WILLCOX SAVAGE

Employment Law Outlook

Spring 2013

DON'T LET YOUR BUSINESS GO UP IN SMOKE - MARIJUANA IN THE WORKPLACE

Samuel J. Webster

Colorado and Washington voters made huge headlines in November, 2012, by passing laws that legalized the recreational use of marijuana. The new laws essentially regulate marijuana supply and use like alcohol. Those headlines have implications for employers with work in those states. However, dealing with marijuana in the workplace is not a particularly new topic. Presently, over one-third of the country, 18 states – Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, plus the District of Columbia – permit the use of medical marijuana. This article will not address, except in passing, the obvious conflict between certain state's laws and federal laws. Employers still need to be mindful of the medical marijuana issue and the advent of more widespread legalization of recreational marijuana use.

The Federal government and the Commonwealth of Virginia remain steadfast in classifying marijuana as an illegal controlled substance. Notwithstanding that over a third of the states legalize medical marijuana, the Supreme Court held in 2005 that possession of marijuana is illegal under the Controlled Substances Act, regardless of whether a state permits medical marijuana use. But, Federal marshals are not camped out on the door steps of medial marijuana suppliers. Moreover, courts have consistently affirmed the employer's right to regulate marijuana use in the workplace. All of the foregoing is consistent with how courts deal with an employer's right to regulate alcohol use in the workplace and the steps the employer may take in the event of an employee's impairment.

Colorado's and Washington's enactments raise again questions about the employer's ability to enforce company drug testing policies and limit marijuana use outside the workplace. Those questions are compounded by the relatively slow metabolic rate of marijuana: an employee could test positive for marijuana a week after it was last used.

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H-1B VISA SEASON OPENED APRIL 1

Susan R. Blackman

Last year, there was a marked increase in the numbers of H-1B petitions filed within the first two months of the opening of H-1B filing season. Our immigration laws allow a maximum of 65,000 H-1B visas to be issued to foreign professionals each year, plus an additional 20,000 visas for those who earned a masters or higher degree at a U.S. university. Once those maximums have been met, no new H-1B visas may be issued until the following federal fiscal year.

The federal fiscal year runs October 1 through September 30. Immigration procedures allow a petitioner to file a petition for an H-1B visa on behalf of a foreign employee no more than six months prior to the requested start date of employment. Consequently, the earliest an employer can file a new H-1B petition for someone to start working in the next fiscal year is April 1, 2013.

If you know of a foreign student or other foreign professional that you are interested in hiring for a professional position in your organization, we urge you to take steps now to begin the process of preparing and filing an H-1B visa petition. There are prerequisites that must be satisfied with the U.S. Department of Labor before the petition may be filed. Our Business Immigration Law Team at Willcox Savage would be happy to assist you with this process. We cannot predict exactly when the H-1B cap will max out for the upcoming fiscal year. We can only note that in 2012, it ran out several months earlier than it had in previous years. If that trend continues, the H-1B cap could potentially run out even earlier in 2013 than it did in 2012.

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IMPACT OF THE NEW OMNIBUS RULE ON SPONSORS OF GROUP HEALTH PLANS

Cher E. Wynkoop and Corina V. San-Marina

On January 25, 2013, the Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) published the final rule "Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules" (Omnibus Rule). The Omnibus Rule was effective on March 26, 2013 with compliance generally required by September 23, 2013. HHS has adopted a transition period that allows compliant business associate agreements that are in effect as of January 25, 2013, and are not renewed or modified between March 26 and September 23, 2013, to be deemed compliant until either the date that the agreement is renewed or modified, or September 22, 2014, whichever is earlier. This article focuses on the changes most relevant to those covered entities that are group health plans.

HIPAA policies and procedures

HIPAA policies and procedures must be revised to comply with the new risk assessment standards. In addition, employers should consider retraining their workforce members, as appropriate. Under the prior rule, "breach" was defined as an impermissible use or disclosure that compromises the security or privacy of protected health information (PHI) such that the use or disclosure poses a significant risk of financial, reputational, or other harm to the affected individual. The Omnibus Rule eliminates the "significant risk of harm" standard. Under the new definition of "breach," an impermissible use or disclosure of PHI is "presumed to be a breach unless the covered entity or business associate, as applicable, demonstrates that there is a low probability that the protected health information has been compromised."

The final rules require an analysis that, at a minimum, takes into account the following: (1) the nature and extent of the PHI; (2) who used or received the PHI; (3) whether the PHI was actually acquired or viewed; and (4) the extent to which the risk to the PHI was mitigated. HHS has indicated that it will provide additional guidance related to risk assessments and common breach scenarios.

Business Associates Agreements

The Omnibus Rule makes business associates, such as vendors that provide services to or on behalf of group health plans, directly liable for compliance with the Security Rule and certain standards under the Privacy Rule. The definition of "business associate" has been revised to include all subcontractors of business associates that create, receive, maintain, or transmit PHI on behalf of a covered entity, no matter how "downstream" those subcontractors may be. Business associates are responsible for entering into business associate agreements with their subcontractors.

Employers that sponsor group health plans should review their agreements with their business associates to ensure that they require the business associate to:

1. comply with the Security Rule and report any security breach to the covered entity;

2. comply with the Privacy Rule as it applies to obligations delegated to the business associate under the agreement; and

3. enter into a business associate agreement with each subcontractor that receives the plan's PHI that contains the same (or greater) protections as the agreement with the covered entity.

Notices of Privacy Practices (NPP)

Covered entities are required to have and distribute an NPP that, among other things, describes permitted uses and disclosures of PHI and summarizes individuals' rights regarding their PHI. The Omnibus Rule requires the addition of several statements to a covered entity's NPP.

For example, an NPP must:

1. contain a statement indicating that most uses and disclosures of psychotherapy notes (where appropriate) and uses and disclosures of PHI for marketing purposes require authorization;

2. state that other uses and disclosures not described in the NPP will be made only with authorization from the individual; and

3. contain a statement explaining the right of affected individuals to be notified following a breach of unsecured PHI.

Health plans (except for long-term care plans) that use or disclose PHI for underwriting must include a statement in their NPP that they are prohibited from using or disclosing PHI that is genetic information for underwriting purposes.

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IMPACT OF THE NEW OMNIBUS RULE ON SPONSORS OF GROUP HEALTH PLANS

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A health plan that currently posts its NPP on its website must:

1. prominently post the material change or its revised NPP on its website by the effective date of the material change (*e.g.*, the compliance date of the Omnibus Rule); and
2. provide the revised NPP, or information about the material change and how to obtain the revised notice, in the health plan's next annual mailing.

For example, this mailing could take place at the beginning of the plan year or during an open enrollment period. Health plans that do not have customer service websites must provide the revised NPP, or information about the material change and how to obtain the revised NPP, to individuals covered by the plan within 60 days of the material revisions to the NPP.

With the final regulations now in hand, employer group health plan sponsors should take a fresh look at their HIPAA/HITECH compliance to identify issues, fill gaps, and correct problems.■

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DON'T LET YOUR BUSINESS GO UP IN SMOKE - MARIJUANA IN THE WORKPLACE

(CONTINUED FROM PAGE 1)

Under most medical marijuana statutes, the patient is provided a registry card indicating the employee is approved for medical marijuana use. That registry card is not a "get out of jail free" card. Many employers have lawfully discharged employees who failed a company drug test, even if the employee possessed a registry card. Thus far, courts have not found medical marijuana use to be protected under the Americans with Disabilities Act.

Most experts agree that employers may continue to enforce a zero tolerance, drug-and alcohol-free workplace. Because of the relatively low marijuana metabolic rate, employees may test positive even while not impaired. States allowing medical or recreational marijuana use are working on an impairment standard similar to those for alcohol impairment in the drunk driving context.

Employers with workers in Colorado, Washington, and in those medical marijuana states identified above must face the prospect of challenges to their marijuana use policies. Employers who do business in those two states plus the medical marijuana states should be especially alert. We recommend that employers having business in those states review their substance abuse and drug testing policies as follows:

- Check for compliance with regulations in the states where they do business;
- Re-examine situations under which the employer will conduct pre-employment, reasonable suspicion and random drug testing;
- Review, revise and republish the educational part of the employer's substance abuse policies to advise employees about the negative consequences of marijuana use, even in states where it has been legalized either recreationally or medicinally;
- Retrain supervisors in the appropriate states to handle employee inquiries regarding marijuana use.

As always, we stand ready to assist with these efforts.■

WILLCOX SAVAGE

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Return Service Requested

REVISED I-9 FORM & HANDBOOK FOR EMPLOYERS

Luba I. Seliavski

On March 8, 2013, the U.S. Citizenship and Immigration Services published a revised I-9 Form and a new version of the Handbook for Employers. The new I-9 Form became effective immediately. Employers must start using the new I-9 Form to verify employment authorization for all new hires and reverifications starting on May 7, 2013. Employers should not complete a new I-9 Form for current employees if a properly completed I-9 Form is already on file.

The new I-9 Form includes additional fields and modified instructions for employers and employees. The additional fields request passport information (the passport number and the country of issuance) from aliens who do not have an Alien Registration Number and have an admission number assigned by the U.S. Customs and Border Protection when they entered the U.S.

The new I-9 Form and the Handbook for Employers can be found at: www.uscis.gov.■

ANNOUNCING MONICA A. STAHLY

Monica joined the Labor and Employment practice group in September.

She is a 2012 graduate of the University of Richmond School of Law. Monica earned her B.A. degree in Government and Legal Studies from Bowdoin College in 2006.