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The Sixth Circuit's *Epic* Enforcement of Employment Arbitration Agreements with Class Action Waivers

By Stephen S. Zashin*

In *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court made it unequivocally clear: arbitration is the favored means of handling employment disputes. *See* 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018). In doing so, the Court held that arbitration agreements containing class action waivers do not violate the National Labor Relations Act and are enforceable under the Federal Arbitration Act ("FAA"). Recently, the U.S. Court of Appeals for the Sixth Circuit reinforced that mandate. *See Williams v. Dearborn Motors 1, LLC*, No. 20-1351, 2021 U.S. App. LEXIS 26350 (6th Cir. Aug. 30, 2021).

In *Williams*, the Sixth Circuit relied on *Epic* in upholding the enforcement of an employer's mandatory arbitration agreement requiring employees to waive their right to pursue claims on a class basis. Further, the Sixth Circuit held an employee could not premise a retaliation claim on his termination for refusing to sign the mandatory arbitration agreement.

The plaintiffs in *Williams* worked at a car dealership for several months when the dealership presented an arbitration agreement to all employees and required them to sign in order to continue employment. The arbitration agreement included a "class waiver" provision, which required employees to litigate all disputes with the dealership individually, rather than on class action basis. Additionally, the class waiver provision required employees to opt-out of class actions and waive all rights to any monetary recovery in any such action.

One of the plaintiffs refused to sign the arbitration agreement, and the dealership terminated his employment. The other plaintiff opposed the arbitration agreement, but ultimately signed and continued to work at the dealership. The plaintiffs then filed a lawsuit asserting discrimination claims and sought to represent a class of the dealership's current and former employees whom the dealership required to sign the arbitration agreement as a condition of employment. One plaintiff also alleged the dealership unlawfully terminated him in retaliation for refusing to sign the arbitration agreement. The district court dismissed the class claims, along with the individual retaliation claim.

The plaintiffs appealed to the Sixth Circuit arguing that the arbitration agreement's class waiver provision was unlawful and violated their rights under various antidiscrimination laws, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"). Furthermore, the one plaintiff argued his termination for refusing to sign the arbitration agreement constituted unlawful retaliation under those laws. On appeal, the Sixth Circuit rejected the plaintiffs' arguments.

Unlike the antidiscrimination laws at issue in *Williams*, the underlying claims in the Supreme Court's *Epic* decision were wage and hour claims brought under the Fair Labor Standards Act. Nonetheless, the *Williams* Court found *Epic's* holding applied in the antidiscrimination

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context. Recognizing the FAA's broad mandate in favor of arbitration and prior decisions enforcing employment arbitration agreements with class action waivers, the Sixth Circuit noted, absent an "express statement [in the antidiscrimination laws] barring the use of class waivers, such policies are enforceable under the FAA with respect to employment discrimination claims." *Id.* at *9. As Title VII, the ADA, and ADEA contain no such "express statement," the court held "none of the civil rights laws that plaintiffs rely on supports the notion that a class waiver constitutes an unlawful employment practice, which plaintiffs assert is the basis for the class-based discrimination claims in the complaint." *Id.* at *19. Accordingly, the Sixth Circuit upheld the dismissal of the class claims alleging discrimination.

The Sixth Circuit also affirmed the dismissal of the individual retaliation claim premised on the plaintiff's termination for refusing to sign the arbitration agreement. In order to set forth a viable retaliation claim, the plaintiff must have engaged in "protected activity." The Sixth Circuit found that, by refusing to sign the arbitration agreement, the plaintiff did not engage in any such activity. Rather, the court explained the plaintiff's "opposition to the class waiver was based on his belief that it violated the procedural requirements under the [antidiscrimination laws] by depriving him of a method of litigation and type of remedy. The refusal to sign did not constitute protected activity because it was not based on a reasonable belief that he was opposing allegedly 'discriminatory acts.'" *Id.* at *21. The court cautioned that the plaintiff may have had a viable retaliation claim if the arbitration agreement required him to waive substantive statutory rights under the antidiscrimination laws, e.g., the right to file a charge of discrimination with the Equal Employment Opportunity Commission. However, the dealership's arbitration agreement, including its class waiver provision, did not interfere with the plaintiff's substantive rights under the antidiscrimination laws. Accordingly, the court found his retaliation claim baseless and properly dismissed.

In sum, the Sixth Circuit's *Williams* decision reinforces the mandate in favor of arbitration as a means to resolve employment disputes, including discrimination claims, and employers' rights to include class action waivers in their arbitration agreements and to terminate employees who refuse to sign them. Employers should consult with counsel to discuss implementing arbitration agreements with their workforce or revising existing agreements to include class action waivers.

***Stephen S. Zashin**, an OSBA Certified Specialist in Labor & Employment Law, has successfully litigated class arbitration issues in state and federal courts including successfully arguing a class action arbitration issue before the Ohio Supreme Court. If you have questions relating arbitration agreements or any other employment law issues, please contact Stephen at ssz@zrlaw.com or (216) 696-4441.

Employers May Utilize Wellness Programs to Encourage Employees to Get a COVID-19 Vaccine

By Brittany A. Mallow*

The U.S. Department of Labor, U.S. Department of Health and Human Services ("HHS"), and the U.S. Treasury (collectively, the "Government") recently issued FAQs (available here) to clarify how employers may encourage employees to get vaccinated using incentives/surcharges through the employer's group health plan. Essentially, a group health plan may offer participants a premium discount for receiving a COVID-19 vaccination if the discount complies with the final wellness program regulations.

HIPAA Compliance

Generally, employers may not charge different premiums under their health plans based on the health factors of their employees. However, the Government advised that HIPAA permits exceptions for both vaccination surcharges and incentives, provided that a plan complies with the requirements for "activity-only" wellness programs. These requirements include:

- The total amount of non-tobacco-related incentives/surcharges may not exceed 30 percent of the cost of coverage under the health plan;

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- Employers must provide a reasonable alternative to avoid the surcharge if it is medically inadvisable for an individual to receive the COVID-19 vaccine;
- Individuals must have the opportunity to qualify for the reward (or avoid the penalty) at least once per year;
- The full reward under the activity-only wellness program must be available to all similarly situated individuals; and,
- The program must be reasonably designed to promote health or prevent disease.

30 Percent Rule

As established under HIPAA, employers may encourage participation in certain types of wellness programs by offering incentives of up to 30 percent of the total cost of an employee's health insurance premiums for self-only coverage. Therefore, any surcharge imposed on an unvaccinated worker cannot exceed more than 30 percent of the total cost of their health insurance premiums for self-only coverage when combined with any existing surcharge.

Many employers have existing wellness programs and may not have much wiggle room to add additional incentives/surcharges and remain under the 30 percent cap.

Reasonable Alternative

The Government advised that a "reasonable alternative" to a surcharge may require an attestation that the individual will follow the Centers for Disease Control and Prevention's ("CDC") masking guidelines for unvaccinated individuals. Additionally, an employer is permitted to require a doctor's note related to whether the vaccine is medically inadvisable.

ACA Affordability Rules

The FAQs also confirm that employers should disregard vaccination incentives when determining compliance with the Affordable Care Act's ("ACA") affordability rules, but employers should include vaccination surcharges in the premium cost when performing affordability calculations. For example, if a COVID-19 vaccination wellness program reduces an employee's individual premium contribution by ten percent, employers should disregard the reduction for purposes of determining whether the offer of that coverage is affordable in assessing liability for the employer's shared responsibility payment. However, if a surcharge increases an unvaccinated employee's individual premium contribution for coverage by ten percent, employers should include the surcharge when assessing affordability.

Employers wishing to impose a surcharge should rerun ACA affordability calculations to ensure compliance with affordability rules. However, employers considering utilizing the incentive approach should not face ACA affordability concerns, as their plans presumably already satisfied the requirements.

Eligibility/Coverage

The FAQs make clear that plan sponsors cannot condition eligibility for benefits on vaccination status. Thus, employers cannot deny unvaccinated health plan participants benefits or eligibility for coverage. Although there is an exception to the general prohibition on discrimination based on a health factor for wellness programs that meet federal standards, this exception is available only for premium discounts or rebates, or modifications of otherwise applicable cost-sharing mechanisms, and not for denying eligibility for benefits or coverage based on a health factor.

EEOC's Lack of Guidance

The Government cautioned that compliance with their regulations is not determinative of compliance with the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), as the U.S. Equal Employment Opportunity Commission ("EEOC") enforces those laws.

The EEOC has remained silent on how wellness plans can comply with the ADA and GINA. Despite the EEOC's silence, it is comforting to note that no court has ever determined that a wellness plan that complies with the Government's regulations violates either the ADA or GINA. Additionally, the EEOC regulations governing the applicability of the ADA to wellness programs defer to HIPAA when it comes to health-contingent wellness programs, and the EEOC has not provided any reason to believe that would change for COVID-19 vaccine incentives.

Best Practices

1. Re-calculate incentive limits to ensure that the incentive, taken together with all other non-tobacco incentives, does not exceed the 30% HIPAA incentive limit.
2. Establish ways to earn incentives for reasonable alternatives/accommodations for those who cannot get vaccinated due to a medical reason, disability, or a religious exemption.

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3. Ensure affordability standards are met under the ACA.
4. Notification rules: Open enrollment periods are either underway, closed, or about to commence for most employers; thus, it may not be logistically possible to implement a vaccine incentive/surcharge program for commencement in the near future. However, if an employer chooses to modify the group health plan by implementing a wellness program mid-year, it must communicate the modification to employees at least 60 days in advance.

***Brittany A. Mallow** practices in all areas of labor and employment law. If you have questions utilizing wellness programs to encourage COVID-19 vaccinations or any other employment law issues, please contact Brittany at bam@zrlaw.com or (216) 696-4441.

Scripture vs. Shots – How Employers Should Respond to Religious Objections to COVID-19 Vaccine Mandates

By Katie McLaughlin*

In the wake of COVID-19 vaccine mandates, an increasing number of employees have claimed religious exemptions. How should employers respond when their employees object to vaccine mandates on religious grounds?

Religious Discrimination Under Title VII

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of religion and requires employers to provide "reasonable accommodations" to employees' "sincerely held" religious beliefs, practices, or observances. Title VII defines religion broadly – protected religious beliefs need not be formally recognized. However, employees' objections cannot be based solely on social, political, or personal preferences or nonreligious concerns about the possible effects of the vaccine. Employers must distinguish between political objections that happen to be religious and objections that are religious at their core.

Most major organized religions do not openly oppose vaccines. For example, Pope Francis stated he believes that everyone has an ethical duty to get vaccinated. In fact, only two religions formally oppose vaccination – Christian Scientists and the Dutch Reformed Church. However, the U.S. Equal Employment Opportunity Commission ("EEOC") stated that a religious group's acceptance or nonacceptance of a belief is not determinative under Title VII. Employers must not lose sight of this statement from the EEOC and should not deny religious accommodations requests based solely on religious doctrine or statements from religious leaders like Pope Francis. The below considerations apply to not only employees who oppose the vaccine altogether on religious grounds, but also employees who wish to wait until an alternative version or specific brand of the COVID-19 vaccine is available.

"Sincerely Held" Religious Beliefs

If an employee raises a religious objection, an employer should generally assume the objection is based on a sincerely held belief. Employers can *only* question an employee's belief if they have an objective basis to do so. The EEOC identified four factors that can create doubt as to the sincerity of an employee's religious belief:

- Whether the employee has acted in a way inconsistent with the claimed belief;
- Whether the employee is seeking a benefit or an exception that is likely to be sought for nonreligious reasons;
- Whether the timing of the request is questionable (for example, the request follows closely after the same employee's request for the same benefit for different reasons); and
- Whether the employer has other reasons to believe that the employee is seeking the benefit for secular reasons.

If an employer has an objective basis, it can ask the employee to discuss their beliefs, describe how the employee follows them, provide written materials about the tenets of their faith, and/or request statements from others who have observed the employee discussing or practicing those beliefs. A religious leader may provide an exemption letter to bolster the employee's claim, but it is not required. Additionally, an employer should

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not assume that an employee's belief is not sincere because it deviates from the commonly followed tenets of the employee's religion or the employee adheres to some common practices but not others. Although prior inconsistent conduct is relevant to the question of sincerity, an employee's beliefs may change over time. An employee's newly adopted or inconsistently observed practice may nevertheless be sincerely held.

Employers should use caution when questioning employee beliefs. For example, in *EEOC v. Consol Energy, Inc.*, the U.S. Court of Appeals for the Fourth Circuit held that an employee was entitled to nearly $600,000 in damages because his employer failed to accommodate his religious concerns regarding a biometric hand scanner.

Reasonable Accommodations

If an employee's religious belief is sincerely held, Title VII requires employers to provide the employee reasonable accommodations. For employees who refuse to get the COVID-19 vaccine due to a sincerely held religious belief, reasonable accommodations include mask wearing, remote work, social distancing, etc. Much will depend on the specific circumstances. Employers must ensure that the accommodation is legitimate and non-retaliatory. However, employers do not have to accommodate an employee's religious beliefs if doing so would impose an "undue hardship" on the employer's legitimate business interests. The EEOC identified six factors employers can consider in denying a religious accommodation as unduly burdensome:

- The accommodation is too costly;
- The accommodation would decrease workplace efficiency;
- The accommodation infringes on the rights of other employees;
- The accommodation requires other employees to do more than their share of hazardous or burdensome work;
- The accommodation conflicts with another law or regulation; and
- The accommodation compromises workplace safety.

Employers should rely on objective information, and not on speculative hardships that may arise as a result of a religious accommodation. Common relevant considerations during the COVID-19 pandemic may include whether the employee works indoors or outdoors, works in a solitary or group setting, or has close contact with other employees or members of the public who are medically vulnerable. The number of fully vaccinated employees, how many employees and nonemployees physically enter the workplace, and current CDC recommendations are also relevant. If more than one reasonable accommodation could eliminate a religious conflict, an employer should consider the employee's preferences but is not obligated to provide the reasonable accommodation preferred by the employee.

If an employer is faced with requests from multiple employees for religious accommodations, the determination of whether a particular proposed accommodation imposes an undue hardship depends on its specific factual context. If an employer grants one employee a religious accommodation related to the vaccine, it is not required to grant the requests of all employees who seek a religious accommodation for the vaccine. Additionally, the cumulative cost or burden on the employer is relevant when multiple employees seek similar accommodations. However, employers should keep in mind that a mere assumption that many more employees might seek a religious accommodation in the future is not evidence of undue hardship.

Finally, employers have the right to discontinue a previously granted accommodation if it is no longer being used for religious purposes and/or the accommodation poses an undue hardship on their operations due to changed circumstances. However, employers should discuss their concerns with employees before revoking accommodations and consider alternative accommodations that do not impose an undue hardship.

Takeaways

Before imposing vaccine mandates, employers should develop a system for considering and responding to religious objections. Employers should use caution when questioning an employee's religious beliefs. So as to avoid inconsistent treatment, employers should strongly consider using a form attestation to be completed by the employee that identifies the employee's belief system and the belief, practice, or observance that prohibits the employee from getting the COVID-19 vaccine. Employers should consult with counsel when drafting such attestations.

***Katie McLaughlin** practices in all areas of labor and employment law. If you have questions regarding COVID-19's continued impact on the workplace or other employment matters, please contact Katie at kem@zrlaw.com or (216) 696-4441.

Weeded Out: Pennsylvania Court Greenlights Employee Claims for Discipline Based Upon Status as a Certified Medical Marijuana User

By Jessi L. Ziska*

Pennsylvania's Medical Marijuana Act ("MMA") prohibits employers from discharging, refusing to hire, or otherwise discriminating or retaliating against an employee based upon their status as a certified medical marijuana user. However, as the MMA does not expressly include a private right of action, it remained unclear whether Pennsylvania employees have a right to bring a lawsuit alleging a violation of the MMA. Last August, a state appellate court answered that question in the affirmative. *See Palmiter v. Scranton Quincy Clinic Co., LLC*, No. 498 MDA 2020, 2021 PA Super 159 (Pa. Super. Ct. 2021). Accordingly, Pennsylvania employers must exercise caution as they may face private lawsuits for making employment decisions based upon an employee's or applicant's status as a certified medical marijuana user.

Background

The plaintiff in *Palmiter* worked as a medical assistant and submitted to a drug test after a new company acquired the hospital where she worked. In connection with the drug test, the employee notified the laboratory that she had a medical marijuana prescription and provided a copy of her legal certification. Nonetheless, her new employer informed her of her termination on account of her drug test. The employee then sued her employer arguing, in part, that her termination violated the MMA and public policy. The trial court overruled the employer's objections to this claim, and the employer appealed the trial court's decision.

Superior Court Decision

The Pennsylvania Superior Court affirmed the decision of the trial court, holding individual employees can maintain private causes of action against their employer under the MMA and public policy. In reaching its decision, the court reviewed the language of the MMA along with similar state medical marijuana laws across the country to find that "an implied private cause of action" existed under the MMA. In doing so, the court held the state legislature's intent in enacting the MMA sought to protect employee-patients certified to use medical marijuana from employers who would penalize employees for availing themselves of the benefits provided under the MMA.

Impact on Pennsylvania Employers

Under the *Palmiter* Court's holding, Pennsylvania employers can face private lawsuits for disciplining, terminating, or otherwise discriminating against an employee or job applicant based on the individual's status as a certified user of medical marijuana. However, the MMA does not require employers to accommodate medical marijuana use in the workplace and allows employers the right "to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position." *See* 35 P.S. § 10231.2103(b)(2). Accordingly, before taking an adverse action, Pennsylvania employers should ensure that they have adequate evidence to show the adverse action is not merely premised upon the individual's status as a certified medical marijuana user.

What About Ohio?

Compared to Pennsylvania's MMA, Ohio's medical marijuana law is more employer friendly. For example, under Ohio law:

- Employers do not have to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- Employers may refuse to hire, discharge, discipline, or otherwise take an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use, possession, or distribution of medical marijuana; and
- Employers can establish and enforce a drug testing policy, drug-free workplace policy, or zero-tolerance policy.

See R.C. § 3796.28(A)(1)-(3).

Given that medical marijuana laws vary by state, employers should review state medical marijuana laws and consult with counsel prior to making employment decisions based upon an employee's status as a medical marijuana user.

***Jessi L. Ziska**, practices in all areas of labor and employment law. If you have questions about employment issues relating to medical marijuana or any other employment law matters, please contact Jessi at jlz@zrlaw.com or (216) 696-4441.

New Year, New Minimum Wages: States Increase Minimum Wage for 2022

By Jzinae N. Jackson*

On January 1, 2022, several states, including Ohio, increased their minimum wage. Ohio's minimum wage increased from $8.80 to $9.30 for non-tipped employees and from $4.40 to $4.65 for tipped employees. In 2022, Ohio's minimum wage law applies to employers with gross revenue of $342,000 or more. Employers whose gross revenue is below that threshold are only subject to the federal minimum wage of $7.25 per hour for non-tipped employees and $2.13 for tipped employees. Additionally, for minors aged fifteen years or younger, Ohio employers are only required to pay the federal minimum wage.

While most states have not yet scheduled minimum wage increases beyond 2022, several states, such as California, Delaware, Florida, Illinois, Maryland, Virginia, and others have scheduled increases over the next few years, with the end goal of $15.00 per hour. Additionally, minimum wage increases in some states will not take effect until later in 2022. For example, Oregon's and Nevada's increases become effective on July 1, 2022. Employers should also recognize that some municipalities have higher minimum wages than the state minimum wage.

*Jzinae N. Jackson regularly advises clients on labor and employment matters, including state and federal wage and hour law compliance. If you have questions about minimum wage laws or labor and employment matters more generally, please contact Jzinae at jnj@zrlaw.com or (216) 696-4441.

The following table lists all 2022 minimum wage increases by state (unless otherwise noted, all increases are effective January 1, 2022):

STATE	STANDARD	TIPPED
Arizona	$12.80	$9.80
California	$15.00 for employers with 26 or more employees. $14.00 for employers with 25 or less employees.	$15.00 for employers with 26 or more employees. $14.00 for employers with 25 or less employees.
Colorado	$12.56	$9.54
Connecticut (effective July 1, 2022)	$14.00	$7.62 for service employees $5.77 for bartenders
Delaware	$10.50	$2.23
Florida (effective Sept. 30, 2022)	$11.00	$7.98
Illinois	$12.00	$7.20
Maine	$12.75	$6.38
Maryland	$12.50 for employers with 15 or more employees. $12.20 for employers with 14 or less employees.	$3.63
Massachusetts	$14.25	$6.15
Michigan	$9.87	$3.75

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States Increase Minimum Wage for 2022 | Continued from page 7

STATE	STANDARD	TIPPED
Minnesota	$10.33 for employers earning $500,000 or more annually. $8.42 for employers earning less than $500,000 annually.	$10.33 for employers earning $500,000 or more annually. $8.42 for employers earning less than $500,000 annually.
Missouri	$11.15	$5.575 (tipped employees must be paid half the state minimum wage rate)
Montana	$9.20	$9.20 for employers earning more than $110,000 annually. $4.00 for employers earning $110,000 or less annually.
Nevada (effective July 1, 2022)	$9.50 for employers offering health benefits. $10.50 for employers not offering health benefits.	$9.50 for employers offering health benefits. $10.50 for employers not offering health benefits.
New Jersey	$13.00 for employers with 6 or more employees. $11.90 for seasonal employees and employers with 5 or less employees. $10.90 for agricultural employees.	$5.13
New Mexico	$11.50	$2.80
New York (effective Dec. 31, 2021)	$13.20 $15.00 for fast food employees.	$8.35
Ohio	$9.30 for employers earning $342,000 or more annually. $7.25 for employers earning less than $342,000.	$4.65
Oregon (effective July 1, 2022)	$13.50	$13.50
Rhode Island	$12.25	$8.36
South Dakota	$9.95	$4.975 (tipped employees must be paid half the state minimum wage rate)
Vermont	$12.55	$6.28
Virginia	$11.00	$2.13
Washington	$14.49	$14.49

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Please join Z&R in welcoming Katie McLaughlin and Brittany Mallow to its Employment and Labor Groups

Katie McLaughlin's practice encompasses all areas of labor and employment law. Katie graduated cum laude from Cleveland-Marshall College of Law, where she served as Editor-in-Chief of the Cleveland State Law Review. As a law student, Katie participated in Cleveland-Marshall's Civil Litigation Clinic, where she advised clients on unemployment claims and landlord-tenant disputes. Prior to law school, Katie worked as an insurance underwriter.

Brittany Mallow represents both public and private sector employers in all aspects of labor and employment law. Brittany graduated, cum laude, with her J.D. from Cleveland-Marshall College of Law, where she was a Cleveland-Marshall Law Justice Scholar and Cleveland-Marshall Law Alumni Association Life Member Scholar. Brittany also earned her M.B.A. from Cleveland State University. During law school, Brittany served as Vice Chair of the Moot Court Team and Treasurer of the International Law Society. As a Member of the Moot Court Team, Brittany competed in several national moot court competitions, winning Best Petitioner's Brief and advancing to the final four at the Herbert Wechsler National Moot Court Competition. Brittany also gained valuable legal experience while serving the Cleveland community as a student in the Community Advocacy Law Clinic at Cleveland-Marshall.

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