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Legal Update

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❑ **Indiana Supreme Court Clarifies Enforceability of Physician Non-Competes**

The Indiana Supreme Court recently handed down its first physician covenant not to compete case in nearly twenty-five years. The decision provides helpful guidance for employers seeking to enforce non-compete agreements in the healthcare industry.

Non-compete agreements are disfavored in Indiana. In order for them to be enforceable, they must be reasonable. An employer seeking to enforce a non-compete agreement must first show that it has a legitimate interest to be protected by the non-compete agreement. Then, the employer must go on to show the non-compete agreement is reasonable in its scope as to time, activity and geographic area restricted.

In this case, the employer, a podiatry practice, had an employment agreement with a doctor that included a non-compete clause preventing the doctor from practicing podiatry for two years in an area defined as fourteen

listed central Indiana counties where they maintained offices, as well as all counties adjacent thereto. On July 25, 2005, the practice terminated the doctor. Two months later, the doctor began working for a competitor in Hamilton County, about ten minutes away from one of the practice's offices in Indianapolis. The practice sued to try to stop the doctor from competing with them. Ultimately, the Supreme Court found that the practice demonstrated a legitimate interest in preserving patient relationships developed with its own resources. It found the geographic scope of the non-compete agreement to be unreasonably broad, however, because there was no evidence that doctor had worked in any counties other than Marion, Tippecanoe and Howard in the final two years of his employment. In short, the Court refused to enforce the non-compete agreement outside of the areas in which the doctor, himself, developed patient relationships, even though the practice had other offices throughout the area covered by the non-compete agreement.

There are several important things to learn from this case. First, physician non-compete agreements are still valid in Indiana. Although this is not a new position by the Indiana Supreme Court, there was some speculation that this may no longer be the case based on the actions of several other states which now consider them to be void because of the potential for negative impact on patients.

Second, even though the Court found the non-compete to be unenforceable, it was able to salvage part of the non-compete clause by using the "blue pencil" doctrine. Because the Agreement specifically listed particular counties by name, the Court was able to strike all of them but Marion, Tippecanoe and Howard counties to create a reasonable and enforceable restriction. The Court also found it necessary to strike the language extending the non-compete agreement to "adjacent" or "contiguous" counties. The Court reasoned that even though the doctor may have developed patient relationships that crossed county lines, there was no evidence to suggest that there was a substantial number of patients developed in all contiguous counties or at their furthest reaches. The import in the court striking entire counties is two-fold. First, it indicates where whole counties are used as the basis of the scope of non-compete agreements, employers will have the burden to demonstrate that their interests and the reasonableness of such non-compete agreements extend

over the entire county. Consequently, restrictions which are measured by mileage from locations and set well within the patient base of a particular physician and location may be more likely to be found reasonable.

Finally, the Court highlighted two supplemental things health care employers can do to better position themselves to enforce non-compete agreements. One has to do with some contractual language that the practice included in the agreement which said that the practice could enforce the non-compete even if the doctor had filed his own breach of contract action. Normally, employers may not enforce non-competes if they have breached the employment agreement themselves. The Court also found it significant that the practice notified its patients of the doctor's departure and had an adequate number of qualified physicians available to meet those patients' health care needs. This fact cut strongly against any suggestion that the public would be harmed if the practice's non-compete agreement was enforced. The lesson here is that health care employers who want to enforce a non-compete agreement should act promptly to notify patients and maintain staff sufficient to provide for their needs.

Central Indiana Podiatry, P.C. v. Kenneth Krueger and Meridian Health Group, P.C., (Indiana Supreme Court 2008).

❑ **New State Law Requires Indiana Employers to Provide Lactation Support in the Workplace**

Beginning July 1, 2008 most Indiana employers will be required to provide their employees who are nursing mothers a private place to express breast milk and a cold place to store it on the employer's premises. This law, Senate Enrolled Act 219, was signed by Governor Daniels on February 28, 2008 and contains slightly different requirements for governmental employers and private employers who have 25 or more employees. Covered employers should plan to meet the requirements of the law by the effective date by assuring that private locations are available, cold storage issues are addressed and break policies are reviewed and revised as necessary.

Governmental employers - The section that applies to governmental employers adds a new section to the Indiana Code, IC 5-10-6-2, that provides that the state and political subdivisions of the state must provide

"reasonable paid break time each day" to an employee who needs to express breast milk for the employee's infant child. The break time must, "if possible," run concurrently with any break time already provided to the employee. Break time need not be provided under this section if doing so would "unduly disrupt the operations" of the governmental employer.

In addition, the governmental employer must "make reasonable efforts" to provide: (1) a room or other location, other than a toilet stall, in close proximity to the work area, where an employee can express the employee's breast milk in privacy; and (2) a refrigerator or other cold storage space for keeping milk that has been expressed. Liability can be avoided if a reasonable effort to comply with the law is made.

Private employers with 25 or more employees - The section that applies to private employers adds a new chapter to the article on wages, hours and benefits of the Indiana Code, IC 22-2-14, entitled "Employee Breaks." This section covers persons or entities that employ 25 or more employees. Covered employers, "to the extent reasonably possible," must provide: (1) a private location, other than a toilet stall, where an employee can express the employee's breast milk in privacy during any period away from the employee's assigned duties; and (2) a refrigerator or other cold storage space for keeping milk that has been expressed; or allow the employee to provide the employee's own portable cold storage device for keeping milk that has been expressed until the end of the employee's work day. The section also provides that, except in cases of willful misconduct, gross negligence or bad faith, a covered employer will not be liable for any harm caused by or arising from either the expressing of an employee's breast milk or the storage of expressed milk that occurs on the covered employer's premises.

Employers should take this opportunity to review existing facilities and to make plans to comply with these new requirements. Policies regarding break time should also be reviewed and revised, if necessary, to address the issue of accommodating nursing mothers' needs in the workplace.

Senate Enrolled Act 219;

<http://www.in.gov.legislative/bills/2008/SE/SEO219.1html>

□ New Federal Law Will Make Genetic-Based Employment Discrimination Unlawful

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act ("GINA") of 2008. This new federal law, which will become effective on November 21, 2009 and will be enforced by the EEOC, is intended to prevent intentional misuse of genetic information by employers and health insurers. GINA covers both public and private employers with at least 15 employees, and was modeled after existing federal anti-discrimination laws. It prohibits employers from discriminating against employees, applicants or their family members based on their genetic information, and from retaliating against any individual who opposes any act or practice made unlawful by GINA or who cooperates in any investigation, proceeding, or hearing conducted pursuant to GINA.

Specifically, GINA: (1) prevents employers from using genetic information when making employment decisions; (2) limiting, segregating or classifying employees based on their genetic information in such a way as to deprive them of employment opportunities or adversely affect their employment status; (3) requesting, requiring or purchasing an employees' or their family members' genetic information (absent one of the prescribed exceptions); or (4) disclosing an applicant's or an employee's genetic information, except under certain conditions.

The EEOC is required to enact final regulations to carry out GINA's employment-related provisions by no later than May 21, 2009. In the meantime, covered employers should begin planning to update their nondiscrimination policies and procedures to ban genetic-based discrimination and harassment. They should also incorporate GINA into existing orientation and training programs to make all employees, particularly managers and supervisors, aware of GINA and their employer's plan to comply with it.

P.L. No. 110-233; [\[H.R.493.ENR\]](#).

❑ **Congress Considering Expanding Scope of ADA**

In addition to the new changes to the FMLA that are coming, Congress is in the process of considering a new law called the "ADA Restoration Act" which, if passed, would considerably expand employee protections under the ADA. The bill, which has enjoyed substantial bipartisan support in the House of Representatives, but less so in the Senate or White House, would redefine "disability" to include "a physical or mental impairment" or "a record of a physical or mental impairment" or "being regarded as having a physical or mental impairment." If passed, this bill would effectively overrule a series of United States Supreme Court decisions which have narrowed the definition of disability to include only impairments that "substantially limit one or more major life activities." Employers could also no longer consider the effects of mitigating measures such as, for example, glasses/contacts, other medical devices or prescribed medications, when determining whether individuals are disabled.

So far, the United States Justice Department and several pro-business groups have voiced their opposition to the ADA Restoration Act, arguing that nearly everyone would be considered "disabled" under this new standard which would massively increase risk of employee terminations as well as the burden of providing reasonable accommodations. Many believe that the complexity of the ADA will make passage of the ADA Restoration Act extremely unlikely. If true, that's good news for employers, but the status of this bill should be monitored nevertheless. Those who are truly concerned about the potential negative effects of this bill should consider contacting their Congressperson or Senator to voice their opposition.

See Proposed ADA Restoration Act, H.R.3195 and S.1881

❑ **Supremes Pass on Opportunity to Clarify Job Reassignments Under the ADA**

The Supreme Court recently decided not to hear a widely anticipated case that could have set the correct standard to apply in ADA situations where an employee seeks a job reassignment to a new position as a reasonable accommodation. The question centers on whether such an

employee should merely be allowed an opportunity to compete with other applicants in the normal hiring pool, or should the employer be forced to grant the reassignment even over more qualified applicants.

Statutory language from the ADA states the scope of reasonable accommodation may include: job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Currently, there is a split among the federal courts of appeals on this issue. The 7th and 8th Circuits take the more employer friendly approach which allows employers to rely on their policies of always hiring the most qualified applicants. It follows that disabled employees who request a transfer as a reasonable accommodation must only be permitted to compete with other applicants for open positions. The 10th Circuit and District of Columbia take the counter viewpoint, arguing that if the reassignment language under the ADA merely requires employers to *consider* the disabled applicant for open positions, then the language adds nothing to the prohibition against discrimination and would be redundant. Other Circuits have not yet ruled and were likely disappointed that no clarification is forthcoming.

The Supreme Court's decision not to hear this case means employers in many parts of the country are left to wonder how their federal court of appeal will decide this issue. Indiana employers should still consider job reassignment for as reasonable accommodations whenever employees with disabilities are no longer able to perform their existing jobs. They can take comfort, though, in the fact that the 7th Circuit does not expect them to give preferential treatment where it would result in a better qualified individual being passed over.

Huber v. Wal-Mart Stores, Inc., (U.S. 2008) (denying cert.)
EEOC v. Humiston-Keeling, Inc., (7th Circuit 2000)

□ DOL Opinion Letter: Pro-rating Minimum Salary for Part Time Exempt Employees Not Allowed

To qualify for exemption from minimum wage and overtime under the Fair Labor Standards Act, employees must perform certain duties and also be paid on a "salary basis" as that term is defined under the law. Part of meeting the "salary basis" test is being paid a certain minimum salary amount. Currently, that minimum salary equals \$23,660 annually, or \$455 per week. Any employee who is paid less than this minimum amount would have to be classified as non-exempt and would, therefore, be eligible for overtime pay for all hours over 40 in a workweek.

Recently, the federal Wage and Hour Division of the U.S. Department of Labor released an Opinion Letter on the topic of pro-rated salaries for exempt employees. Specifically, the Opinion Letter addressed whether the employer could pro-rate the minimum salary of an otherwise exempt employee to reflect his normal workweek of 20 hours. The employer desired to pay the employee an annual salary of \$15,000. In its Opinion Letter, the Wage and Hour Division stated that there is no provision in the law that would allow the salary requirement to be pro-rated when an employee works a reduced schedule. In short, the employee must receive at least \$455 per week in any week in which he performs work in order to qualify for the exemption, regardless of the number of days or hours he actually works in that week. Of course, a non-exempt employee may be paid a salary of under \$455 per week as long as the amount of the salary paid when divided by the actual number of hours worked equals the equivalent of at least \$5.85 per hour.

Practically speaking, most part time salaried employees will not be working over 40 hours in a workweek very often, so the potential for overtime exposure may be low. Employers should be aware, however, that any part-timers that are paid a salary of less than \$455 per week will be entitled to overtime pay in any workweeks in which they work more than 40 hours.

DOL Opinion Letter, FLSA2008-1NA, February 14, 2008

❑ Age Discrimination – Employer Could Not Rely on Inaccurate Job Description

The 7th Circuit recently vacated a summary judgment ruling at the lower court in favor of an employer who transferred a 51-year-old material handler to another position because he could not perform all of the duties listed in his written job description. The employee, Barry Duncan, had worked for the employer for 20 years, 15 of which were as a material handler. In 2004, when he was 41 and not long after he injured his back lifting a 60-70 pound box, Duncan was told by his employer that he could no longer work as material handler and offered several less desirable jobs. Eventually, he accepted a position as an assembler which offered less opportunities for overtime. He sued claiming age and disability discrimination, but later dropped the disability claim.

The employer explained its decision to remove Duncan from the material handler position by stating he could not meet the lifting demands listed in the job description. Specifically, the job description says material handlers must be able to lift "97 pounds occasionally" and "73 pounds frequently." Duncan testified that these requirements are inaccurate and that he had consistently demonstrated his ability to meet the employer's expectations. Indeed, he never missed a shift during the time he was working under lifting restrictions, and after his doctor lifted the restrictions, he performed the same work as all of the other material handlers. The employer did not dispute that Duncan was meeting their job expectations. Nor did it contest the fact that material handlers do not lift extremely heavy items without the help of machines or coworkers. Further, the employer offered no evidence that it had ever relied on the job description to justify the denial of employment opportunities for anyone else.

The 7th Circuit found a logical inconsistency in the employer's stated reason for removing Duncan from the material handler position. Specifically, arguing that Duncan was unable to meet the physical demands of the paper job description could not be reconciled with the fact that the company admitted he was meeting their performance expectations. The only way these positions could both be true is if the job description did not

accurately reflect the employer's expectations. The Court found that was the case here.

This decision should be taken as important reminder to employers not to deny job opportunities to older workers just because of their age, and that if job descriptions are going to be relied upon to justify adverse employment actions, the employer should take care to ensure that the job descriptions actually represent the employer's legitimate performance expectations.

Duncan v. Fleetwood Motor Homes of Indiana, Inc., (7th Cir. 2008)

❑ **"Love is the Loser" in Recent 7th Circuit "Nonfraternization" Case**

An African-American management employee, Gerald C. Ellis, filed a discrimination claim against UPS after he was fired for fraternizing with an hourly employee. Specifically, Ellis claimed he was fired after his supervisors discovered he was dating and eventually married a white woman who worked in UPS' phone center. UPS has a strict nonfraternization policy which expressly forbids managers from having romantic relationships with hourly employees. When Ellis' direct supervisor learned of the relationship, she reported it to HR who told Ellis he would have to end the relationship or quit. Ellis didn't end the relationship and ultimately married the hourly employee nearly a year later. When this was discovered by UPS, Ellis was terminated for violating the policy and dishonesty after he refused to resign.

At trial, Ellis pointed to evidence that several other UPS employees were known to have romantic relationships and were not fired. The Judge noted, however, that Ellis' discrimination case was ultimately doomed by the fact that he could not show that other "similarly-situated" managers in interracial relationships were terminated. In other words, there was no evidence that the decision makers responsible for Ellis' termination had ever tolerated policy violations of this sort in the past.

Although he decided in the employer's favor, the Judge noted that he was not endorsing strict nonfraternization policies such as the one relied on

by UPS. The Judge stated that, more and more, people are meeting their significant others in the workplace, and that Ellis had been a good employee for many years. Ultimately, he concluded: "Although UPS . . . comes out on top in this case, love and marriage are the losers."

Ellis v. United Parcel Service, (7th Circuit 2008)

□ Indiana Hospital Unlawfully Applied Solicitation/Distribution Policy

The 7th Circuit recently found that an Indiana Hospital violated the National Labor Relations Act by applying its solicitation/distribution rule too broadly and by discriminatorily enforcing it. The NLRA, which covers private and not government facilities, protects against unlawful interference with employees' rights to organize. The National Labor Relations Board, as well as the federal courts, have also recognized a right by hospitals to be free from disruptions to their operations caused by union organizing activity. These two rights are balanced when disputes arise concerning the enforcement of solicitation/distribution policies.

In this case, the hospital instructed its nurses during a union organizing drive that, under its written policy prohibiting solicitation and distribution in "all patient areas," such activity would not be permitted in employee break rooms because of their close proximity to patient care areas. The hospital argued that patients in rooms opposite the break rooms could hear the staff talking and thus the break rooms are akin to patient care areas. The 7th Circuit rejected this argument, however, finding that there was only slight evidence that conversations actually carried across the hospital's corridors and that the hospital could fix this issue by simply requiring that the break room doors be kept closed.

The Court also found that the hospital discriminatorily applied its policy to only union solicitation, and not to charitable, social or commercial solicitations. Specifically, the Court found that the hospital disciplined a nurse who was engaging in union solicitation at a nurses' station, but there was evidence that the hospital had permitted employee solicitations at nurses' stations that were not related to unions. This disparity in treatment resulted in a violation of the NLRA.

Whether the application of solicitation/distribution policies results in a violation of the NLRA is a very fact specific analysis. Non-governmental hospitals should tread carefully in this area and consider consulting their legal advisors before attempting to enforce these policies.

St. Margaret Mercy Healthcare Centers v. NLRB (7th Cir. 2008)

□ **NLRB Region 25 Newsletter Reminds Employees of Their Workplace Rights**

The local National Labor Relations Board district office (Region 25) recently issued a newsletter which, among other things, reminds employees that they have a protected right to discuss their wages. The National Labor Relations Act ("NLRA"), which covers private employers, protects the rights of both unionized and non-unionized employees. Specifically, the NLRA protects employee rights to join and support unions where they work, to participate in protected concerted activities with other employees, and to refrain from participating in such activities. Under the NLRA, two or more employees have the right to act together to raise workplace issues with their employer or to press for changes in wages or other working conditions. The working conditions include topics that some employers would rather keep confidential, such as wages and disciplinary matters. Many employers have policies or issue instructions that unlawfully prohibit employees from engaging in these types of discussions. Other employers may have facially neutral confidentiality policies that do not specifically prohibit these discussions, but may still be considered "overly broad" by the National Labor Relations Board because of their "chilling" effect on employee rights. These policies subject employers to legal risks and should be reviewed for compliance with the NLRA.

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