintiff turned down another job offer in reliance on this information. The plaintiff sued when he learned that, rather than receiving \$2914 a month, his pension was only \$789 a month. While this might seem to be a failure to keep a focused eye on the beneficiary's interests, the court found that the act of the HR representative in providing the statements was not in the role of a plan fiduciary. Instead, he was performing a ministerial task. *Livick v. Gillette Co.*, Case No.07-2108 (1st Cir. Apr. 17, 2008).

Although the result was a happy one for the employer, if not for the unfortunate employee who relied upon the HR representative's bad information, *Livick* points out the issue of the employer when acting as a fiduciary. A fiduciary must perform fiduciary duties with "an eye single" to the interests of a benefit plan's participants and beneficiaries. However, a person may act as a fiduciary at some times

and not at others, depending on the duties being performed. Fiduciary status is based on the functions performed for the benefit plan, not just a person's title. A person acts as a fiduciary when exercising discretion or control in administering and managing a plan or controlling a benefit plan's assets. A person is not acting as a fiduciary in making decisions to change the types of benefits or even to terminate a plan. Employer business decisions to establish a plan, to determine the types of benefits to include, to amend a plan, or to terminate a plan, are excluded from fiduciary obligations because employers need to be able to make decisions on behalf of its business, even though these may have a negative effect on beneficiaries. However, when an employer or its representative implements these decisions, that person is a fiduciary when acting on behalf of the plan.

The practical lesson from *Livick* is that only those employer representatives who are trained and authorized to provide pension information to employees should do so. The employer dodged a bullet this time, but it may not be so lucky in the future. Besides, nothing destroys employees' trust and confidence in an employer faster than lousy pension information. Make sure it does not happen to you. ■

Fines for I-9 Violations Raised Effective March 27, 2008

The Immigration Reform and Control Act of 1986 (IRCA) made it unlawful for a U.S. employer to knowingly hire or continue to employ an alien not authorized to be employed in the United States and imposed

a requirement that employers verify the employment eligibility of all employees they hire (both U.S. workers as well as aliens), by completing a Form I-9. The "civil monetary penalties" levied on employers who violate these rules were raised approximately 25% effective March 27, 2008.

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The minimum penalty for knowing employment of an unauthorized alien increases by \$100, from \$275 to \$375. Some of the higher civil penalties are increased by \$1,000; for example, the maximum penalty for a first violation increases from \$2,200 to \$3,200. The biggest increase under the rounding mechanism raises the maximum civil penalty for multiple violations from the current \$11,000 to \$16,000. These penalties are assessed on a per-alien basis; thus, if an employer knowingly employed,

or continued to employ, five unauthorized aliens, that could result in five fines.

We are working with many employers to make sure that they are in compliance with all the requirements of IRCA. This includes a complete audit of I-9s as well as training for supervisors. If you have any questions concerning compliance, please be sure to call. ■

For more information about any of the topics covered in this issue of the Labor and Employment Law Update, Please contact:

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