Pacific Employers
Management Advisor
47 Years of Excellence!
May 2011

What's New!

Refusing to Hire Applicant Who Fails Drug Test Not an ADA Violation

Many employers require new hire candidates to undergo, and (believe it or not) pass, a drug test prior to commencing employment. There has been a fair amount of litigation over employers' decisions not to hire candidates who fail drug tests.

These candidates most commonly sue, claiming their drug use is tied to some sort of disability and, therefore, is "protected" under the law. Fortunately, this is one of the few areas of law where courts have generally decided the cases favorably to employers. The California Supreme Court has upheld an employer's right to refuse employment to applicants who test positive for marijuana, even where the employee subsequently claims "medical" marijuana use. Last week, the famously liberal Ninth Circuit also upheld an employer's right to deny employment to an applicant who failed a drug test, even where the applicant claimed protection under the Americans With Disabilities Act (ADA).

In *Lopez v. Pacific Maritime Association*, the Ninth Circuit held that an employer's "one-strike" rule permanently barring employment for any applicant who fails a drug test, did not violate the ADA. The plaintiff applied to be a longshoreman in 1997. At that time, he was apparently addicted to drugs and alcohol and unsurprisingly failed the employer's drug test, disqualifying him from employment. A few years later, Plaintiff allegedly decided to become clean and sober and re-applied for employment as a longshoreman in 2004. The employer rejected Plaintiff's application because it had a one-strike rule, whereby applicants who fail a drug test, even once, are permanently disqualified from employment.

Plaintiff sued, claiming the employer violated the ADA by discriminating against him based on his protected status as a rehabilitated drug addict. The Court threw out the claim, holding that there was no ADA violation. The employer's policy treated all test failures the same--whether the failure was due to a disability or mere recreational drug use. The employer did not even know of any disability or rehab status at the time of the drug test or subsequent rejection of his employment application. As a result, the employer could not have discriminated against Plaintiff on this basis.

The bottom line for employers is that drug testing policies barring employment based on test failures should be a clearly defined rule or standard, and administered as such. In the absence of such a policy, employers remain exposed to claims based on alleged disability discrimination. [PE]

Heat Illness Flyer Enclosed!

President's Report
~Dave Miller~

"Pay Stub" Rulings Continue!

In ***Heritage Residential Care,*** the Division of Labor Standards Enforcement (DLSE) imposed a civil penalty of $72,000 on the employer after finding 288 violations of Section 226(a) at $250 per violation in a workplace inspection. Under Section 226(e), employees can recover penalties if they suffer an "injury" as a result of an employer's "knowing and intentional" failure to comply with the statute.

Labor Code section 226(a) requires employers to provide "an accurate itemized statement in writing" each pay period that includes nine categories of information specified by law. These categories include gross wages earned, total hours worked, deductions taken, net wages earned, all applicable hourly rates in effect and the hours worked at each rate, and the name and address of the legal entity that is the employer. Although it is recommended that these records be retained for four years, employers should retain these records for at least three years and must allow current and former employees to inspect them. [PE]

IRS - Reporting of Healthcare Costs

Employers will be required to report the aggregate cost of applicable employer-sponsored group health plan coverage on Forms W-2 provided to the IRS and employees, beginning with such forms for the 2012 calendar year. Transition guidance on this new reporting requirement was recently issued.

IRS Transition Guidance provides that almost all employers are subject to the reporting requirements, including government and tax-exempt entities, churches and other religious organizations and employers that are not subject to COBRA, ERISA, or PHSA healthcare continuation requirements. However, for the year 2012, and until the issuance of further guidance, employers who file fewer than 250 Form W-2s are not required to report. Moreover, federally-recognized Indian tribal governments are excluded from the reporting requirements. [PE]

"The true danger is when liberty is nibbled away, for expedience, and by parts."
-- Edmund Burke (1729-1797)

Recent Developments

New ADAAA Regulations Increase Coverage and Risk

The U.S. Equal Employment Opportunity Commission (EEOC) has issued new regulations governing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Effective on May 24, 2011, the regulations greatly broaden the definition of "disability" making clear that to "substantially" limit a major life activity, an impairment need not be "significantly" or "severely" limiting, as was previously established by Supreme Court precedent.

New language specifically overturning several Supreme Court cases that substantially narrowed the number of individuals who fell into each of the three main coverage categories. Regulations provide rules to determine if "individualized assessment" of an impairment substantially limits a major life activity. The net effect is to make it easier for individuals who have mental or physical impairments to qualify for protection under the ADAAA.

"... most significant addition in the new regulations ..."

Significant addition in the new regulations are the adoption of nine rules for courts to use when interpreting the ADAAA.

1. The term "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADAAA, and is not meant to be a demanding standard.

2. An impairment need not prevent, or significantly or severely restrict, an individual from performing a major life activity in order to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.

3. A substantial limitation should not be the primary object of attention; the regulations make clear the courts are not to get bogged down in whether an impairment is substantially limiting.

4. "Substantially limits" should now be interpreted and applied using an individualized assessment that is broader than the standard applied prior to the ADAAA.

5. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. This comparison usually will not require scientific, medical or statistical analysis.

6. Except in the cases of ordinary eyeglasses or contact lenses, the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative (or positive) effects of mitigating measures. This is a significant departure from the analysis before the amendments.

7. An impairment that is episodic, in remission, or could recur is a disability if it would substantially limit a major life activity when active. For example, cancer that has responded to treatment is nonetheless still a disability.

8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

9. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting. However, short-term illnesses lasting only a few days or weeks are likely not substantially limiting.

In addition to the changes above, the ADAAA and the regulations expand who is covered under the "regarded as" prong of the disability definition. The regulations now make clear that the concepts of "major life activities" and "substantially limits" are not relevant in evaluating a claim that an individual was "regarded as" disabled. This analysis is now solely confined to whether the employer treated the individual differently as a result of his or her assumed impairment.

The regulations repeatedly refer to employer's obligations to engage in an individualized assessment of each employee. However, the regulations ironically provide that some impairments involve "predictable assessments" that, in "virtually all cases," will result in a finding that the employee qualifies for protection under the ADAAA. For example, according to the regulations, such conditions include deafness, blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

"... primary impact of the new regulations ..."

The primary impact of the new regulations is that employers' ability to defend disability discrimination claims will no longer focus as intently on whether an employee is covered under the ADAAA. Instead, cases will focus on whether the employee and employer properly engaged in the interactive process, whether a reasonable accommodation was provided, and if not, why. Employers will also continue to maintain the burden of proving "undue hardship" to proposed accommodations.

As a best practice, employers should revisit their disability-related policies and procedures to ensure they adequately address the new standards. Further, all managers and human resources professionals need to be trained on the ADAAA and the new regulations to ensure understanding and compliance with the new regulatory regime, being particularly mindful of the employer's obligation to engage in the interactive process to determine what, if any, accommodations the employer can provide. [PE]

Pep Boys Penalized Hazards

OSHA has issued four repeat and one serious citation to the Pep Boys auto service company following a recent inspection at its facility in Hamden, Conn. The Philadelphia-based chain faces a total of $75,000 in proposed fines.

OSHA alleges that workers in the Hamden store's service area were exposed to electric shock hazards from damaged power cords, as well as to cuts and lacerations from a grinder that lacked a safety guard, a tongue guard, and guarding of its spindle end.

"... Pep Boys previously was cited ..."

OSHA alleges that workers in the store's service area were exposed to electric shock hazards from damaged power cords, as well as to cuts and lacerations from a grinder that lacked a safety guard, a tongue guard, and guarding of its spindle end. As a result of this latest inspection, OSHA has issued the repeat citations with $70,000 in proposed fines. A repeat citation is issued when an employer previously has been cited for the same or a similar violation of a standard, regulation, rule or order at any other facility in federal enforcement states within the last five years.

Pep Boys was issued the serious citation with a fine of $5,000 for missing face plates on an electrical outlet box and a snap switch box. A serious citation is issued when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known. [PE]

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Human Resources Question with Candice Weaver

The Month's Best Question

Private Attorneys General Act

Q: ***"I have been threatened with penalties of $100 or more per employee per paycheck going back one year for Wage Order violations. Where does this come from?"***

A: The Private Attorneys General Act of 2004 (PAGA) which provides for an employee to recover penalties on behalf of other employees for an employer's alleged Labor Code violations. The state benefits from these actions by getting 75% of the penalties recovered.

With penalties of $100 or more per employee per paycheck going back one year, the penalties can be astronomical. (For employers who pay semi-monthly, that is $2,600 times the total number of employees.) The PAGA penalty is essentially an add-on penalty that drastically increases the cost of many Labor Code violations. Recently, PAGA has also been interpreted to apply not only to the Labor Code itself, but to provisions of the Industrial Welfare Commission Wage Orders. The tortured legal theories that were cobbled together to achieve this result are beyond the scope of this article, but the result is that many requirements contained in the Wage Orders are now subject to PAGA penalties.

The specific provisions contained in most of the Wage Orders and which are now subject to PAGA penalties include:

Duty to provide seats when the nature of the work reasonably permits the use of seats;

Duty to maintain comfortable temperature consistent with industry-wide standards, including maintaining restrooms at a temperature of at least 68 degrees;

Duty to keep a record of the start and end time of an off-duty meal break;

Duty to maintain specified records for at least three years and to store them within the State of California;

Duty to provide clocks in all major work areas or within reasonable distance thereto insofar as practicable.

Because lawsuits involving seating requirements are now being filed at a rapid rate, employers would be prudent to anticipate claims based on these other little-known Wage Order requirements and assess their current practices accordingly. [PE]

No-Cost Employment Seminars

The Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

2011 Topic Schedule

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.

Thursday, May 19th, 2011, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.

Thursday, June 16th, 2011, 10 - 11:30am

♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

Thursday, July 21st, 2011, 10 - 11:30am

There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Thursday, September 15th, 2011, 10 - 11:30am

♦ **Guest Speaker Seminar -** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.

Thursday, October 20th, 2011, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.

Thursday, November 17th, 2011, 10 - 11:30am

There is No Seminar in December

Dinner for 2 at the *Vintage Press*?

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press*. Call 733-4256 or 1-800-331-2592.

Want Breaking News by E-Mail?
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Suit for use of SSNs in IDs

Employees at a large amusement park filed a putative class action alleging that the company violated California state law by encoding employees' Social Security numbers on the employees' worker identification cards in such a way that the information could be read using a common barcode scanner.

The lawsuit could involve as many as 20,000 workers. Plaintiffs claim that the practice puts employees' personal information at risk. Employees use the identification cards throughout the day, including to clock in and out of breaks, order food, and gain access to restricted areas.

The basis of the lawsuit is California Civil Code Section 1798.85, a law that bars companies from printing an individual's Social Security number on any card required for that individual to access products or services. [PE]

SSA Resumes Issuance Of "No Match" Letters

The Social Security Administration (SSA) has resumed sending out No-Match letters to employers. This ends a long break that started when the Department of Homeland Security's 2007 no-match regulation (now rescinded) was blocked by a court. SSA's new letter says that the recipient is not required to respond, and that the letter alone should not be the basis for taking any adverse action against the employee listed. If you do respond to the letter, the SSA may share the information with the Internal Revenue Service or the Department of Justice.

If you receive an SSA No-Match letter, the SSA instructs you to:

- check your records to see if there is a discrepancy in the records submitted to SSA;
- ask the employee to check his or her records to determine if the information was accurately recorded/reported;
- instruct the employee to contact the SSA to resolve any discrepancy;
- provide the employee a reasonable amount of time to resolve the discrepancy; and
- document your efforts to resolve the matter.

The SSA, Immigration and Customs Enforcement (ICE), and the Office of Special Counsel provide no additional guidance for an employer's obligations upon receipt of a No-Match letter. These agencies all appear to take the position that a No-Match letter is not evidence that the employee is unauthorized to work. They do not offer any clarification of what would be considered "a reasonable amount of time" to resolve the discrepancy, nor what to do if the employee is unable to resolve the discrepancy.

ICE Notices of Inspection for I-9 audits generally request copies of any correspondence received from SSA, including No-Match letters. It is unclear whether merely documenting an employee's inability to resolve a discrepancy without taking further action will satisfy ICE in the event of an I-9 audit.

The rescinded No-Match regulation outlined "safe harbor" procedures to demonstrate that an employer had acted reasonably to a No-Match letter, including allowing the employee 90 days within which to resolve the discrepancy and completing a new I-9 form with updated documents. It is recommended that you develop standard policies and procedures to address issues raised in SSA No-Match letters and implement them in a non-discriminatory way. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on Wednesday, *July 27th*, registration at 7:30 am. Seminar 8:00 to 10:00 am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast