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MARCH 2015

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EEOC Targets Wellness Programs

The Affordable Care Act (a.k.a. Obamacare) creates new incentives for employers to adopt and expand their wellness programs. According to some estimates, 94 percent of large employers (those with 50 or more employees) have some kind of wellness program. These vary from participatory wellness programs that encourage participation by employees, which stop short of offering rewards for participation, to health-contingent wellness programs that offer a reward for either participating in healthy behaviors (such as gym attendance) or achieving certain health goals (such as not smoking). These programs are popular with employers as they have the potential to reduce health insurance premiums through a healthier workforce, but recent lawsuits by the Equal Employment Opportunity Commission (EEOC) are causing employers to take pause.

The EEOC has filed at least three lawsuits against employers alleging that their Wellness Programs violate the Americans with Disabilities Act. In *EEOC v. Orion Energy Systems, Inc.* (filed in the Eastern District of Wisconsin), the EEOC has alleged the employer's wellness program was not voluntary because the penalties imposed for failing to participate were too steep and that, as a result, the program violated the ADA by requiring the employee to subject herself to medical examinations that made disability-related inquiries that were not job related. Under Orion's program, employees who opted out of participation in the wellness program, which included completing a Health Risk Assessment, were required to pay 100% of their health insurance costs. The EEOC has alleged that this made the program not truly voluntary and, therefore, the Health Risk Assessment was a prohibited required medical inquiry. Orion has denied the allegations. The lawsuit is in the beginning stages.

In *EEOC v. Flambeau, Inc.* (filed in the Western District of Wisconsin), the EEOC similarly challenged a wellness program that required biometric testing and

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Tax Assessment Reminder!

For 2015, Grievance Day in Most Towns and Cities in New York State is May 26th.

However, some municipalities differ, so check with your local Assessor's offices.

For questions or concerns about your real property tax assessment, contact Paul T. Sheppard, Esq., at (607) 231-6729 or psheppard@hhk.com or Tina Fernandez, Esq., at (607) 231-6913 or tfernandez@hhk.com.

EEOC Targets Wellness Programs (continued)

(Continued from page 1)
a health risk assessment that were not job-related. The EEOC alleges that, for employees who did not complete the testing or who objected to it, Flambeau shifted the cost of health insurance to the employee and, in some cases, cancelled the insurance. Flambeau has answered the complaint, denying that it continues to use the same wellness program. As with the *Orion* case, the lawsuit is in the beginning stages.

In *EEOC v. Honeywell* (filed in the Northern District of Minnesota), the EEOC alleges violations of both the ADA and the Genetic Non-Discrimination Act (GINA) for penalties imposed on employees who declined to participate in the company wellness program or whose spouse declined to do so. The EEOC aggressively sought a preliminary injunction and temporary restraining order; however, both were denied by the District Court. Unlike the other cases, the Honeywell plan did not shift the cost of medical insurance to employees, but rather imposed certain penalties on employees who declined to participate. These included a $50 surcharge applied to the employee's medical plan costs; a $1,000 tobacco surcharge; and a loss of health savings account contributions from Honeywell (up to $1,500). Honeywell has defended the lawsuit, pointing out that its incentives fall without the range allowable under the ACA.

The EEOC's position in these cases appears to be at odds with the guidance issued from other agencies regarding wellness plans under the ACA. For instance, tying participation in biometric screening to premium reduction is a common plan feature. The EEOC has suggested it will issue guidance for employers in the near future but to date, no guidance has been forthcoming.

Because of the uncertainty, employers who use financial incentives (or penalties) as part of their wellness programs should be careful to ensure their programs do not run afoul of the EEOC's rules, or they risk litigation over their wellness plans.

Article written by Dawn J. Lanouette, Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at dlanuoette@hhk.com.

Proud to Announce

Our new Edmeston and Morris offices

Located in the heart of Central New York, our Morris and Edmeston offices provide a range of services including general business and corporate, real estate, estate planning and administration, guardianships, and Medicaid planning.

7 West Street, PO Box 306
Edmeston, NY 13355

144 Main Street, PO Box 238
Morris, NY 13808

Timothy R. Johnson Esq.

HH&K is pleased to introduce you to Timothy R. Johnson. Mr. Johnson has joined the firm in our Morris, Edmeston and Oneonta offices. His practice focuses in the areas of business, non-profits, municipal and corporate, residential and commercial real estate, estate planning and administration, trusts, elder law and Medicaid planning, guardianships and adoption.

Mr. Johnson operated a general private practice in Morris and Edmeston for over 27 years. Mr. Johnson is a member of the Otsego County, New York State, and American Bar Associations and the Electric Cooperative Bar Association.

Meredith A. Baio, Esq.

HH&K is pleased to introduce you to Meredith L. Baio. Ms. Baio is located in the firm's Morris, Edmeston and Oneonta offices and maintains a general practice in business and individual representation in real estate, trusts and estates, elder law and Medicare planning, guardianships and adoptions.

Ms. Baio graduated from William & Mary Law School in 2011, where she was a member of the William & Mary Journal of Women and the Law. Meredith serves on the Board of Directors of the Otsego County Bar Association and Co-Chairs the Young Lawyers Section of the Otsego County Bar.

Congratulations

Donald R. Stacey, Esq.

and

Christopher L. Roma , Esq.

For being admitted into the New York State Bar

Miriam R. Schindel, Esq.

for being admitted into the U.S. Supreme Court

Out and About

Hinman, Howard & Kattell attorneys and guests enjoyed the 2015 Lourdes Ball held on February 28 at the Holiday Inn Arena in Binghamton.

Do Same Sex Couples Have a Constitutional Right to Marry? United States Supreme Court Agrees to Hear Four New Cases on Same Sex Marriage

On January 16, 2015, the United States Supreme Court agreed to hear four new cases on same-sex marriage. The specific questions that the Supreme Court will address are (1) whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, and (2) whether the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

The Fourteenth Amendment of the United States Constitution contains the "Equal Protection Clause," which provides that individual states may not "deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment also contains the "Due Process Clause," which provides that states may not "deprive any person of life, liberty, or property, without due process of law."

In the 1972 case of *Baker v. Nelson*, 409 U.S. 810 (1972), the U.S. Supreme Court refused to review a finding of the Minnesota Supreme Court that upheld the state's denial of a marriage license to a same-sex couple. In a one-line order, the Court stated that the appeal did not raise "a substantial federal question."

However, since *Baker*, public opinion and legal recognition of same-sex marriage have drastically changed. In 2003, the Massachusetts Supreme Court ruled in *Goodridge v. Dept. of Public Health* that same-sex couples had the right to marry under their state constitution. *Goodridge* began a trend of state recognition of same-sex marriage by state legislature, court action, or popular vote.

As of now, same-sex marriages are allowed in thirty-six states, with bans remaining in the other fourteen states, all of which are under court challenge. In addition, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the U.S. Supreme Court invalidated the Defense of Marriage Act of 1996, a law that banned the federal government from recognizing state-sanctioned same-sex marriages.

The Supreme Court has agreed to hear four cases arising out of the United States Sixth Circuit:

- *Bourke v. Beshear* involves a federal constitutional challenge to a Kentucky state constitutional amendment providing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Ky. Const. § 233A.
- *DeBoer v. Snyder* involves a constitutional challenge to a Michigan law that declares marriage "inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1; see also Mich. Const. art. I, § 25
- *Tanco v. Haslam* deals with a constitutional challenge to a Tennessee law providing that "the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." Tenn. Code Ann. § 36-3-113(a).
- *Obergefell v. Hodges* involves the State of Ohio, which defines marriage as between "one man and one woman," refusing to recognize out-of-state same-sex marriages, which is set forth in a law providing that "[a]ny marriage entered into by persons of the same sex in any other jurisdiction . . . shall be considered and treated in all respects as having no legal force or effect." Ohio Rev. Code § 3101.01(C)(2). This case is the first case listed in the Supreme Court's Order granting certiorari and, accordingly, if customary practice is followed, this case will become the historic title for the Court's final ruling.

Kentucky, Michigan, Tennessee and Ohio are among the fourteen states that ban gay marriage. The remaining states are Alabama, Arkansas, Georgia, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Dakota and Texas.

The Supreme Court will hear oral arguments between April 20, 2015 and April 29, 2015. A decision is expected by late June.

Article written by Jeffrey A. Jaketic, Esq. For more information, contact Mr. Jaketic at (607) 231-6742 or via email at jjaketic@hhk.com.

Presentation

Clifford S. Weber, Esq.

HH&K Partner Clifford Weber presented as part of the Independent Banker Association of New York State for the Regulatory Compliance Conference on March 25 and 26, 2015. Cliff's segment covered the Bank Secrecy Act. Cliff is an experienced in regulatory, corporate, securities, advisory, transactional and enforcement defense work for financial institutions. He counsels clients in their dealing with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and state financial services regulators.

INSIDER STOCK TRADING UPDATE

In recent years there have been many reports in the news media about federal government prosecutions of business executives, their friends and associates, for "insider trading" of certain well known stocks. Under the federal securities law, "insider trading" is prohibited when a corporate executive or key employee purposely buys or sells the company's stock in reliance upon important company information (such as earnings reports) before this information is disclosed to other shareholders and the public by a media announcement. These stock trades are intended to capture profits early, before good news is announced, or to avoid losses if the stock will likely fall in response to bad news. The most basic example of a potential criminal violation of "insider trading" is where the company "insider" breaches the duty of confidentiality for personal gain. However, very often the facts can become more complicated, such as when the company "insider" secretly shares the important information with others by giving stock "tips" to relatives, friends and business associates. The recipients of this "inside" information are called "tippees" because they receive confidential information from their "tipper" within the company. If these tippees buy or sell the stock before public disclosure of the significant new information, the tippee may also be prosecuted for insider trading. In recent years, the U.S. Securities Exchange Commissioner and the U.S. Justice Department have been aggressively prosecuting tippees who complete stock trades based on insider information. Some of these criminal prosecutions have targeted tippees who were three or four levels of contact removed from the original tipper within the company. These remote tippees often did not know the identity of the original tipper or whether the original tipper benefited in any way from the initial discloser of confidential information.

Let us consider a typical set of likely circumstances. A friend, neighbor or relative calls you to say that they were told by a business associate that the annual earnings of X corporation will be higher than expected by market analysts. These positive earnings will be reported to the public in two days. Your caller urges you to buy the X corporation's common stock as soon as possible. You do not know the identity of the source of this tip. You proceed to buy 200 shares at $20 each. After the X corporation announces its surprising earnings, its stock rises to $30 each. If you sell those shares immediately, have you violated the federal law prohibiting trading on "inside information" and getting a profit of $2,000?

In 2012, the federal government prosecuted Anthony Chiasson and Todd Newman as remote tippees of confidential information which originally was leaked by employees of two tech companies, Dell and Nvidia. Chiasson and Newman managed stock portfolios for customers of the investment firms where they worked. Each was three or four levels of communication removed from the information disclosed by the original tipper from each company. The information pertained to the corporate earnings soon to be announced by each company and was clearly important. The information flowed from the tipper to a number of different stock analysts before the tips ultimately reached Chiasson and Newman, who made millions of dollars in profit by trading in reliance of this advance information. After a trial in federal court, Chiasson and Newman were convicted and sentenced to 6.5 and 4.5 years in jail, respectively.

Chiasson and Newman appealed their convictions and, on December 10, 2014 the U.S. Court of Appeals for the Second Circuit overturned their convictions and dismissed the charges against them. This is a very important decision on the subject of "insider trading." In a detailed written opinion by three judges, the Second Circuit ruled that the government has a heavy burden of proof to convict remote tippees who were three or four levels of communications removed from the original corporate tip. In this case, neither Chiasson nor Newman knew the identity or the job title of the person who was the source of the original tips within the companies. Nor did they know whether the person who was the original tipper received any real benefit from any of the earlier tippees in exchange for this information. In general, the government failed to adequately connect all the dots to prove beyond a reasonable doubt, that Chaisson and Newman knew the information they received was based on important confidential information from an insider source. Nor did these remote tippees have knowledge of any personal benefit received by the original tipper in exchange for the confidential information.

The Court of Appeals relied on the U.S. Supreme Court decisions in *Dirks v. SEC,* 463 U.S. 646 (1983). Since that 1983 decision, a number of prosecutors have been successful in convincing some federal trial judges to broadly interpret the *Dirks* decision to permit criminal convictions of remote tippees like Chiasson and Newman. This Court of Appeals decision directs judges to more closely follow the principles of the U.S. Supreme Court on the subject of the insider trading. The SEC and federal prosecutors are disappointed with this recent decision and have filed a further appeal requesting reconsideration by all of the judges on the Second Circuit.

Depending on the outcome of this further appeal, it is possible that this case could be presented to the U.S. Supreme Court in the future.

Article written by Ralph K. Kessler, Esq. For more information, contact Mr.Kessler at (914) 694-4102 or via email at rkessler@hhk.com.

PRESENTATION

Hinman, Howard & Kattell attorneys Dawn Lanouette and Michael Keenan presented A Drunk, Drugged and Stoned Workforce in 2015? Untangling the Web of Drug and Alcohol Testing, Medical Marijuana Use, E-Cigarettes and More" in conjunction with the STAHR.

Title Agent Licensing

All Title Agents in New York—including attorneys—must now be licensed by the New York State Department of Financial Services. Hinman, Howard & Kattell, LLP has received its Title Agent License and will continue to provide title insurance to its clients on residential and commercial real estate transactions.

The new Title Agent licensing rules were enacted to address concerns that title agents were overcharging consumers, that some agents do not have the proper knowledge and experience to serve as Title Agents, and that consumers were not adequately informed about the purpose of and coverage provided by title insurance. The legislation not only provides that only licensed agents can issue title insurance policies, but it is also designed to ensure that title insurance applicants receive disclosure of the costs of obtaining title insurance and preapprove any special expenditures before they are incurred. In addition, consumers will be provided with information about the protection a title insurance policy actually provides and who it protects.

Title practices in New York are subject to local customs and practices. The differences are most pronounced between upstate and downstate. Upstate, attorneys have always played an important role in handling real estate closings, including the examination of title.

Any purchaser of real property should want to have someone tell them whether or not they are receiving good title to their property and whether or not there are any easements, restrictions or other encumbrances to the property that might interfere with their use and enjoyment of the property. Mortgage lenders want to be assured that their mortgage lien will be first in line and will not be subject to any other liens such as mortgages and judgments.

Traditionally, Upstate purchasers and lenders relied on attorneys to give them a legal opinion as to the quality of their title or the validity of their mortgage lien. Most lenders now prefer a title insurance policy issued by a State regulated title insurance company to a local attorney's title opinion, especially when a lender's mortgage is being sold on the secondary market. As more and more lenders required title insurance, title insurance companies in the Upstate area enlisted attorneys who were already examining title to use their knowledge of the title to prepare and issue a title insurance policy for the title company. Most Upstate New York real estate attorneys are affiliated with one or more title companies and share in the title premium. Premiums are fixed by the Department of Financial Services and cannot be negotiated. Hinman, Howard & Kattell, LLP is an authorized agent for several title insurance companies.

In our area and much of Upstate New York, buyers still rely on their attorney to provide them with their legal opinion as to the status of their title, although owner's title insurance policies are available. Downstate, attorneys do not provide title opinions or examine title. Buyers usually rely upon a separate title agent to provide an owner's policy of title insurance rather than an attorney opinion. Many of these title agents are not attorneys. In our experience, more problems have occurred with title agents Downstate than under the attorney based system Upstate.

While not as common in our area, there are benefits to receiving an owner's title insurance policy as opposed to an attorney's legal opinion. For example, an attorney title opinion could be limited by the three-year statute of limitations on a malpractice action against an attorney.

Under the new rules, title insurance applicants must now be provided with a copy of a title insurance commitment on their property at least three days prior to a closing, along with a good faith estimate of the title premium and title charges. This good faith estimate is different than the good faith estimate issued by a mortgage lender under federal RESPA guidelines. Consumers must also be provided with an explanation of what the title insurance policy covers and an opportunity to purchase an owner's policy whenever a lender's policy is issued on a purchase transaction.

Applicants will be asked to acknowledge at closing that they have received copies of all these disclosures, approved any ancillary charges and either elected or declined to obtain an owner's title insurance policy.

HH&K's attorneys have been examining real estate title since the firm was founded. We pride ourselves on our ability to wade through the more challenging titles, explain the status of a property's title to our clients and, if requested, obtain and issue a title insurance policy to protect our clients' interests. While the new regulations do require additional paperwork, they will also provide us with one more opportunity to help our clients understand the title to the property they are purchasing.

Article written by John E. Jones, Esq. For more information, contact Mr. Jones at (607) 231-6738 or via email at jonesje@hhk.com.

Presentations

HH&K Special Counsel Marty Kane and Of Counsel James M. Hayes presented as part of a Broome County Bar Association continuing education seminar on Elder Law on Thursday, March 5, 2015.

Marty J. Kane, Esq.

Marty's segment covered the rules and regulations regarding Medicaid and Homestead exemptions. Marty is an experienced elder law and estate planning and estate administration attorney. He counsels individuals on issues relating to long-term care, estate planning, and estate administration, and is the author of "Should I Give My House to My Kids?"

James M. Hayes, Esq.

Jim's segment covered the rules and regulations regarding Supplemental or Special Needs Trusts. Jim has over 30 years of experience handling matters including housing issues, guardianships, estate planning, special needs trusts, and disability issues including Medicaid, Medicare and disability benefits.

Ohio Supreme Court Rules That Individual Municipalities Cannot Regulate Fracking

Even before Governor Cuomo's recent decisive action to ban hydraulic fracturing ("fracking") in New York, the practice faced significant hurdles. The decision of the New York Court of Appeals in *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014) had made clear that individual municipalities could place their own restrictions on fracking, through zoning and other exercises of local government power. The *Wallach* case was an industry challenge to this practice, based on the likelihood that the economic viability of fracking would be threatened by the cost of compliance with a patchwork of local regulation schemes. Ultimately, the Court of Appeals (the highest state court in New York) held that it was permissible for a local zoning ordinance to ban exploration, extraction, and storage of natural gas, including fracking.

The Ohio Supreme Court, in a decision issued in February 2015, has reached the opposite conclusion. In *State ex rel. Morrision v. Beck Energy Corp.*, Slip Op. No. 2015-Ohio-485 (2015) the Supreme Court held that several local zoning ordinances, which placed procedural and licensing requirements on the placement of new oil and gas wells, were not enforceable as written, thereby clearing the way for new drilling.

Both the New York and Ohio decisions rest on the interpretation and application of a doctrine known as "home rule," which is protected in the Constitutions of both states. "Home rule" is a concept which recognizes a right to local self-governance by individual municipalities with respect to certain activities. One important aspect of home rule is that it is subject to preemption by state law, which means that where a local law conflicts with a law of statewide applicability, the statewide law prevails.

Where the Ohio and New York cases differ is the extent to which the local ordinances governing oil and gas extraction were preempted by state laws regulating the oil and gas industry. In *Wallach*, the New York Court of Appeals held that it was not certain that the regulatory scheme provided for in the Environmental Conservation Law was intended to prevent a municipality from regulating the oil and gas industry through use of the zoning law. Because the statute did not clearly and explicitly prohibit municipalities from regulating the industry through the use of their zoning power, that regulation was not preempted by state law.

By contrast, in the *Beck Energy* case, the Ohio Supreme Court held that the local ordinances necessarily conflicted with a law of statewide applicability, in that they prohibited an activity which was expressly permitted by the Ohio law governing licensure of oil and gas extraction companies. Because that state law was clear in stating that local governments were expressly prohibited from discriminating against, impeding, or obstructing the activities regulated by the statewide regulatory scheme, the local law was held to be preempted.

Obviously, the decisions by those two courts were directly in conflict. Because that conflict is rooted in the interpretation of state laws and constitutions, with regard to which the state's courts are the highest authority, there will be no resolution of that conflict by the U.S. Supreme Court. As a result, based on those rulings, Ohio would likely be the more attractive candidate for an oil and gas extraction company with the luxury of choosing between the two states for new operations, all other things being equal. Investment in Ohio operations would present significantly less risk of costly capital projects being jeopardized by local decree. Regardless, the statewide ban on fracking in New York announced in December 2014 has simplified the calculus. In other words, all other things are not equal; New York has taken itself out of the running.

Article written by Alex D. Racketa, Esq. For more information, contact Mr. Racketa at (607) 231-6748 or via email at aracketa@hhk.com.

Proud to Announce

Lauren E. Allu, Esq.

HH&K is pleased to introduce you to the newest attorney in our Saddle Brook New Jersey office: Lauren E. Allu. Lauren has extensive experience with real estate and land use matters including commercial, industrial and residential properties. Her experience includes distressed debt, loan workouts, and foreclosure proceedings. She has also been involved with a variety of commercial litigation matters. Lauren received her BA from Lehigh University and her JD from Fordham Law School.

For More Information

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