EMPLOYMENT LAW TODAY

News & trends that matter to you

Restrooms, pronouns, and employee angst

Appropriately addressing transgender issues in the workplace

In 2012's *Macy v. Holder*, the Equal Employment Opportunity Commission (EEOC) stated that Title VII of the Civil Rights Act protects individuals from being discriminated against or harassed because they are transgender. Discrimination based on transgender status, according to the EEOC, is based on sex and is therefore illegal.

The EEOC's stance has been clear, but what's not always as clear is what that means from a practical standpoint in the workplace. Employers may be confused about issues like restroom and locker room use, pronoun use, and dealing with confusion and even discomfort from other workers. While the law is still evolving to help employers understand what the right moves might be, a recent decision from the EEOC provides some guidance.

The restroom dilemma

In *Lusardi v. McHugh* (EEOC, No. 0120133395, April 1, 2015), a male employee transitioning to female had been using a unisex restroom at work. The employee had agreed to use a unisex restroom until having gender reassignment surgery to allow other employees time to accept the change.

However, after deciding not to have the surgery, the employee began using the women's restroom more regularly. Her supervisor scolded her for this choice, indicating that it made other employees uncomfortable. The scolding continued even after the employee reminded the supervisor that she had legally changed her name and identified as female.

While the employer argued that the law did not require employer to allow a transgender employee to use the restroom consistent with his or her gender identity, the EEOC disagreed.

The agency indicated that "Title VII prohibits employers from relying on speculation, stereotypes, and coworkers' preferences when limiting a transgender female employee's right to use a female restroom." The agency further noted that employers may not require employees to take certain medical steps to prove the legitimacy of gender identity before allowing them to use certain facilities or access other conditions or privileges of employment.

Watch your pronouns

Also in this case, even after the employee had legally changed her name and expressed a preference to be treated as female, her supervisor continued to refer to her using masculine pronouns and calling her "sir." The EEOC determined that the supervisor's conduct was "intended to humiliate

and ridicule," and therefore constituted sexual harassment.

How training can help

Supervisors must be respectful of all employees, and they may even need to be reminded of what that looks like. Diversity training

See **'Transgender,'** *pg. 2*

In This Issue

'Transgender,' *from pg. 1*

that addresses respect for fellow employees and includes specific information about transgender individuals is a good place to start for supervisors and for employees in general.

Such programs should outline issues like restroom and pronoun use for transgender employees, and should discuss gender expression and sexual stereotyping issues as they could manifest in the workplace. They should also reinforce that harassment of any kind with regard to an employee's diverse characteristics is prohibited. Of course, harassment policies should specifically identify gender identity and expression as protected, and employees should clearly understand the company's commitment to enforcing such a stance.

Diversity and sensitivity training can help lower employee discomfort and misunderstandings about employees who are transitioning (or who have already transitioned) from one gender to another.

Key to remember: A recent case provides employers with guidance on how to treat transgender workers.

Proposed rule suggests limits for wellness programs

A proposed rule gives employers their first glimpse of how the Equal Employment Opportunity Commission (EEOC) may amend regulations addressing the interplay between the Americans with Disabilities Act (ADA) and wellness programs. At issue is the extent to which employers may provide rewards or penalties to employees for submitting to disability-related inquiries and/or medical examinations.

The background

Under the ADA, employers have long been allowed to require medical examinations of employees when such exams are job related and consistent with business necessity. However, since medical exams that are part of a wellness program won't typically meet those criteria, they must be voluntary. What's been less clear, however, is the extent to which an employer can provide incentives for participation in these programs without threatening the plan's voluntary status.

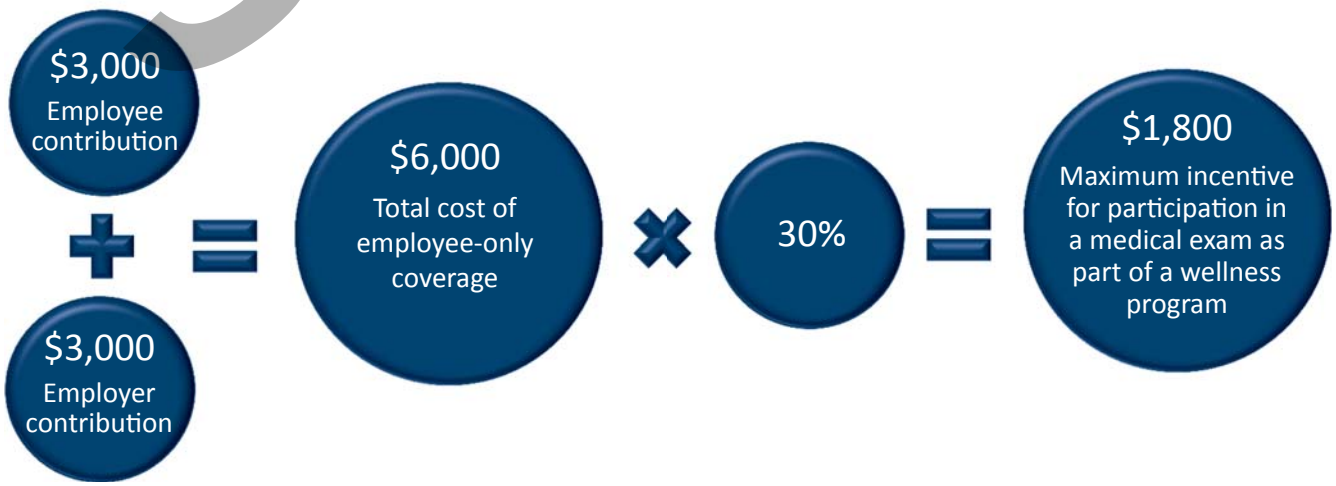
According to the EEOC, when an employer requires participation in a medical exam as part of a wellness program as a condition to participate in the company's health insurance plan, the enticement to participate is too great for the medial exam to be voluntary. However, until now, the agency has not gone so far as to define the precise extent to which an incentive could be offered for participation.

The magic number

The EEOC's proposed rule does include the fixed limit most employers were looking for. Incentives offered as part of a wellness program that includes disability-related questions or exams must not exceed 30 percent of the total cost of employee-only health care coverage.

This number is consistent with the limits already in place under the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) for standards-based wellness programs.

That means, for instance, if the total cost of employee-only coverage were $6,000 (perhaps the employee and the employer both contribute $3,000), the employer could offer an employee up to an $1,800 discount on his or her premium contributions for participating in a biometric screening as part of a company-sponsored wellness program.



What about smoking cessation programs?

HIPAA and the ACA also provide for rewards of up to 50 percent of the cost of employee-only coverage for participation in smoking cessation programs. Under the EEOC's proposed rule, such programs could still exist at the 50 percent threshold if they do not involve medical exams. That is, if a smoking cessation program merely asks employees whether they've quit smoking, the employer could offer incentives up to that 50 percent limit.

However, if the smoking cessation program included biometric screening or another medical examination that tested for the presence of nicotine or tobacco, that would be considered a medical exam, so the employer in this example could offer only up to 30 percent of the cost of employee-only coverage as an incentive for participation.

Other changes

While the clarifications regarding incentives may be the most anticipated change, other content in the proposed rule include the following requirements:

- Wellness programs must be reasonably designed to promote health or prevent disease. The EEOC indicates that a program that collects information without providing feedback to employees or without using the information to design specific health programs will not achieve this standard.
- Employers must provide employees with a notice that describes what medical information will be collected as part of the wellness program, who will receive it, how the information will be used, and how it will be kept confidential.
- Medical information obtained as part of a wellness program must be kept confidential. Employers may receive medical information only in aggregate form that is not reasonably likely to disclose the identity of specific employees.
- Employers must provide reasonable accommodations that enable employees with disabilities to participate in wellness programs and to earn whatever incentives the employer offers.

While employers must remember that this rule is only at the proposed stage, it may be a good time for companies to begin reviewing their wellness programs and anticipate what changes may need to be implemented if the changes are made final.

Key to remember: A proposed rule from the EEOC provides clarification about the voluntariness of disability-related inquiries and medical examinations as part of a wellness program, including the identification of a limit for acceptable incentives.

The EEOC asks for your feedback

The EEOC will accept comments on this proposed rule on or before June 19, 2015. The agency has specifically asked for comments regarding the following:

- For a program to be "voluntary" under the ADA, should employers be required to offer similar incentives to employees who provide certification from medical providers indicating that they are under the care of a physician rather than disclosing specific medical information to the employer?
- For a program to be "voluntary," should the EEOC require that incentives used by employers to encourage participation in wellness programs not render the cost of health insurance "unaffordable" under the ACA?
- Should employers be required to obtain prior, written, and knowing confirmation from employees that their participation in wellness programs including disability-related inquiries and/or medical examinations is voluntary?

AAP employers: Change in the veterans benchmark

Employers required to maintain a written affirmative action plan including protected veterans should note that the Office of Federal Contract Compliance Programs (OFCCP) has adjusted the national hiring benchmark for veterans. The new benchmark is 7 percent, a slight adjustment down from the previous 7.2 percent benchmark.

Contractors use this number to gauge the effectiveness of their veteran outreach and recruitment efforts. The benchmark is based on annual data from the Bureau of Labor Statistics, and could be updated annually.

An affirmative action plan addressing protected veterans must be created by employers with 100 or more employees and a federal contract of $100,000 or more.

STATE UPDATE

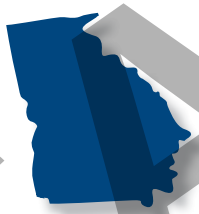
ARKANSAS

Noncompete agreements

A new law in Arkansas requires that, to be enforceable, a noncompete agreement must address an employer's protectable business interest and be reasonably limited with respect to time and scope. While a geographic restriction will also be considered, the lack of such a restriction does not automatically make a noncompete unenforceable if the agreement's time and scope limitations are reasonable.

Under previous law, a noncompete had to be valid as drafted to be enforceable. Under the new law, however, Arkansas courts have the power to revise overly broad restrictions and enforce the agreement under reformed terms and conditions. SB 998

GEORGIA



Medical marijuana use

Effective April 16, 2015, Georgia joined a long list of states that allow medical marijuana use. Georgia's law allows registered medical marijuana users to possess a limited amount of cannabis oil.

While some state laws have limited employer action with medical marijuana users, Georgia's new law specifically indicates that employers are not required to accommodate the use of marijuana in any form. It further states that employers may enforce a zero-tolerance policy prohibiting both on- and off-duty marijuana use. Haleigh's Hope Act, HB 1

NEBRASKA

Pregnancy protections

Amendments to Nebraska's Fair Employment Practices Act expand protections for pregnant workers. Effective July 13, 2015, the law makes it illegal for employers to discriminate against an individual who is pregnant, who has given birth, or who has a related medical condition with regard to hiring, advancement, termination, job training, and compensation. The law also requires employers to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions. Such accommodations might include more frequent or longer breaks, modified work schedules, leave, or a temporary transfer to less strenuous work, for example. LB 627

TENNESSEE

Protection for handgun owners

Individuals with concealed carry permits in Tennessee already had the right to store firearms in their personal vehicles in a parking area. However, it wasn't clear whether employers could terminate employees for having firearms in a personal vehicle parked at work. A law signed on April 6, 2015, clarifies that employers may not discharge (or otherwise take adverse employment action against) an employee solely because he or she lawfully stores a firearm in a personal vehicle parked on the employer's property. Tenn. Code Anno. §50-1-312

UTAH

Bullying

On March 26, 2015, the state enacted an antibullying law for state agencies. The law requires state agencies to provide training to employees and supervisors regarding "abusive conduct," which includes verbal, nonverbal, or physical conduct that "a reasonable person would determine is meant to cause intimidation, humiliation, or unwarranted distress." HB 216

VERMONT

Ban the box for state agencies

State agencies in Vermont may not ask about criminal convictions on employment applications. While employers may still conduct background checks, the state may not rule out applicants based on criminal convictions before considering work-related qualifications. The order does not apply to law enforcement, corrections, or other sensitive positions. Executive Order No. 03-15

VIRGINIA

Social media privacy

Employers in Virginia may not require current or prospective employees to disclose the username or password of their social media accounts. Employers also may not require that employees add an employee, supervisor, or an administrator to the list of contacts associated with the employee's social media account. HB 2081

HR INBOX

Name change and the Form I-9

Q. When an employee's name changes, must we update the individual's Form I-9?

A. You are not required to update the I-9 when an employee changes his or her name. However, the United States Citizenship and Immigration Services (USCIS) recommends that employers maintain correct information on Forms I-9 and note any name changes on the Form. Doing so can help maintain clarity — it might be difficult to remember an employee's former name if you're looking for his or her I-9 down the road but never made the update.

If you choose to update an employee's I-9, you may do so using Section 3 of the form by entering the employee's new name in block A. You are not required to obtain documentation from the employee showing proof of a name change, but you may take steps — such as asking the employee for the basis of the change — to be reasonably assured of the validity of the change.

Off-the-clock emails

Q. Our policy forbids hourly workers from checking their work email when they are away from work because we don't want to pay them for that time. However, some employees are asking if they can have access to their email outside of working hours if they agree not to be paid for that time. Can they do that?

A. No. Employers are required by law to pay employees for all hours worked, even if employees are working voluntarily, and even if they specifically agree not to be paid. Essentially, any agreement with the employee to ignore working time would not be a legal agreement. One of the best ways to avoid paying for additional working time is the strategy you're already employing — prevent work from being performed in the first place. Some employers even block employees from off-hours access since, if an employee worked despite your policy, he or she would still need to be paid.

Requesting a work release

Q. An applicant for a highly physical job mentioned (unprompted) that she has had multiple surgeries on her leg. Can we ask her to obtain a work release before we offer her the job?

A. No. The Americans with Disabilities Act (which applies to employers with 15 or more employees) prohibits you from making any medical inquiries or requiring an individual to undergo a medical exam before making a job offer. If you wanted to require a medical examination after a conditional job offer was made, you could do so, but it would need to be done for all entering employees in that job category.

At the pre-offer stage, you may ask the employee whether he or she can perform the essential functions of the job with or without a reasonable accommodation.

Independent contractors and background checks

Q. We are planning to enlist the services of an independent contractor. Can we require a physical, background check, and credit check?

A. You should not require a physical or perform the same background checks on an independent contractor that you would require for an employee. You could certainly check the contractor's credentials by asking for references from previous customers, but an independent contractor is not an employee and should not be treated as such.

WHAT WOULD YOU DO?

Frank, an exempt employee, is notorious for running out of paid time off (PTO) early in the year. You previously allowed him to borrow against next year's allotment, but you let him know that would not be allowed this year. He began this year with 15 days of PTO (used for both sick and personal days) but has already used up all of this time. Today, Frank called in sick. He has asked to take the time off unpaid rather than have you impose discipline. **Can you allow this even though he's exempt?**

A. No. Exempt employees must be paid their full salaries for each week in which any work is performed.

B. Yes. You may make a deduction for the full-day absence since Frank used all his PTO.

C. No. Deductions from the wages of exempt employees are only allowed for absences covered by the Family and Medical Leave Act.

D. Yes, because you can pay exempt employees for only the hours they actually work.

For the answer, turn to p. 7.

Bills introduced to curtail certain union tactics

A host of laws, including the National Labor Relations Act (NLRA), delineate the rights of employers, employees, and unions with regard to unionization and unionizing efforts. However, some lawmakers believe that the balance is a bit off and that certain union tactics have crossed the line.

Specifically, Congressman Earl L. Carter introduced two bills to address stalking and actions that might facilitate identity theft by union officials.

A 2011 case illustrates the kinds of activities Congressman Carter hopes to curtail with The Freedom from Union Stalking Act and the Freedom from Union Identity Theft Act. In this case, workers in North Carolina had their personally identifying information (including social security numbers) disseminated via email after resigning their union membership.

After unsuccessfully filing an unfair labor practice with the National Labor Relations Board (NLRB) claiming that they were being pressured to support the union, the employees filed a lawsuit claiming a violation of North Carolina's Identity Theft Protection Act (ITPA). The employees claimed that their social security numbers were posted on a publicly accessible bulletin board, effectively making that information accessible to the general public and thereby violating the ITPA

Ultimately, the North Carolina Court of Appeals indicated that the employees' claims were preempted by the NLRA. The court granted summary judgment for the employer.

If passed, the two aforementioned bills would mean that union officials would not be exempt from state stalking and identity theft laws.

While the fate of the bills remains to be seen, it's good for employers and employees alike to know that such tactics could be utilized.

Key to remember: Union officials may be exempt from state laws that prohibit stalking and address activities related identity theft.

Several likely ADA oversights send employer back to court

An employee worked as a deputy clerk for a state administrative office of the courts, where her job consisted largely of filing. When the employee eventually began working at the front counter providing customer service, she suffered panic attacks.

The employee indicated to a supervisor that she suffered from social anxiety disorder. She requested that she be allowed to train for a different role or be allowed to work at the front desk less frequently. However, that supervisor indicated that she was not authorized to act on the accommodation request, so the employee would need to wait until another supervisor returned from her three-week vacation.

At that point, the employee sought approval to take time off. Though her previous leave requests had always been granted without question, the in-office supervisor denied this request after questioning the employee about her need for time off.

When the employee's other supervisor returned, the employee was informed that her performance was not up to par and that there were no other places in the clerk's office where her services could be utilized. The employee asked directly whether the termination had to do with her accommodation request but was told it did not.

The employee sued for discrimination under the Americans with Disabilities Act (ADA), which forbids discrimination against individuals with disabilities and also requires employers to provide reasonable accommodations to qualified individuals with disabilities.

While a lower court indicated that "social anxiety disorder" was not a disabling condition, the Fourth

Circuit Court of Appeals disagreed, citing the American Psychiatric Association's (APA's) Diagnostic and Statistical Manual of Mental Disorders. According to this reference, social anxiety disorder "interferes significantly with the person's normal routine, occupational … functioning, or social activities or relationships."

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities," including speaking, concentrating, thinking, communicating, and working. The Equal Employment Opportunity Commission (EEOC) has also specifically identified "interacting with others" as a major life activity.

Besides rejecting the lower's courts determination of whether a disability existed, the Fourth Circuit noted the following potential problems with this case:

- The employer had not shown that working behind the counter was an essential function of the job. Fewer than 15 percent of deputy clerks worked behind the front counter and many employees were trained and available to perform the function.
- The employer's argument that the employee was terminated for poor performance created a genuine dispute of fact. The employer had no record of poor performance for the employee, though it alleged that the employee was a slow worker, disclosed sensitive information to the public, and had outbursts with coworkers and supervisors.
- The employer had not shown that the employee couldn't perform the essential functions of her job because of her social anxiety disorder (and therefore would not need to be accommodated).
- The employer failed to show that it had engaged in the interactive process with the employee.

Because of these issues, the appeals court reversed the lower court's grant of summary judgment and sent the case back to trial. *Jacobs v. North Carolina Administrative Office of the Courts*, No. 13-2212, March 12, 2015

Lessons learned

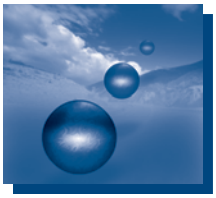
While the final outcome remains to be seen, the employer in this case may have made some pretty fundamental errors with regard to the employee's treatment and the ADA. Employers must understand the relatively broad definition of "disability" under the ADA, must understand how to identify a job's essential functions, and must engage in the interactive process promptly. Additionally, an employer "must" that goes well beyond the ADA: Employers must create solid documentation of any and all performance issues if they wish to be able to refute claims that they acted in contrast to their legal obligations.

Key to remember: A recent case illustrates several areas in which employers might go wrong under the Americans with Disabilities Act.

WHAT YOU SHOULD DO

Some deductions allowed

The correct answer is B. While the allowable deductions from wages for exempt employees are limited, this is a situation in which you could deduct the pay for a full day's absence. Employers may make a full-day deduction from the salary of an exempt employee when the employee is absent for personal reasons, other than sickness or disability. Since the employee had a PTO bank but exhausted it for the year, you can also make full-day deductions for sickness or disability. Of course, you'll want to consider whether you want to allow the employee an alternative to discipline, and whether you're willing to make such an exception in similar situations with other employees.



Looking for balance? Hire chefs and bakers

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.

Recruiting is a key element in any organization; if companies can't get the right talent in the door, struggle will inevitably ensue. Unfortunately, finding the right talent isn't a simple task. There's more to it than just developing a profile of the perfect employee and repeatedly seeking him and her out. Instead, recruiting strategies will likely need to identify a balance of employee profiles, all of which carry different — but harmonizing — strengths and characteristics.

For instance, whether your company is a technology firm, a rehabilitation center, or a horse ranch, one arm of such a strategy is to make sure your organization is open to hiring both chefs and bakers. Wait, what?

A chef's profile

Clearly, if your company is a technology firm, you may have little use for an actual chef, but you'll like have plenty of opportunities for chef-like employees.

The best chefs tend to be creative. They likely think on their feet and can easily improvise. While most chefs could certainly follow a recipe, they might see such directions as mere suggestions, not hard and fast rules to be followed.

Chefs might be prone to the spontaneous inspiration to add another ingredient or depart from a process. They may prefer to look at the available ingredients before determining what they might create. The responsibility to create something new is likely seen by a chef as a wonderful opportunity to learn and experiment.

Without chefs, companies risk stagnation. But most need bakers, too.

A baker's profile

Like real-life chefs, actual bakers won't find employment in every organization, but employees with comparable qualities provide necessary balance to the equally valuable chef-like employees.

In contrast to chefs, most bakers are experts in precision. Recipes offer strict directions for success. Weights, measurements, and ratios are part of an exact science, which must be followed diligently to create the desired outcome. Baker-employees are meticulous, focused, and attentive.

Bakers might prefer to work with specific instructions and may be less inclined to experiment without restraint. They may, however, be inclined to make tiny tweaks until a process (recipe) is just right.

Without bakers, a company may struggle with focus and direction.

It's about balance

In short, bakers are the perfect complement to chefs. They can provide stability, while chefs challenge the status quo.

That's not to say that baker-employees and chef-employees will find a consistently harmonious existence. Fortunately, constant harmony is not necessary, and it's not even really desirable. It's the push-pull of conflict that challenges ideas and processes and keeps a company fresh and productive.

In reality, your organization may not need chefs *or* bakers (literally or figuratively), but if you find that all of your employees tend to fit a similar profile, consider whether you might also benefit from recruiting the yin to their yang.

In the end, your strategy for acquiring a balanced ratio of skills and personalities in your workforce may be similar to a baker's recipe or a chef's favorite dish: it may require tiny, meticulous adjustments, and it perhaps even bit of experimentation. But a consideration of the composition of your workforce and how well your employees are working together should inform your recruiting practices enough to get the balance just right.

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