ZASHIN & RICH CO., L.P.A.

Attorneys & Counsellors At Law

55 Public Square, Suite 1490
Cleveland, Ohio 44113-1901
(216) 696-4441
Fax: (216) 696-1618

2242 S. Hamilton Rd., Suite 101
Columbus, Ohio 43232
(614) 861-5550 • (614) 861-7612
Fax: (614) 861-7616

email@zrlaw.com
http://www.zrlaw.com

WINTER 2003
VOLUME V, ISSUE I

EMPLOYMENT LAW QUARTERLY

REVIEWING RECENT DEVELOPMENTS IN THE EMPLOYER-EMPLOYEE RELATIONSHIP

ARE YOU HIP TO HIPAA?

Part 1: Privacy Rule Basics

by Helena Oroz*

It's big, it's bad, it can be ugly. If ignored, it can turn on you. Folks, go to the zoo if you want to talk hippos—I'm talking about HIPAA, the Health Insurance Portability and Accountability Act. If you're not hip to HIPAA, you better get to work. The next impending compliance deadline is April 14, 2003. What does this mean to you and your business? Read on, and get hip to HIPAA.

The quick run-down. Congress originally passed HIPAA to reform the insurance market and simplify health care administrative processes. The legislation included five separate titles that cover portability, continuity of health insurance and administrative simplification, among others. HIPAA's Administrative Simplification provisions include privacy, security, and transaction/code sets rules, each with their own compliance deadline. The deadline to comply with the Privacy Rule is April 14, 2003 for most covered entities.

What is a covered entity? HIPAA's regulations apply to *health plans*, *health care clearinghouses,* and *health care providers that transmit health information in electronic form* ("covered health care providers" for short).

- *Health plans* include individual or group plans that provide or pay the cost of medical care, including health insurance issuers, HMOs, and Medicare/Medicaid programs. A self-administered group health plan with less than fifty participants is not a health plan within the meaning of the regulations. Employers who do not fit within the other two categories may be indirectly regulated through their group health plan.
- *Health care clearinghouses* include private or public entities that process health information received from other entities. One example is a hospital billing service.
- *Covered health care providers* are doctors, hospitals, pharmacists and others who provide medical services in the normal course of business.

What does HIPAA's Privacy Rule regulate? HIPAA restricts uses and disclosures of *protected health information* ("PHI"). PHI is health information, transmitted or maintained by a covered entity that can be used to identify the individual it concerns.

How do covered entities comply with HIPAA's Privacy Rule? First and foremost, covered entities must comply with the Privacy

Rule's baseline requirement that they limit PHI use and disclosure to the minimum necessary required to accomplish the intended purpose of that use or disclosure. Important exceptions to the minimum necessary requirement include disclosures to or requests by a health care provider for treatment purposes, and uses and disclosures to the individual of his or her own PHI.

Covered entities must implement policies and procedures that reflect the minimum necessary standard. The regulations are flexible, and basically leave it up to each covered entity to make that assessment on its own. For recurring disclosures, covered entities should identify individuals who may need PHI to carry out their job functions, identify the PHI needed, and limit access accordingly. For other disclosures, covered entities should establish criteria to make the minimum necessary determination and individually review requests in accordance with those criteria.

Is that all it takes to get hip to HIPAA's Privacy Rule? If getting hip was that easy, everyone would be doing it. Actually, what all covered entities should do includes much more than implementing policies and procedures to deal with the minimum necessary standard. Among other requirements, covered entities must—

- provide individuals with a *Notice of Privacy Practices* that explains the entity's duties and an individual's rights with respect to PHI uses and disclosures, and the regulations include other requirements with respect to format, content, and disclosure of the Notice;
- establish a complaint procedure for individuals who believe their privacy rights have been violated and appoint a *Privacy Officer* to receive complaints and provide further information about privacy practices;
- train their workforce to comply with newly implemented policies and procedures that set out minimum necessary guidelines;
- hold members of their workforce accountable for violations of the policies and procedures that result in privacy breaches;
- document compliance with the Rule's requirements with a written or electronic record that must be maintained for at least six (6) years; and
- have Business Associate contracts in place if PHI is used or disclosed with anyone who performs a function or provides a service that may involve PHI disclosure.

Employer obligations. HIPAA's reach will affect your company if you provide health care coverage to your employees. How much your company needs to care about HIPAA depends on how involved your company is with providing health care coverage and if your company receives PHI in that role:

- An employer that receives PHI in its role as group health plan sponsor, to carry out plan administration functions, for example, must amend its plan documents and must agree to certain restrictions before it may receive PHI.
- An employer with a group health plan that provides benefits solely through

EMPLOYMENT LAW QUARTERLY

an insurance contract with an insurer or HMO that does not create or receive PHI is not subject to the Privacy Rule's administrative requirements.

Future installments of "Are you hip to HIPAA?" will cover other aspects of HIPAA compliance. If you need more information about how to get hip to HIPAA, please contact Helena Oroz at hjo@zrlaw.com or (216) 696-4441.

***Helena Oroz** is the newest member of Z&R's Employment and Labor Group. Helena practices in the areas of ERISA, HIPAA and COBRA compliance and litigation.*

YOU'RE BUSTED: *Ohio Supreme Court Strikes Statute Requiring Drug Tests for Injured Workers*

by Michele L. Jakubs*

The Ohio Supreme Court struck a statute that required workers injured in an employment-related accident to submit to a drug test at their employer's request. Under the statute, any injured employee who refused to take a drug test after an on-the-job injury was presumed to be intoxicated at the time of the injury.

The challenged statute related to Ohio's workers compensation laws. Under Ohio law, an injured worker cannot receive workers' compensation benefits if his/her injury resulted from intoxication. Under the challenged statute, a worker who refused his/her employer's request to submit to drug testing after an employment injury was rebuttably presumed to have been intoxicated when the injury occurred.

The Ohio AFL-CIO and the United Auto Workers of America filed an action seeking to prevent enforcement of this statute. The unions did not assert a specific harm, but contended that the statute could potentially harm their members.

The Ohio Supreme Court struck the regulation. In its opinion, the Court held that the drug testing requirement violated the Fourth Amendment of the U.S. Constitution and the Ohio Constitution, which prohibit unreasonable searches.

The regulation's drug testing requirement, according to the Ohio Supreme Court, fell squarely within the Fourth Amendment's definition of search. The Court then determined the reasonableness of drug testing after employment accidents.

The Ohio Supreme Court concluded that a worker's privacy interest outweighed the state's interest in preventing drug and alcohol use in the workplace. The Court faulted the general nature of the statute—all workers must submit to drug testing after a workplace injury.

By contrast, the cases that upheld suspicion-less drug testing concerned specific individuals with either a history of abuse or in a unique position that could create catastrophic results if under the influence of drugs or alcohol.

Although the Court's decision remains disturbing, the substantive ruling affects employers little. Employees who refuse to submit to state-mandated drug testing after an accident are no longer presumed intoxicated.

EMPLOYMENT LAW QUARTERLY

Employers, however, may still prove their case with effective drug policies and record-keeping.

For more information about effective workplace drug polices or the FLSA, please contact Michele Jakubs at (216) 696-4441 or mlj@zrlaw.com.

***Michele L. Jakubs** practices in the areas of labor relations, equal employment opportunity, employment discrimination, the Fair Labor Standards Act, and state wage and hour laws*

INTENTIONAL GROUNDING: *Ohio Supreme Court Redefines Intent for Employer Intentional Torts*

by Robert C. Hicks*

The Ohio Supreme Court redefined intent in the context of intentional employer torts. In *Gibson v. Drainage Products*, the court held that an injured worker did not need to prove that the employer expressly ordered the employee to perform a dangerous task. Rather, the employee need only show that the employer required him to engage in a dangerous task to maintain a cause of action for an employer intentional tort.

In *Gibson*, an employee's estate sued his former employer after he died in a workplace accident. The estate claimed that the employer's policies placed the employee in harm's way and ultimately caused his death.

According to other employees, the employer required an employee to seek other work after completing an assigned task. Following this procedure, the decedent attempted to help fellow employees repair a piece of machinery. Another employee previously shut down the machine after he noticed hot molten plastic leaking from the machine. While attempting to repair the machine, molten plastic spewed from the machine in question, killing the employee.

The Occupational Safety and Health Administration ("OSHA") cited the employer for numerous violations related to the employee's accident. Significantly, OSHA previously cited the employer for similar violations.

The trial court directed a verdict for the employer. The trial court held that the employee's estate did not prove the necessary elements to establish an intentional tort. The court of appeals affirmed, holding that the employee's estate failed to meet a different element of the intentional tort claim. The Ohio Supreme Court reversed the appellate court and remanded the case.

The Court recited the elements of an intentional tort claim. To establish an employer's intentional tort, an employee must demonstrate that the employer (1) knew about the existence of a dangerous condition; (2) knew that subjecting the employee to this condition was substantially certain to harm the employee; and (3) the employer required the employer to perform the dangerous task.

Addressing the third element of an employer intentional tort, the Court held that the employee need only prove that the employer knew about the dangerous condition and exposed the employer to that condition. The Court rejected the appellate court's

holding that the employee must prove that the employer expressly ordered the employee to engage in a dangerous task. Rather, the employee need only establish that the employer required the employee, through its actions and policies, to engage in the dangerous task.

Applied to the facts of this particular case, the court held that a jury could reasonably conclude that the employer's policy placed the employee in a dangerous position. The jury could find that the employee entered the accident area to offer assistance to a fellow employee or that he entered the area to search for his supervisor. Either determination by the jury would satisfy the third element of an employer intentional tort claim.

This case reasserts the Ohio Supreme Court's position that the intentional tort doctrine remain a viable alternative to injured employees. Due to the availability of punitive damages, intentional tort cases expose employers to substantial damages in excess of workers' compensation benefits.

In light of this holding, companies must scour their employment policies, keeping an eye toward potential workplace hazards. In addition, employers must take reasonable steps to ensure a safe workplace. Significantly, OSHA cited the employer in *Gibson* on prior occasions for not having a written program concerning the safety violations at issue. A well-written and enforced program would have saved this employer from extended litigation and possibly prevented injury in the first place.

For more information about employer intentional torts or OSHA, please contact Rob Hicks at (216)696-4441 or rch@zrlaw.com.

***Robert C. Hicks** practices in the areas of employment discrimination, wrongful discharge, unfair competition and occupational safety and health.*

MAKING WAIVERS: *Court Invalidates Employee's Waiver of FMLA Claims*

by Stephen S. Zashin*

In a surprising move, an Illinois district court held that the plain language of a Department of Labor ("DOL") regulation precluded an employee's waiver of her FMLA claims. As a result, the court invalidated the waiver.

The employer offered the employee a "stay bonus"–a lump sum amounting to half her yearly salary–to facilitate a management transition. The employee fulfilled the terms of the agreement, remaining with the company for an additional year. During that transition, however, the employee took 12 weeks of FMLA leave to adopt a child. As a result of that leave, the employer reduced the employee's bonus.

After her resignation, the employee signed a separation agreement, releasing all claims against her former employer. By signing the agreement, the employee specifically agreed to waive all existing or potential claims against her former employer.

Despite that agreement, the employee sued her employer, alleging that the bonus reduction violated the FMLA. Both parties moved for summary judgment. The employer

EMPLOYMENT LAW QUARTERLY

contended that the employee expressly waived her rights. The employee, on the other hand, claimed that the waiver violated the DOL's regulations. The court held that DOL regulations simply forbid employees from waiving their FMLA rights.

The regulation in question, 29 C.F.R. § 825.220(d), states that "employees cannot waive nor may employers induce employees to waive their rights under the FMLA." The court found only one other case addressing the regulation. In that case, a Texas district court upheld the validity of the DOL regulation preventing waivers of FMLA rights. According to the Texas court, the regulation was not an impermissible or unreasonable interpretation of the FMLA. The court applied the plain language of the regulation to forbid employee waivers of FMLA rights.

The Illinois district court followed suit, and set aside the employee's waiver of FMLA rights. The court then moved to the employee's substantive rights under the FMLA. The DOL's regulations extend FMLA protection to certain bonuses an employee would receive absent FMLA leave. Specifically, an employer cannot deduct from bonuses solely because an employee takes FMLA leave.

The court likened the employee's stay bonus to a perfect attendance bonus. As a result, the employee's FMLA leave did not disqualify her from receiving the entire bonus. Since the employee met her attendance requirements except for the FMLA leave, the employer could not deduct from her bonus. The court granted the employee's motion for summary judgment and awarded her the remaining portion of her bonus plus attorney's fees.

This decision casts a shadow of doubt across all employee releases. According to this district court, the DOL regulation precludes any waiver of FMLA claims. Consequently, an employee may be able to assert claims for FMLA violations despite an otherwise valid release and waiver.

***Stephen S. Zashin**, a member of Z&R's Employment and Labor Department, has extensive experience in all aspects of employment law, including state and federal anti-discrimination laws. For more information about the decision discussed in this article or any other aspect of the FMLA, please contact Stephen S. Zashin at ssz@zrlaw.com or (216) 696-4441.*

***Employment Law Quarterly* is provided to the clients and friends of Zashin & Rich Co., L.P.A. This newsletter is not intended as a substitute for professional legal advice and its receipt does not constitute an attorney-client relationship. If you have any questions concerning any of these articles or any other employment law issues, please contact Stephen S. Zashin at (216) 696-4441. For more information about Zashin & Rich Co., L.P.A., please visit our website @http://www.zrlaw.com. If you would like to receive the *Employment Law Quarterly* via e-mail, please send your request to ssz@zrlaw.com.**

Contributing Editor to Employment Law Quarterly: Robert W. Hartman