EMPLOYMENT LAW TODAY

News & trends that matter to you

Supreme Court ruling keeps Affordable Care Act intact

Health insurance subsidies available through both federal and state exchanges

An integral part of the Affordable Care Act (ACA) is the implementation of a health insurance exchange in each U.S. state. These exchanges are health insurance marketplaces, intended to allow individuals to purchase competitively priced health insurance. However, language in the ACA clarifies that individual states are not strictly required to set up an exchange, but may "elect" an exchange, which many states opted not to do.

In total, 34 states declined to set up a state-based exchange, so, per the ACA, the Department of Health and Human Services established federally facilitated exchanges (FFEs) in those states.

Exchanges and subsidies

Also under the ACA, individuals who need financial assistance to purchase health insurance are to receive it in the form of a subsidy (a tax credit). The Obama administration has indicated that the tax credits are available to individuals who purchase health insurance both through FFEs and through exchanges established by individual states. However, the ACA outlines how tax credits are determined, and it indicates that such a determination applies to insurance purchased through an exchange "established by the state." Some individuals have argued that this language means that subsidies are not available for individuals in states with FFEs.

The decision

After several court cases challenged the availability of subsidies, the U.S. Supreme Court agreed to review one case (*King v. Burwell*), issuing a 6-3 decision on June 25. The opinion, written by Chief Justice John Roberts, indicated that the intent of Congress with the ACA was "to improve health insurance markets, not to destroy them." The Court ruled that subsidies *are* available to individuals who purchase coverage through FFEs.

For proponents of the ACA, this ruling is a relief. Experts have indicated that the alternate ruling would likely have caused health insurance costs to rise, making coverage unaffordable for many consumers. For employers, this case was especially interesting since, the shared responsibility (or "pay or play") provision would apply to an employer only if an employee received a subsidy to purchase insurance through an exchange. Had the court ruled the other way, employers in 34 states would have effectively been immune from the pay or play penalty.

What's next for the ACA?

This case is the second challenge before the Supreme Court that the ACA has survived. The first, in 2012, addressed whether the law's requirement for individuals to purchase health insurance (the

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individual mandate) exceeded the authority of Congress.

With yet another hurdle overcome, the ACA may get a bit of a breather, perhaps not facing another significant challenge until the 2016 presidential election (if it's won by a Republican). Even then, however, experts cite the extent to which the law has already been implemented as a possible barrier to any further large-scale challenges.

Key to remember: The Supreme Court ruled that tax credits (subsidies) will be available to participants of both state insurance exchanges and federally facilitated exchanges under the ACA, leaving the law intact for now.

A timely reminder from the EEOC about retaliation

For the past several years, retaliation has been the most common discrimination charge filed with the Equal Employment Opportunity Commission (EEOC), making up 42 percent of the charges resolved by the EEOC in 2014. It should come as no surprise, then, that the EEOC's legal staff recently found it prudent to remind employers about some of the tenets of retaliation in a June informal discussion letter.

What's considered retaliation?

Employees and applicants are protected from retaliation for opposing discrimination or participating in a discrimination proceeding. The EEOC's letter reminds employers that these protections extend to applicants and employees even when those individuals engaged in protected activity against a *former* employer.

That means that the following would be prohibited actions by an employer:

- Refusing to hire an applicant after a background check revealed that the individual sued a previous employer under equal employment opportunity laws.
- Removing an applicant from consideration because the individual's former employer reported (during a routine reference check) that the applicant seemed particularly sensitive to sexual remarks and often made complaints alleging harassment.
- Terminating an employee after finding out that she participated in a discrimination proceeding in which a manager was charged with sexual harassment.

Elements of a retaliation claim

A retaliation claim has three elements. First, the individual must have engaged in protected activity. This would include either participation in EEO activity or opposition to employment discrimination.

For activity to be protected, the individual need not oppose actual discrimination, but must believe that he or she is opposing a practice that is illegal discrimination. The individual must have a reasonable, good-faith belief that the activity he or she is complaining about or reporting violates antidiscrimination law.

The manner of opposition must also be reasonable for the activity to be protected. Protected opposition might include:

- Complaining to coworkers about alleged discrimination against oneself or others.
- Threatening to file a claim of discrimination with the EEOC.
- Refusing to carry out work instructions reasonably believed to be discriminatory.

Unreasonable opposition (which would not be protected) might include acts or threats of violence or deliberate attempts to interfere with another employee's job performance.

Second, an adverse action must have occurred against the individual engaging in protected activity. Adverse action might include refusal to hire, demotion, discipline, or termination, for example. Essentially, it includes any action that may deter a reasonable person from engaging in protected activity.

Finally, to show retaliation, it's not enough that an employee or applicant who engaged in protected activity happened to also suffer an adverse action; the individual must be able to show that the adverse action was taken *because of* the protected activity.

Complainants aren't untouchable

Many employers believe that once an employee or applicant makes a claim of discrimination or opposes discrimination, that he or she cannot be disciplined, even for unrelated issues. While employers are right to be wary of creating the perception of retaliation, they may still discipline employees for violations of work rules or performance standards.

For example, Billy has been arriving late to work, and has re-

ceived two out of three progressive disciplinary steps outlined by his employer's policy. In conjunction with an incident unrelated to his tardiness, Billy participates in an investigation with the EEOC regarding a discrimination complaint made by one of his coworkers. Two days later, Billy is tardy for the third time, which would normally mean termination. However, the employer is nervous that termination at this point would appear to be retaliation for Billy's participation in the EEOC investigation.

While the employer should keep the perception of retaliation in mind, the company may still terminate Billy for violating an unrelated company policy. It's not that he can never suffer adverse action after participating in an investigation regarding discrimination; he just can't suffer adverse action *because of* that participation.

While discipline would still be allowed if it were unrelated to Billy's participation in the EEOC investigation, the employer should be particularly careful to make ensure that a thorough trail of documentation clearly shows the nonretaliatory reason(s) for the adverse action. Employers that are unsure of whether the action clearly appears nonretaliatory should consult an employment law attorney for an assessment of risk.

Key to remember: Employers must understand what may constitute retaliation, as it is the most common type of claim filed with the EEOC.

Focus on paid leave continues at the federal and state level

The U.S. Department of Labor (DOL) recently announced that it will make $1.25 million available to research and analyze how paid leave programs can be developed. The grant money is designed to help jurisdictions throughout the U.S. develop the administrative and financial infrastructure necessary to help states and cities give employees paid leave.

Greater access to paid leave has been a priority for President Barack Obama's Administration. But while almost every recent Congress has seen bills introduced that would provide employees with designated amounts of time off, such bills have not recently made much progress.

The states take matters into their own hands

In many cases, when the federal government cannot achieve a goal, individual states step in to get the job done. Currently, California, Connecticut, Massachusetts, New Jersey, Oregon, Rhode Island, and several cities have passed paid family and medical leave or earned sick days laws. What follows is a brief summary of these states' paid time off laws.

California: Effective July 1, 2015, employees who work for an employer at least 30 days within a year must earn at least one hour of paid leave for every 30 hours worked. These employees may use the paid sick time beginning on the 90th day of employment. Employers may limit the amount of paid sick leave an employee may take to 24 hours in a year. Accrued but unused sick time does carry over to the following year of employment.

Connecticut: Employers of 50 or more employees must provide up to five days per year of paid sick leave to service workers. "Service workers" include, but are not limited to, bank tellers, bus drivers, cashiers, child care workers, computer operators, food service workers, home health aides, nurses, retail salespersons, administrative assistants, and restaurant servers.

Massachusetts: Employers with 11 or more employees must allow employees to earn and use up to 40 hours of paid sick time per calendar year. Employers with fewer than 11 employees must provide the same amount of time, but may provide it as unpaid time. Employees may carry over up to 40 hours of unused time into the next year but may not use more than 40 hours in a calendar year.

New Jersey: New Jersey's law extends the state temporary disability insurance system to provide any eligible worker with up to six weeks of paid family leave during the first 12 months after the birth or adoption or a child, or to care for a family member with a serious medical condition.

Oregon: Effective January 2016, employers with 10 or more employees working in Oregon must provide up to 40 hours of paid sick time per year. Employers with fewer than 10 employees must provide up to 40 hours of unpaid sick leave. Employees must accrue one hour of sick time for every 30 hours worked.

Rhode Island: Eligible employees are entitled to up to four weeks of wage replacement and job protected leave under the state's paid caregiver leave provisions. This entitlement falls under the state's expanded disability insurance program. Employees may take leave to care for a seriously ill child, spouse, parent, grandparent, parent-in-law, or domestic partner; or to bond with a new child.

Key to remember: Paid leave remains a priority at the federal level. Employers should continue to be aware of federal, state and local legislation, which will likely continue to emerge.

STATE UPDATE

COLORADO

Medical marijuana use

Colorado is one of several states with a law prohibiting employers from taking adverse employment action against employees who participate in legal activities on nonwork time. However, the Colorado Supreme Court recently ruled that employees that lawfully use medical marijuana away from the workplace are not protected by the lawful activities statute. According to the court, since medical marijuana use is still illegal at the federal level, its use isn't a "lawful activity" under the state's lawful use law. *Coats v. Dish Network,* June 15, 2015

CONNECTICUT

Social media law

Effective October 1, 2015, employers in Connecticut may not request or require that an employee or job applicant provide a username or password for accessing a personal online account. Employers also may not request that an employee or applicant log in to a personal online account in the presence of an employer or require such an individual to invite the employer to join a group affiliated with the individual's personal online account. A personal online account includes email, social media, and retail-based websites used exclusively for personal purposes. SB 426

DISTRICT OF COLUMBIA

Drug testing

Employers in the District of Columbia may not test prospective employees for marijuana use during the hiring process, unless otherwise required to do so by law. Employers may test applicants only after a condition al offer of employment has been made. Act 21-67

FLORIDA

Pregnancy discrimination

Both private and public employers are prohibited from discriminating against employees and applicants because of pregnancy. This law was passed after the Florida Supreme Court ruled in April 2014, that by prohibiting discrimination based on sex, the Florida Civil Rights Act (FCRA) also prohibits discrimination based on pregnancy. SB 982

HAWAII

E-cigarettes

Hawaii prohibits smoking in enclosed or partially enclosed places of employment. Effective January 1, 2016, the definition of "smoking" will be revised to include the use of electronic smoking devices, also referred to as "e-cigarettes." As such, electronic smoking will be prohibited in all places where smoking is currently prohibited. HB940.

KANSAS

Veterans preference

Private employers in Kansas may adopt employment policies giving preference in hiring to qualified veterans. Such a policy must be in writing and must be applied consistently to all decisions regarding initial employment. Veterans must submit proof of service to establish eligibility for the preference. HB2154

OREGON

Sick leave

Effective January 1, 2016, employers in Oregon with 10 or more employees will be required to provide all employees with up to 40 hours of paid sick leave per year. Sick leave must accrue at a minimum rate of one hour for every 30 hours worked.

Alternatively, employers may provide employees with a full bank of 40 hours of sick leave as soon as they are eligible to use leave (this number could be prorated for employees who become eligible for leave mid-year). Employees must be allowed to carry over 40 hours of unused sick time into the subsequent year. SB454

OREGON

Ban the box

Effective January 1, 2016, most employers in Oregon will be prohibited from requiring applicants to disclose criminal convictions on an employment application or any time prior to an initial interview.

Employers may, however, ask questions about criminal convictions during or after an interview, and may indicate on an employment application that applicants may be required to disclose convictions. HB 3025

HR INBOX

Rehires and benefits

Q. A former employee was recently rehired after a 10-month hiatus. Must we consider her previous years of service when offering benefits that hinge on seniority, such as scheduling preferences and paid time off?

A. The Employee Retirement Income Security Act (ERISA) requires employers to consider hours worked during the previous 12 months to determine eligibility for things like participation in a retirement plan. However, absent a contract stating otherwise (like a union contract, for example), you are not required to give consideration for prior service when determining eligibility for discretionary benefits like paid time off or special privileges with regard to scheduling.

Requesting ADA accommodations

Q. Can an employee's spouse or relative request an accommodation on his/her behalf?

A. Yes. A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Of course, you should discuss the accommodation with the applicant or employee, who may refuse the accommodation if it is not needed.

Benefit allocation

Q. Is it discriminatory to offer a profit-sharing plan to our full-time employees without offering proportional benefits to our part-time workers?

A. Employers may not make benefit offerings based on an employee's membership in a protected class, but an employee's classification as either a part- or full-time worker is not a protected characteristic. Employers may base the allocation of different levels of benefits on a number of different classifications, including whether an employee is a part-time or full-time worker, whether the individual is exempt or nonexempt, and whether the employee is a regular employee or a temporary or seasonal employee.

Language for policies

Q. About ten percent of our workforce speaks Spanish much more fluently than they speak English, but most do speak English relatively well. Are we required to maintain a policy handbook in Spanish?

A. Employers are not required by law to maintain a policy handbook in English or in any other language. That means you could choose to maintain you policies only in English. However, if your aim with the policies you maintain is to support communication with employees, it might make sense to make sure your policies are available in whatever language your employees are most comfortable with.

As an alternative, you could make an interpreter available who could discuss the policies and offer clarifications to employees who don't feel as comfortable with English

WHAT WOULD YOU DO?

Penalties with leave as a reasonable accommodation

Your company isn't covered by the Family and Medical Leave Act, but one of your employees, Martha, took a three-week leave of absence as a reasonable accommodation under the Americans with Disabilities Act (ADA). Martha works in sales, and occasionally fails to meet her sales goals. Your company policy for salespeople is that individuals who are more than 20 percent under their goal for each quarter are subject to discipline. In the quarter in which Martha is on leave, she fails to meet her goal by more than 20 percent. This is the third time in a period of two years that Martha has missed the performance standard, which would normally merit her termination. Can you penalize Martha for not making her goal even though she was on leave? **What would you do?**

Medical marijuana meets Colorado's off-duty conduct rule

In 23 states plus the District of Columbia, the use of marijuana for medical reasons is legal. Four states have legalized recreational marijuana use. Still, the drug remains illegal at the federal level, and courts have consistently ruled that employers need not allow employees to have marijuana in their systems while at work, even if they aren't impaired at work, and even if the drug was used outside of working hours.

Generally speaking, that means employers may maintain and enforce zero-tolerance drug policies without making exceptions for medical marijuana users.

To many employers, this makes sense, since, in many situations, employers are able to create standards for the workplace that are stricter than the law. For instance, smoking cigarettes is legal at both the federal and state level, but that doesn't mean employers are required to allow employees to smoke cigarettes during work time or on company grounds. Some employers may even require that employees be nonsmokers in their personal lives away from work.

While this would be allowed many states, in others, taking adverse action against employees because of their legal behavior while away from work is not allowed. At least 29 states have laws prohibiting employers from taking adverse employment action against employees who participate in certain legal activities during nonwork time. Some states specifically protect an employee's right to use tobacco products, while other state laws more generally protect an employee's right to engage in any legal activities away from work.

Marijuana + off-duty conduct rules

Recently, in *Coats v. Dish Network*, an employee challenged the interaction between Colorado's medical marijuana law and the state's off-duty conduct law. In Colorado, this law specifically prohibits employers from terminating employees for engaging in lawful activities away from the employer's premises during nonwork time.

In this case, an employee who was a medical marijuana user tested positive for the drug during a routine drug test at work. He was not suspected of being impaired while at work, nor had he used the drug during work time or on company grounds. Nevertheless, he was terminated under the company's zero-tolerance policy.

The employee sued, citing the state's off-duty conduct law. He argued that he was using the drug legally, away from work, and during nonwork time, and therefore was protected from termination.

What's "lawful"?

At issue was whether the state's off-duty conduct law used the term "lawful activities" to refer specifically to activities that were legal under state law, or whether the activities would also need to be legal at the federal level to be protected.

The Colorado Supreme Court ultimately disagreed with the employee, indicating that Colorado's law was not so strict as to refer only to activities that were lawful under state law, noting that there is no language in the statute to limit the term in that way. As such, according to the state's highest court, Colorado's off-duty conduct law does not provide protection from termination for employees who engage in activities that are lawful under state law but not under federal law.

This ruling was in line with those of two lower courts, indicating that the employee's medical marijuana use was not legal activity, and the employer did not break the state's off-duty conduct law by terminating him.

What it means

For now, the courts have consistently indicated that employers are not required to make exceptions to no-tolerance drug policies for

See **'Marijuana'**, *pg. 7*

WHAT YOU SHOULD DO

Reconsider performance standards

While an employee who is given a reasonable accommodation can be held to certain performance standards, you may not grant leave as a reasonable accommodation and then effectively penalize the individual for the absence. Doing so would make the leave an ineffective accommodation under the ADA, and could make your company liable for failing to accommodate the employee or for retaliating against her for using a reasonable accommodation. Rather than terminate Martha, you should consider whether her lowered sales numbers were proportional to the time she was away. If your company were to prorate sales goal for the time Martha did work during the quarter in question, it could then consider whether she was within 20 percent of the prorated goal. You may not, however, hold Martha to the same standards as she would have been held to had she not received three weeks of leave as a reasonable accommodation.

Social media research becoming a staple

A recent survey conducted by CareerBuilder indicates that more than half (52 percent) of employers use social networking sites to research job candidates. This figure is up from 43 percent in 2014 and 39 percent in 2013.

According to this survey, companies are using online research to find reasons not to hire a candidate (21 percent), but that's not actually the most important goal. Employers are more likely to be seeking out feedback from others about the candidate (37 percent) and looking more generally to see if the individual even has a professional persona online (56 percent).

For many employers, no news about a candidate is not necessarily good news. In fact, 35 percent of employers were less likely to grant an interview to a candidate if the company was unable to find information about the person online.

What's the goal?

With more employers relying on the internet for information about candidates, it's a good idea to have a strategy for conducting online research. Before even beginning to browse online, employers should outline what kind of information they are looking for about candidates, making sure the sought-after information is relevant. That will make it much easier to compare candidates fairly.

Companies should also consider ahead of time the kinds of behavior or online posts that would remove a candidate from consideration. They should identify the types of data that would bode well for prospective employees in particular positions. By failing to create these definitions, online research could potentially be an overwhelming and unorganized endeavor.

In addition to knowing what they're looking for, employers must be certain of *who* they're looking for. Employers should verify as many details as possible to ensure the individual whose information they're viewing online is actually the candidate they're considering for employment. Identity mix-ups aren't entirely uncommon, and can cost an otherwise qualified applicant a job, simultaneously costing an employer a potentially valuable employee.

What to avoid

One of the main risks inherent in searching online for information about applicants is finding information that the employer should not have. In particular, any information about an applicant's membership in a protected class is usually best left unknown since, once an employer collects it, the company may then bear the burden of proving that the protected data was not used to make an employment decision. To the extent possible, employers should avoid obtaining information online that they wouldn't ask for directly or otherwise learn in a face-to-face interview.

Since it can be difficult for employers to control exactly what they come across about a candidate in an online search, having an individual who will not make the hiring decision conduct online research can be wise. With this strategy, employers can limit the amount of protected information that decision-makers are exposed to but still provide hiring managers with relevant online research about the candidates.

Key to remember: While researching candidates online is becoming increasingly common, employers should have a strategy for what they hope to achieve with online research and should avoid collecting protected information.

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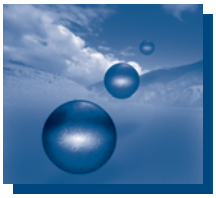
medical marijuana use. While the Colorado Supreme Court's decision applies only within the state, this case may have broader implications as it could set a precedent for other states which have both medical marijuana laws and laws protecting employees' lawful activity on nonwork time.

In the meantime, employers must still be aware of the extent of employee protections under individual state laws, which do vary. Some states (including Arizona, Delaware, and Minnesota) specifically prohibit employers from penalizing medical marijuana users for testing positive for the drug at work. Even in those states, however, employers are not required to allow employees to be impaired on the job.

Key to remember: Colorado's Supreme Court considered the interaction between the state's medical marijuana law and its law protecting employees' legal, off-duty conduct, deciding that medical marijuana use is not protected because it is not legal under federal law.



Hello, I'm Secret Shopper and I'd like a job, please

By Katie Loehrke

The views expressed in this article are those of the editor, and do not necessarily reflect the views of J. J. Keller & Associates, Inc.

What has long been a source of dread for employees of retail and food service establishments may soon be putting various New York City (NYC) *employers* to the test: the dreaded secret shopper.

Why secret shoppers strike fear in the hearts of employees

Particularly for employees of retail and food service establishments, a secret shopper is a constant threat of an employee's worst day becoming representative of the individual's abilities or work ethic and/or the quality of the establishment as a whole.

The undercover investigators coming to NYC aren't exactly secret shoppers, but beginning on or before October 1, 2015, they'll be testing employers much like secret shoppers test employees.

While secret shoppers are usually employed by the companies they're examining, this new initiative involves investigators who work for the city's government. A new law in NYC (Bill 690-A) requires at least five pairs of these "testers" to be dispatched to businesses in the city. The idea is that both individuals of each "matched pair" will pose as potential job applicants, either actually applying or simply seeking information about a specific position with a company.

The two individuals will be similarly qualified, but one will possess a characteristic that puts him or her in a protected class under NYC law. The intent is to compare an employer's treatment of the two individuals to determine whether any discrimination might have occurred within the interview process.

Consistency is key

Though this isn't a "secret shopper" situation in the traditional sense, the risks are similar. In a conventional secret shopper test, an employee must treat each customer as well as it would if that individual were a known secret shopper. That way, when the test subject comes along, the report on the employee's performance would (ideally) represent an excellent customer experience.

For employers in NYC, much the same strategy has to apply. Employers should be doing everything they can to avoid discriminatory practices in the first place, but employers in NYC now have extra motivation to do so. This is particularly true since, if the NYC Human Rights Commission finds actual or perceived discrimination, such actions will be reported to the Commission's law enforcement bureau.

All applicants are secret shoppers

Realistically, this initiative may not be a terrible thing for employers in NYC. A reminder to take care with hiring practices and avoid, at all times, even the perception of unfair treatment may help them be successful in the event they are selected for a pseudo-"secret shop." It may also help them avoid claims of discrimination unrelated to the city's investigations.

Secret shoppers not only give employers reports of how they're doing, but the mere potential for a secret shop might cause employees to step up their games. Realistically, any applicant to any company poses as much risk for the employer as one of NYC's investigators, because any applicant can file a claim if he/she feels that discriminatory treatment has occurred.

As such, it might be wise for all employers to behave as though every applicant is a secret shopper. After all, even employers who are never specifically investigated stand to have one single experience with an applicant become representative of their company, how it treats people, and the quality of the establishment as a whole.

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