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EMPLOYMENT LAW OUTLOOK

CONGRESS INTRODUCES BILL TO LIMIT THE USE OF INDEPENDENT CONTRACTORS

William M. Furr

On September 15, 2010, Senator John Kerry and Representative Jim McDermott introduced the Fair Playing Field Act of 2010 to restrict the use of independent contractors by employers. The bill attempts to limit the use of a provision in the Internal Revenue Code that allows employers to avoid penalties for misclassifying employees as independent contractors. Under the current rule, an employer can avoid or reduce liability for misclassifying employees as independent contractors if it can point to a reasonable basis for the classification. The proposed Fair Playing Field Act attempts to limit employers' use of this "safe harbor" because according to the sponsors, too many employers have been allowed to escape liability by providing creative explanations for their independent contractor classifications.

On his website, Senator John Kerry states that the Fair Playing Field Act will: 1) require the Secretary of Treasury to issue prospective guidance on worker classification issues; 2) amend the provisions of the Tax Code that provide for reduced penalties for failure to deduct and withhold income taxes from the worker's compensation; 3) require businesses who use independent contractors to provide each independent contractor with a written statement regarding the individual's tax obligations, the labor and employment law protections that do not apply to independent contractors, and the right of independent contractors to seek a status determination from the Internal Revenue Service; and 4) require the Secretary of Treasury to issue annual reports on worker misclassification.

This bill reflects the increased scrutiny that the Obama administration and Congress have placed on businesses that use independent contractors. We have advised our clients that if they use independent contractors, they should make sure that the workers satisfy the Internal Revenue Service's Twenty Factor Test in determining whether the worker should be classified as an employee rather than an independent contractor. If the Fair Playing Field Act becomes law, employers will need to revisit their use of independent contractors.■

SUPERVISORS HAVE RIGHTS ALSO

William E. Rachels, Jr.

In August of this year, the U.S. Court of Appeals for the First Circuit ruled that a supervisor who had supported a subordinate in pursuing her claim for sexual harassment by a fellow employee was protected under the opposition clause of the anti-retaliation provisions of Title VII in the case of *Collazo v. Bristol-Myers Squibb Manufacturing, Inc.*

Hiraldo, one of the scientists under Collazo's supervision, approached him and told him that she felt sexually harassed by Acevedo, another scientist in the group. She expressed various details to support her feelings and, at Hiraldo's request, Collazo arranged a meeting with a Human Resources representative and accompanied Hiraldo to the meeting. Collazo then e-mailed his supervisor to inform him of Hiraldo's complaint and the steps taken to address it. Two days later, Collazo accompanied Hiraldo to meet with the Human Resources representative and Hiraldo explained the basis of her complaint in more detail. After Hiraldo came to Collazo to request another meeting with Human Resources, Collazo left a voice mail stating that he needed to speak with the Human Resources representative about Hiraldo's sexual harassment case. The next day, Collazo was informed that he was being terminated because of communication and performance issues, and the company's reorganization.

Collazo brought suit claiming that he was terminated in retaliation for opposing Acevedo's sexual harassment of Hiraldo. Bristol-Myers Squibb moved for summary judgment claiming among other positions that Collazo had not been engaged in any protected activity. The District Court granted the defendant's motion for summary judgment.

The Court of Appeals reversed the decision. It found that the defendant was entitled to have a jury decide whether his actions in regard to Hiraldo's complaint fell within the protection of the opposition clause. The Court relied upon the Supreme Court's 2009 decision in *Crawford v. Metropolitan Government of*

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ANTI-DISCRIMINATION LAWS PROVE THE CUSTOMER IS NOT ALWAYS RIGHT

Samuel J. Webster

What happens when a customer's preferences collide with anti-discrimination laws? Contrary to popular perception, depending upon the nature of the discriminatory preference, the customer is not always right. A recent Indiana case from the Seventh Circuit Court of Appeals illustrates the employer's problem.

First, some background. Federal anti-discrimination laws prohibit employers from taking adverse job actions or allowing the creation of a hostile work environment when based upon race, sex, religion, national origin, age and disability. An exception to the anti-discrimination requirements is a bona fide occupational qualification (BFOQ). BFOQ examples include advertising by a menswear retailer for male models, mandatory retirement ages for airline pilots for safety reasons, a Roman Catholic university requiring its president, dean, and faculty to be Roman Catholic, but not necessarily a secretary or janitor. Some are more obvious than others. The BFOQ exception occurs with some frequency in the context of gender discrimination in the healthcare arena. Generally, female patients are permitted to insist upon care by female providers, and the healthcare employer will not be subject to discrimination charges for following that practice.

Race, on the other hand, will cause difficulties for employers. The recent Seventh Circuit case, *Chaney v. Plainfield Healthcare Center*, illustrates the problem. In that case, Plainfield Healthcare Center, a nursing home, had a resident who did not want assistance from black certified nursing assistants (CNA). Believing that "the customer is always right," Plainfield acceded to this racial preference. Brenda Chaney's position as a CNA required her to monitor patients, responding to their requests for service and assisting their daily living needs. Plainfield provided Chaney and other CNAs daily assignment sheets, which listed the residents in Chaney's unit, and in a column for miscellaneous notes, the sheet contained the annotation for the resident "prefers no black CNAs." Plainfield admitted at trial that it honored its residents' racial preferences, believing that otherwise it would violate state and federal law purportedly granting residents the right to choose their healthcare providers. Plainfield's daily written annotation of the residents' racial preferences spawned race-based remarks from co- workers. Chaney, for fear of being fired, attempted to adhere to the racial preference even to the point of not assisting the resident when assistance was required. Some three months into her employment, Chaney had no alternative but to assist that resident, and she was accused by another CNA of using a profanity. The investigation of the incident revealed no use of a profanity, but the director of nursing nevertheless fired Chaney.

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HIPAA ALERT: RITE AID SETTLED PRIVACY CASE FOR $1 MILLION

Cher E. Wynkoop and Ruby W. Foley

Rite Aid Corporation and its affiliated entities (Rite Aid) have settled with the U.S. Department of Health and Human Services (HHS) following a lengthy joint investigation by HHS and the Federal Trade Commission (FTC) of Rite Aid's violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). In connection with the settlement, Rite Aid must pay HHS $1,000,000 by the second anniversary of the date of the settlement agreement, and implement substantial corrective action to ensure that the HIPAA violations do not recur.

HHS's Office of Civil Rights (OCR) is charged with enforcing HIPAA, which addresses the privacy and security of individuals' protected health information (PHI). OCR and the Federal Trade Commission (FTC) began investigating Rite Aid after the media exposed several Rite Aid pharmacies for disposing of prescriptions and labeled pill bottles containing PHI into open dumpsters that were accessible to members of the public. The investigation ultimately uncovered the following violations of HIPAA:

- The policies and procedures regarding disposal of PHI that Rite Aid adopted and implemented were not adequately designed to appropriately and reasonably safeguard PHI;
- Rite Aid did not maintain a sanctions policy for employees who failed to comply with the disposal policies; and
- Rite Aid failed to train employees on how to dispose of PHI properly.

In connection with the settlement agreement with OCR, Rite Aid must adopt a "corrective action program" for its approximately 4,800 retail pharmacies. Under the correction action program, which will be in effect for three years, Rite Aid must:

- Develop policies and procedures regarding the disposal of PHI and submit such policies and procedures to OCR for review;
- After the policies and procedures have been approved by OCR, distribute such policies and procedures to all members of its workforce who have access to PHI and require such members to submit a written or electronic compliance certification;

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ANTI-DISCRIMINATION LAWS PROVE THE CUSTOMER IS NOT ALWAYS RIGHT

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Chaney sued her employer, complaining of hostile work environment and a race-motivated discharge. The trial court entered summary judgment on behalf of Plainfield. The trial court first ruled that Plainfield avoided hostile work environment liability by responding to each of the complaints. The court treated the racial preference policy separately, concluding that Plainfield had a good-faith belief that ignoring the preference would violate Indiana and federal privacy and patient rights laws. The trial court finally concluded that Chaney had failed to produce any racial animus motivating the discharge.

The Seventh Circuit reversed the decision. First, the Court stated, "we have no trouble finding that a reasonable person would find Plainfield's work environment hostile or abusive." Therefore, the Court held that summary judgment on behalf of Plainfield was erroneous because factual issues existed regarding the existence of a hostile work environment. The Seventh Circuit further stated that it was "widely accepted" that an employer's desire to accede to customer racial preferences was not a defense to a Title VII case alleging discriminatory treatment based upon race. Plainfield erroneously relied upon the gender discrimination cases arising in the healthcare setting. The Seventh Circuit found those cases easily distinguishable: while the law tolerates same-sex restrooms or same-sex dressing rooms, it does not tolerate white-only restrooms or dressing rooms. The Seventh Circuit also analyzed both federal and state patient rights laws and concluded that they were narrowly construed for sex differentiation and that they do not overcome the employer's duty to its own employees to "abstain from race-based work assignments." That policy created a hostile work environment. The Court also found that evidence existed that Plainfield's reasons for discharge were "insincere" and therefore pretextual.

The Seventh Circuit's message is that employers should never treat race as a bona fide occupational qualification. Customer preferences do not trump the employer's duty to provide a workplace free of race discrimination. In Brenda Chaney's case, the Court made several suggestions: (1) advise prospective residents in writing of the non-discrimination policy and obtain the resident's written consent; (2) attempt to modify the resident's behavior; and (3) advise employees of their right to protection from customer's racial harassment. Under all circumstances, the employer must take care to make assignments based upon race-neutral criteria.■

SUPERVISORS HAVE RIGHTS ALSO

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Nashville & Davidson County, Tennessee. In that case, the Supreme Court held that the term "oppose" carries an ordinary meaning which includes "to resist"; "to contend against"; or "be adverse to a situation." There, the Court found that a plaintiff who did not initiate a complaint about sexual harassment nevertheless engaged in protective conduct under the opposition clause by responding to questions posed to her during an internal investigation of the sexual harassment complaints. The *Crawford* Court held that her responses could be seen as resistant or antagonistic to the sexually harassing treatment. The Supreme Court quoted from the EEOC guideline: "When an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity."

The *Collazo* Court found that a reasonable jury could well find that he opposed the treatment of Hiraldo by Acevedo. It was noted that *Crawford* had recognized that an employee can impose unlawful employment practices by his or her conduct. His repeated efforts accompanying Hiraldo to Human Resources to file and pursue her sexual harassment complaint could be found to be effectively and purposefully communicating his opposition to Acevedo's treatment of Hiraldo.

As may be expected, Bristol-Myers Squibb contended that Collazo's conduct was not protected because it was done in furtherance of his supervisory responsibilities.

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The Court proceeded to apply the standard that for opposition a supervisor must step outside of his normal employment role representing the company and take action adverse to the company. The Court concluded that Collazo had put forth sufficient evidence to support a jury finding that he had done so. Collazo was not a personnel manager warning the company of potential harassment claims. Instead, as a supervisor, he assisted a subordinate employee in filing a sexual harassment complaint. He thereby stepped outside of his normal supervisory role and took action adverse to the company.

Bristol-Myers Squibb's argument is probably understandable. However, the case points out that the same action can be viewed differently by a reasonable jury. While it is reasonable to believe that he was acting to protect the company, it is also reasonable to believe that he was acting in opposition to the harassment, particularly where he was accompanying Hiraldo in processing of the complaint. The jury gets to decide such a factual issue.■

HIPAA ALERT: RITE AID SETTLED PRIVACY CASE FOR $1 MILLION

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- Provide training to workforce members who have access to PHI and make the evidence of such training available for inspection by OCR;

- Provide OCR with a written plan on how Rite Aid will internally monitor that PHI will be disposed of in accordance with the policies and procedures developed under the corrective action program;

- Engage a third-party assessor to conduct assessments of compliance and to submit written reports of its assessments to OCR; and

- Provide an implementation report to OCR, as well as periodic reports regarding its compliance with the corrective action program requirements.

In connection with the FTC settlement, Rite Aid must obtain, every two years for the next 20 years, an audit from a third party assessor, to ensure that its security program meets the standards of the FTC order.

This is the second time that HHS and the FTC have jointly investigated a covered entity for HIPAA violations. Covered entities, including self-insured medical plans sponsored by employers, (and their business associates) should ensure that their policies and practices are in compliance with HIPAA, as amended. ■

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