ECKERT SEAMANS

Spring 2010

ATTORNEYS AT LAW
www.eckertseamans.com | info@eckertseamans.com

Legal Update

In This Issue…

PITTSBURGH, PA
BOSTON, MA
CHARLESTON, WV
HARRISBURG, PA
PHILADELPHIA, PA
RICHMOND, VA
SOUTHPOINTE, PA
WASHINGTON, DC
WEST CHESTER, PA
WHITE PLAINS, NY
WILMINGTON, DE

Alternative Dispute Resolution

The risk of appealing an arbitration award


Charles F. Forer

"The bad news," Bob told client Anne, "is that the arbitrator rejected my argument regarding the interpretation of your contract with John." So started Bob's odyssey – and Anne's increasing legal fees – as Bob sought to have a court vacate the arbitration award in favor of John and against Anne in a rather routine contract dispute involving the calculation of a bonus that Anne paid to her former employee John.

Bob did have decent legal arguments. The arbitrator did not get it right in applying the payroll evidence rule under Pennsylvania law. Plus, the arbitrator ignored Anne's slam dunk argument that the contract gave John only 45 days to dispute his annual bonus award and that John's failure to do so precludes him from seeking an award recalculation.

continued on page 2

Labor and Employment

Rumors of the EFCA's death may be greatly exaggerated: While card check fervor may have faded, it's important now to understand the binding arbitration provision


Michael McAuliffe Miller

The Employee Free Choice Act ("EFCA") is again poised to retake a prominent place in our national debate. Indeed, John Sweeney, the President of the AFL-CIO, has indicated that Organized Labor would be willing to soften its previous insistence on the inclusion of the EFCA's "card check" provisions as part of a package that included first contract

continued on page 3

Alternative Dispute Resolution

(continued)

As Bob explained to Anne in the same conversation in which she complained about the "never ending" legal fees: "The arbitrator got it wrong on the law." There was one other motivation for Bob. He told himself that Anne was "entitled" to have a court review the arbitrator's award. "Is there any risk in appealing the arbitration award?"

In choosing arbitration, the parties bargain away lots of rights and opportunities – including the right to appeal legal errors – in return for the promise of a result that may not be legally perfect, but that has a more immediate end.

Because there was diversity of citizenship and because the amount in controversy in the arbitration easily exceeded $75,000, Bob filed a motion in federal court to vacate the award under the Federal Arbitration Act, 9 U.S.C. § 10.

It came as a surprise when the court denied the motion to vacate the arbitration award. Bob was peeved that the court did not even consider his carefully written and researched legal arguments. However, it came as a shock when the court, in part II of the opinion, concluded that Bob *personally* was liable to pay John's attorneys' fees in connection with the motion to vacate the arbitration award. Ouch.

As Bob complained to his partners, who may be jointly responsible to pay the court-awarded attorneys' fees: "What happened to a litigant's right to have a court consider its legal arguments? Does a court just look the other way when an arbitrator makes a mistake?"

What about Bob's asserted "right" to an appeal? To begin with, 28 U.S.C. § 1927 states as follows:

Any attorney or other party admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Where a case arises out of an arbitration award, Section 1927 takes on added significance because a court in reviewing an arbitration award is not only required to give extreme deference to the arbitrator's factual and legal determinations; the court also will not vacate an award due to the arbitrator's error in interpreting or applying the law – the very type of error that, according to Bob, tainted the arbitration award against Anne.

In granting a motion for attorneys' fees under Section 1927 against a party that made an arbitrator-got-it-wrong-on-the-law argument, the Tenth Circuit reiterated that arbitration "presents a narrow standard of review"; and, therefore, that one who "assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief that it will prevail does so at the risk of being sanctioned." *DMA International, Inc. v. Quest Communications International, Inc.*, 2009 U.S. App. LEXIS 24165 (10th Cir. Nov. 5, 2009). This and numerous other decisions throw cold water on Bob's theory that arbitrating parties have the right to appeal a legally erroneous award.

In choosing arbitration, the parties bargain away lots of rights and opportunities – including the right to appeal legal errors – in return for the promise of a result that may not be legally perfect, but that has a more immediate end. As the court in *DMA International, Inc. v. Quest Communications International, Inc.* recognized: "If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be honored sooner instead of later."

Bob went off the track in concluding that he needed only to convince the court to agree with his substantive legal arguments. In arbitration, the aggrieved party must show a lot more; "even a showing of clear error on the part of the arbitrator is not enough," said the Tenth Circuit in *DMA International, Inc. v. Quest Communications International, Inc.*

All of this means that a litigator in deciding whether to appeal from an arbitration award must consider whether the proposed appeal presents issues that merit overturning the arbitrator's decision *after taking into account the narrow standard of review and the deference that the court will give to the arbitrator.* Otherwise, the litigator – like Bob – could wind up not only losing on appeal, but also being hit in the pocketbook for filing a frivolous appeal that may be right on the substantive law, but wrong on the standard of review.

Does this warning apply only in federal cases? Nope. Pennsylvania state courts have been equally protective of arbitration. In language strikingly similar to the Tenth Circuit's warning in *DMA International, Inc. v. Quest Communications International, Inc.*, the Superior Court in *Gargano v. Terminix Int'l Co.*, 784 A.2d 188, 195 (Pa. Super. 2001), cautioned as follows:

Additionally, the arguments set forth by Appellant indicate that this appeal was taken solely for delay. As arbitration proceedings were instituted to provide the parties with a quick and easy mode of obtaining justice, we decline to allow arbitrations to become an unnecessary step in the course of litigation, causing delay and expense, but settling nothing finally.

This article previously appeared in The Legal Intelligencer*.*

Charles F. Forer is a Member in the Philadelphia office where he is engaged in all types of Alternative Dispute Resolution. He can be reached at cforer@eckertseamans.com.

Labor and Employment

(continued)

> *"The EFCA's mandatory first contract arbitration provisions, if enacted, have the potential to eliminate one of the most fundamental assumptions that underlie American labor policy—the right to say no."*

binding arbitration. This is cold comfort as mandatory first contract binding arbitration has the potential to be more disruptive to the workplace than even the EFCA's oft-reviled card check provisions.

Like all laws, the National Labor Relations Act ("NLRA") is based on certain fundamental assumptions. These assumptions form the foundational pillars around which a body of law can be built. The EFCA's mandatory first contract arbitration provisions, if enacted, have the potential to eliminate one of the most fundamental assumptions that underlie American labor policy—the right to say no. As the Supreme Court noted 72 years ago, a "free opportunity for negotiation… is likely to promote industrial peace and may bring about the adjustment and agreements which the [NLRA] in itself does not attempt to compel."

[T]o bargain collectively is the performance of the mutual obligation… to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder…" 29 U.S.C.A. § 158(d). While Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to refuse to bargain with an employees' union and Section 8(b)(3) makes it unlawful for a union to likewise refuse to bargain with an employer, there is no section of the NLRA which precisely defines those subjects over which the parties in a collective bargaining relationship must bargain. 29 U.S.C.A. § 158(a)(5) and 8(b)(3). Further, under Section 8(d) of the NLRA, the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C.A. § 158(d).

As currently constituted, the EFCA would amend Section 8 of the NLRA in two significant ways: 1) the EFCA would permit an arbitration panel to define the amount and number of issues in any first contract imposed by award; and 2) would truncate the long recognized right to say no to the other side's proposals by empowering a panel of arbitrators to award a first contract.

Once a newly certified representative files a written request for collective bargaining, the EFCA would require parties to commence bargaining for new contract within ten days. Failure to reach an agreement within 90 days would permit either party to notify the Federal Mediation and Conciliation Service ("FMCS") of the existence of a dispute and request mediation.

FMCS then would have the duty to use its best efforts, by mediation and conciliation, to bring the parties to agreement. If an agreement is not reached within 30 days, FMCS would refer the dispute to an arbitration board. The arbitration panel would then render a decision settling the dispute and such decision would be binding on the parties for two years (unless amended during such period by written consent of the parties).

One of the premises underlying compulsory first contract arbitration is the idea that first contracts are difficult to reach and that arbitration will level the playing field and serve as an impetus for parties to reach agreement. A closer analysis belies the truth of that premise.

First, the experience of lawyers in states like Pennsylvania which requires compulsory contract arbitration for, *inter alia*, public safety personnel who are prevented from striking demonstrates that arbitration does not encourage negotiations. To the contrary, since compulsory arbitration is available if the parties get stuck at the negotiating table, there is little incentive to amend one's position to reach an accord. Unions often conclude that they will get something more through arbitration and, therefore, see little advantage to making concessions or forging innovative proposals designed to reach majority support.

Second, there is a belief that compulsory arbitration will shorten the time necessary to reach agreement on a first contract. However, the EFCA's prescription is not matched to any consistent underlying diagnosis.

The usual justifications for this provision include claims that employers drag their feet during negotiations presumably as retaliation for the certification of an exclusive representative. Often EFCA supporters suggest that employers seek to frustrate negotiations deliberately in an attempt to seek to oust the union after the conclusion of the first year's presumption of majority status in favor of the union.

For the employers' part, unions are accused of making outlandish promises during an organizing campaign which are not obtainable at the bargaining table even after good faith negotiations. Further, there is a shared supposition that the employer has an advantage at the table during first contract negotiations based on some greater sophistication or access to a greater level of professional support.

Honest, good-faith bargaining requires time. Where there is exists a mature bargaining relationship extending over several contracts, the parties engage in bargaining over a finite set of issues

continued on page 5

Social Marketing

The value of social media tools for legal marketing

Gregory H. Teufel

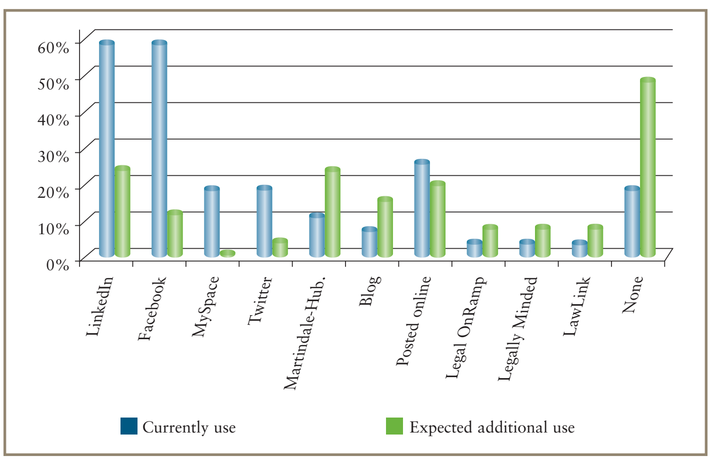
We hear a lot about the dangers and pitfalls of using social media tools. We also hear about the value of social media tools, but usually only from the promoters of the various tools. We have precious little information about perceptions of value from lawyers that use social media tools for marketing. A recent survey done by 360 Intelligent Marketing sought to learn something about that, and turned up some interesting results.

Roughly 60 lawyers, including judges, public (government) attorneys, and private practice attorneys from the Pittsburgh Chapter of the American Inns of Court were recently surveyed about their use of social media tools and how valuable they viewed social media tools in relation to other more traditional methods of marketing. Some, such as judges and public attorneys, tended not to use social media tools at all. Others reported extensive use of social media tools of all kinds. So their views as to the value of social media tools varied considerably.

What are Social Media Tools?

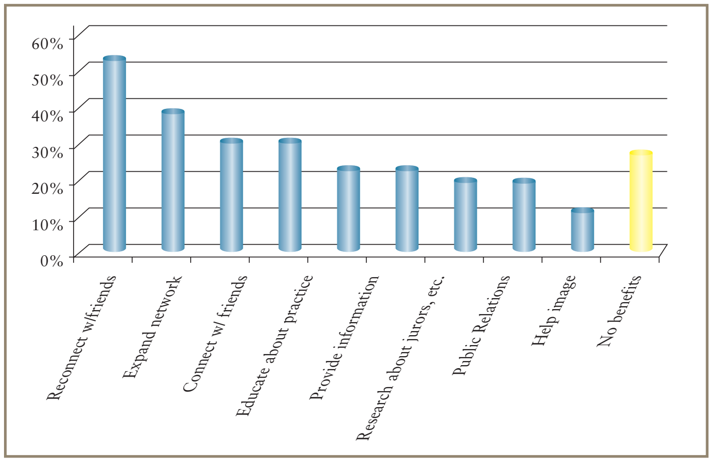
Social media tools are internet-based applications that allow the creation and exchange of user-generated content, such as blogs, online forums, and professional and social networking tools. Some of the more commonly known ones are LinkedIn, Facebook, and Twitter. Increasingly, lawyers have begun creating their own blogs, setting up profiles on networks like LinkedIn, and participating in online forums by posting and responding to articles, comments, questions, and answers. Some social media tools are geared toward lawyers specifically, while others are more general use oriented.

Some Clear Winners



Roughly 60% used **LinkedIn** or **Facebook**, the two most used social media tools among the lawyers surveyed. LinkedIn was rated as more valuable to their practices than Facebook. Though a much smaller number of lawyers used Martindale-Hubbell Connected (a relative newcomer to the social media scene, geared specifically toward lawyers), those who did use that tool rated its value higher than the users of LinkedIn and Facebook rated those tools in terms of value to their practice. Blogging, using forums, and using LinkedIn and Martindale-Hubbell Connected were the social media tools with the most expected benefit in the future.

Benefits Identified



In identifying the ways in which Social Media tools helped their practice, the responding lawyers indicated the top ways were in (1) helping reconnect with former friends, classmates, and colleagues, (2) helping stay up to date and connected with friends, classmates, current and former colleagues, clients and potential clients, and (3) in helping expand networks and spheres of influence. However, only **23 percent reported that social media tools actually helped them generate new business**. Other benefits cited included:

- Helping educate others about one's practice (strengths, experiences, and areas of expertise, and the type of referrals sought);
- Helping research information about jurors, witnesses, parties, or experts, providing information regarding friends, classmates, current/former colleagues, employees, clients and potential clients;
- Helping with image; and
- Helping with public relations.

On the other hand, **roughly 30 percent saw no benefit to their practice from social media tools**.

Traditional Tools Valued More

Despite those benefits, the lawyers surveyed indicated that other, more **traditional marketing tools were more valuable to their practice**. Social media tools were seen less valuable than publishing books and articles, teaching and attending seminars, advertising, networking events, client and potential client entertainment (lunches, sporting events, etc.), and sending legal updates and items of interest to clients and potential clients. Of those, attending networking events was rated the highest in terms of value to practice. Though social marketing tools were viewed as less valuable than traditional marketing tools, one respondent commented, "Social media tools are a nice complement to other marketing efforts and enhances the benefit of those efforts and vice versa."

No Transformation of Legal Marketing Just Yet

If these survey results are any indication, social media tools have not quite yet transformed the way lawyers do marketing or directly generated business for many lawyers. There is still a lot of **skepticism among lawyers about the value of social media tools** as compared to more traditional marketing methods. Nevertheless, among those who have taken the plunge and begun using social media tools for legal marketing, some clear and significant benefits are starting to be identified.

Gregory H. Teufel is a Member in and Co-Chair of the Dealership and Franchise Law Group. He can be reached at gteufel@eckertseamans.com.

Labor and Employment

(continued)

designed to amend the existing agreement. However, the more subjects over which parties bargain necessarily means that more time is required.

Unlike a mature bargaining relationship, a first contract requires parties to evaluate almost every aspect of the employer-employee relationship. Decisions must be made both over well established subjects such as pay, leave time and benefits, as well as matters which are new to the employer-employee relationship such as fair share membership, "union shop" provisions and the establishment of a grievance procedure.

The problem with the EFCA's mandatory arbitration procedure is that seeks to impose an "off the rack" solution onto a problem that, as the drafters of the NLRA recognized, requires a great deal of tailoring to individual circumstances. Further, the current draft of the EFCA delegates to FMCS and the panel of arbitrators a practically unfettered right to impose terms on almost any conceivable subject.

It is a truism that once a term or a benefit is contained within a collective bargaining agreement and the parties rely upon it, the possibility of negotiating that provision out decreases with the passage of time. The very risk inherent in the current version of the EFCA is that an arbitration panel will impose a term odious to either labor or management which will negatively affect the parties' ability to either bargain in subsequent contracts or continue operations.

It is entirely possible that, under such a scenario, a union will enjoy the benefits of a first contract and reap the whirlwind when the obligation to arbitrate is no longer present for subsequent contract. At that juncture, it will be difficult for union representative to explain why benefits improvidently granted in arbitration but relied upon by members must be given back in whole or in part. This, in turn, will likely lead to greater disruptions in the form of difficult successor contract negotiations and possible strikes as the parties adjust to a period of hard bargaining occasioned by a poorly drafted first contract.

As written, the EFCA's arbitration provisions are overbroad and need to be reworked because they are inconsistent with the NLRA's fundamental tenant which permits any party to negotiations to say no to those terms which are antithetical to its core business practices. There may be compromises available, for instance, rather than mandatory arbitration, the appointment of a fact finder who could issue a non-binding draft contract might serve a salutary purpose towards reaching a first contract. The alternative – turning over the power to decide wages, benefits, hours, and conditions of employment to an arbitrator with no institutional knowledge of an employer's business practices – will simply lead to greater union-management strife.

This article previously appeared in the National Law Journal*.*

Michael McAuliffe Miller is a Member in the Labor and Employment Group in the Harrisburg, Pennsylvania office. He can be reached at mmiller@eckertseamans.com.

Firm News

Eckert Seamans continues to grow and has added to several of its practice areas. The following attorneys and professionals have recently joined the firm.

Members

David W. Clarke joins the Richmond, Virginia office. He blends general counsel representation of a variety of business interests with emphasis on government, administrative law, telecommunications, insurance and real estate. His experience includes handling matters involving the regulation of and transactions for telecommunications, energy, insurance, and health care companies. David represents client interests before the Virginia General Assembly, the State Corporation Commission and various executive department agencies. He earned his J.D., *cum laude*, from the University of Richmond School of Law and his undergraduate degree, with honors, from the University of Virginia.

John A. Filoreto rejoins the Philadelphia office as a Member in the Litigation Division. His practice is concentrated on all aspects of the defense of medical malpractice claims, ranging from the defense of a single physician to entire hospital systems involving multiple physician and paraprofessional employees as well as complex administrative issues that affect hospitals and hospital systems. John earned his J.D. from the Widener University School of Law and his undergraduate degree from The Pennsylvania State University.

Gerit F. Hull joins the Washington, D.C. and Richmond, Virginia offices. He represents electric industry clients before the FERC, FCC, state commissions and in state and federal courts with respect to transactions, rate cases, rulemakings, licensing, regulatory compliance, complaint proceedings, and investigations. Prior to entering private practice, Gerit served as in-house counsel to PacifiCorp and to U.S. DOE Bonneville Power Administration. He earned his LL.M. in environmental law from Lewis and Clark Law School, his J.D. from George Washington University Law School and his undergraduate degree from Hiram College.

Matthew B. Kirsner joins the Richmond, Virginia office. He is the Member-In-Charge of the firm's newly established Richmond, Virginia office. He represents clients in energy and telecommunications litigation, broker/dealer disputes and compliance advice, trade secret litigation, class action defense, antitrust investigations and litigation, commercial leasing disputes, fiduciary litigation, and regulatory proceedings before state and federal agencies. Matt earned his J.D. from George Mason University School of Law and his undergraduate degree from the College of William and Mary.

Raymond A. Kowalski joins the Washington, D.C. and Richmond, Virginia offices. Ray Kowalski serves as regulatory and litigation counsel to electric and telecommunications companies in a wide variety of Federal Communications Commission and other regulatory and litigation contexts. Prior to entering private practice, Ray served for 20 years in the Federal Communications Commission in the Broadcast and Private Radio Bureaus (now known as the Media and Wireless Telecommunications Bureaus). He earned his J.D., *cum laude*, from George Washington University Law School and his undergraduate degree, *cum laude*, from St. Bonaventure University.

Thomas A. Lisk joins the Richmond, Virginia office. He focuses his practice on regulatory matters before agencies, boards and commissions of the Commonwealth of Virginia including the State Corporation Commission. In addition, he is a registered lobbyist in Virginia, providing legislative representation of business interests and trade associations before the Virginia General Assembly. Tom previously served as chairman of the Industry Advisory Panel to the Virginia Alcoholic Beverage Control Board and as a member of the Industry Task Force to the Virginia Code Commission. He earned both his J.D and undergraduate degrees from Washington & Lee University.

Richard L. Savage, III joins the Richmond, Virginia office. He focuses his practice on administrative law and government relations. He previously served the Commonwealth of Virginia as Chief Counsel to the Attorney General, Deputy Attorney General and Executive Director of the Virginia State Crime Commission, instrumental in the passage of over 220 pieces of legislation on topics such as: telecommunications, taxation, banking, education, racketeering, money laundering, healthcare, prescription drugs, economic development, consumer protection and transportation. He earned his J.D. from the Wake Forest University School of Law, M.B.A. from the College of William and Mary and undergraduate degree from Radford University.

Eric J. Schwalb joins the Washington, D.C. and Richmond, Virginia offices. He provides counsel to businesses in multiple industries, including electric and telephone utilities, transportation and shipping companies, telephone and telecommunications companies, as well as broadcasters and manufacturers. His practice entails the provision of regulatory advice and counsel in a myriad of corporate matters, as well as representation before state and federal courts and government agencies. He earned his J.D. from the Georgetown University Law Center and his undergraduate degree, *summa cum laude*, from Saint Louis University.

Marjorie K. Shiekman joins the Philadelphia office as a Member in the Litigation Division. Her practice is concentrated in the field of product liability defense, with a particular emphasis in pharmaceutical and tobacco mass tort litigation. Marjorie earned her J.D. from the University of Pennsylvania Law School, her M.S. from the Penn Graduate School of Education and her undergraduate degree, *cum laude*, also from the University of Pennsylvania.

Charles A. Zdebski joins the Washington, D.C. and Richmond, Virginia offices as the Co-Chair of the firm's Utilities and Telecommunications Group. He serves as litigation, regulatory and transactional counsel to energy and telecommunications companies on varied issues of infrastructure and facilities deployment, operations and access. Charlie earned his J.D., with honors, from the George Washington University Law School and his undergraduate degree, also with honors, from Harvard University.

Associates

Trudy E. Fehlinger joins the Harrisburg office as an Associate in the Litigation Division. She concentrates her practice on civil litigation, with primary focus on product liability, personal injury defense and complex litigation. Prior to joining the firm, Trudy served as a judicial law clerk to The Honorable John C. Uhler of the York County Court of Common Pleas. She earned her J.D. from The Dickinson School of Law of The Pennsylvania State University, and her undergraduate degree, *summa cum laude*, from King's College.

Raj A. Shah joins the Charleston office as an Associate in the Litigation Division. His practice is focused in the areas of toxic tort defense, insurance defense, product liability and general defense litigation. Prior to joining the firm, Raj served as a judicial extern for The Honorable Robert B. King of the U.S. Court of Appeals for the 4th Circuit. He earned his J.D. from the University of Denver Sturm College of Law and his undergraduate degree from Indiana University.

Louis A. DePaul joins the Pittsburgh office as an Associate in the Litigation Division. He represents various clients in complex commercial litigation matters, bankruptcy and collection matters, real estate transactions and employment disputes. Lou earned his J.D. from the University of Pittsburgh School of Law and his undergraduate degree from Carnegie Mellon University, with highest honors.

Riyaz G. Bhimani joins the White Plains office as an Associate in the Litigation Division. His practice covers a wide range of complex and commercial litigation matters, including partnership and shareholder disputes, improper business practices, intellectual property, fraud, RICO, defamation, employment agreements and restrictive covenants. Riyaz earned his J.D. from Pace University School of Law and his undergraduate degree from the University of Michigan.

Jessica Priselac joins the Pittsburgh office as an Associate in the Litigation Division. Her practice is concentrated in commercial and product liability litigation matters. Prior to joining the firm, Jessica served as a law clerk to The Honorable Nora Barry Fischer in the United States District Court for the Western District of Pennsylvania. She earned her J.D. from Emory University School of Law, her M.A. from Johns Hopkins University School of Advanced International Studies and her undergraduate degree from Dickinson College.

Government Relations

May H. Fox, a non-lawyer professional, joins the firm's Richmond, Virginia office as the Director of Government Relations. She has extensive bi-partisan experience representing clients before the Virginia General Assembly on issues ranging from pharmacy benefits to alcoholic beverage control, to conservation and the environment. May has served in a range of policy positions, including such roles as the founding Executive Director of the Virginia Association of Health Plans, Deputy Secretary of Administration and Deputy Secretary of Health and Human Resources. She earned her Masters in Health Planning and Administration from Boston College and her undergraduate degree from Sweet Briar College.

Nicole A. Riley, a non-lawyer professional, joins the firm's Richmond, Virginia office as a Government Relations Specialist. She represents clients before the Virginia legislature and state agencies on issues related to retail sales, tourism, health insurance, and energy. Previously, Nicole directed the legislative efforts for current Governor Bob McDonnell while he was Attorney General. She earned her undergraduate degree from Roanoke College.

Lisa A. Foster, a non-lawyer professional, joins the firm's Richmond, Virginia office as a Government Relations Coordinator. She assists clients in planning and implementing successful governmental strategies by tracking legislation, lobbying, conducting research, monitoring campaign finance and lobbyist compliance. Lisa earned her undergraduate degree from Virginia Commonwealth University.

Employee Benefits

Does your health and wellness plan violate GINA?

The Genetic Information Nondiscrimination Act (GINA), which took effect November 21, 2009, was designed to prohibit the improper use of genetic information in health insurance and employment-related decisions. GINA prohibits group health plans and health insurers from denying coverage to a healthy individual or charging that person higher premiums based solely on a genetic predisposition to developing a disease in the future. The legislation also bars employers from using individuals' genetic information when making hiring, firing, job placement, or promotion decisions.

In addition to these workplace concerns, the GINA provisions could also place big hurdles in the path of workplace wellness programs, in which employers often rely on family health histories to help employees make lifestyle decisions to improve their physical health and well-being, and to ward off disease and disability.

Many employers did not understand or anticipate the full impact of GINA until this fall, when three federal agencies jointly issued regulations explaining its implementation.

Changes Under GINA

GINA prohibits group health plans and insurers from collecting any genetic information in connection with plan enrollment or prior to an employee's effective date of coverage in a plan. In addition, the law prohibits the use of genetic information when setting health insurance rates.

The final interim regulations went into effect on January 1, 2010. Issued by the departments of Labor, Health and Human Services, and Treasury, the regulations clarify that "genetic information" includes the results of genetic tests and family medical history and that the term "group health plan" includes wellness programs.

Until the regulations came out, it wasn't abundantly clear that GINA applied to wellness programs, which is, by and large, where this genetic information is collected.

Previously, when enrolling employees in a wellness program, employers could include questions on health risk assessments (HRAs) about whether participants had a family history of medical conditions.

Under GINA and its implementing regulations, however, employers may no longer ask those questions during enrollment in a group health plan, including wellness programs. Many employers are unhappy about this development because those questions were a big part of identifying potential health risks for their employees.

After enrollment, employers can still ask employees to answer questions about family medical history on a voluntary basis.

In a related matter, employers should be wary of another potential legal problem pertaining to wellness programs. The Equal Employment Opportunity Commission (EEOC) has issued informal opinion letters, stating that employers could run into trouble with the Americans with Disabilities Act (ADA) if completion of an HRA or participation in a wellness program is tied to a reward that is too large such as an overly generous employer subsidy for healthcare premiums.

What to Do

Given the provisions of GINA, its implementing regulations, and the EEOC's stance on large rewards for participation in wellness programs, employers must first decide whether to continue their wellness programs. Some employers who relied heavily on collecting family medical history information during enrollment and on large rewards have discontinued their programs, but they are in the minority.

Employers should consider the following solutions:

Review wellness rewards. Obviously, before instituting any reward, employers should review the reward with legal counsel.

Employers will need to keep an eye on these continuing developments and evaluate whether their wellness programs need any modification due to changing regulations. However, employers should not be scared away from implementing a wellness program. This kind of creative problem solving is what is necessary today for businesses looking to minimize costs and remain competitive.

– Sandra R. Mihok
Employee Benefits Group

ECKERT SEAMANS

Pittsburgh, PA 412.566.6000
Boston, MA 617.342.6800
Charleston, WV 304.346.5500
Harrisburg, PA 717.237.6000
Philadelphia, PA 215.851.8400
Richmond, VA 804.758.7760
Southpointe, PA 724.873.2870
Washington, DC 202.659.6600
West Chester, PA 610.738.8850
White Plains, NY 914.949.2909
Wilmington, DE 302.425.0430