EMPLOYEE RIGHTS

EEOC focuses on intellectual disabilities, wellness plans

by Emily Bristol
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The Equal Employment Opportunity Commission (EEOC) has placed an increased emphasis on employee welfare, as seen through its recent public exploration of employee wellness programs and a significant court ruling in its favor in a case involving intellectually disabled workers.

Disabled workers exploited

In a lawsuit filed in the Southern District of Iowa, the EEOC alleged that Hill Country Farms Inc., doing business as Henry's Turkey Service, exploited a class of disabled workers because their intellectual impairments made them vulnerable and unaware of the fact that their legal rights were being violated. Senior U.S. District Judge Charles Wolle found that disabled workers who contracted to work on an evisceration line at a poultry-processing plant should have been compensated at the $11 to $12 an hour that was typically earned by nondisabled workers who performed the same or similar work rather than the $65 a month they received.

The EEOC submitted evidence that the company was paid as much as $11,000 a week for the work performed by the disabled employees; however, it paid the men an average of only $15 per week. Further, the EEOC submitted evidence that the living quarters the company argued should have been credited to the workers' wages were located in a 100-year-old former schoolhouse that was previously closed by the state fire marshal as unsafe. The building had inadequate heating, rodents, and a roof in such disrepair that buckets were put out to catch water pouring in when it rained.

In addition to deducting $1,000 a month from the employees' wages to cover room and board and expenses, the company allegedly pulled out hundreds of dollars a month for Social Security Supplemental Security Income (SSI) and other benefits to reimburse itself for the expenses. Ultimately, the court ordered the company to pay the employees wages totaling $1.3 million.

Interplay between federal law and wellness programs

In another move related to employee welfare, the EEOC recently held a meeting to hear from panelists on the treatment of wellness programs under federal law, with an emphasis on the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and other EEOC-related statutes.

During the meeting, the EEOC recognized that there is broad bipartisan support for the use of wellness programs to reduce health insurance and healthcare costs, but there is also a need to ensure that programs are designed and implemented in a manner consistent with federal equal employment opportunity laws. The agency acknowledged its corresponding responsibility to let stakeholders know its position on questions about the intersection of wellness programs and federal employment laws.

The EEOC pointed out that issues will most likely arise when wellness programs require medical exams or ask disability-related questions because those actions ordinarily lead to a violation of the ADA. Other panelists argued that the EEOC should provide guidance on its regulations under GINA, which prohibits employers from acquiring genetic information, including family medical history, because wellness programs may ask for health information from employees' spouses.

Some panelists expressed concern for people with disabilities because of employer-based health programs that penalize them for not being as "well" as other employees. Others highlighted Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) because of the likelihood of discrimination against women, who tend to have more health problems than men, and people who are older and have more health problems. One panelist pointed out that health conditions such as obesity, diabetes, and hypertension disproportionately affect members of racial minorities and that wellness programs with punitive measures could have a disparate impact on those groups.

Ultimately, it's clear that the EEOC is taking an interest in employee welfare and is aware of the need to advise employers on their wellness programs so they can balance the rights of employees under the law with the benefits of a wellness program. ✤

HEALTHCARE UPDATE

HIPAA compliance: what providers should know about HITECH Act mandatory audits

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Covered entities and business associates should start to prepare now rather than after receiving notice from the U.S. Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) of its intent to audit them. Preparing for a potential audit may also help protect covered entities and business associates from complaints to the OCR related to violations of the Health Insurance Portability and Accountability Act (HIPAA). Below are suggestions on how to prepare.

HHS-mandated audits

Investigations by the OCR related to compliance with HIPAA will no longer be initiated only by complaints and self-reported breaches. Section 13411 of the Health Information Technology for Economic and Clinical Health Act (HITECH Act) requires the HHS to provide for periodic audits of covered entities' and business associates' compliance with HIPAA's privacy rule, security rule, and breach notification standards. While the audits aren't intended to be investigations, an audit could reveal a serious compliance issue that could lead to a separate enforcement investigation by the OCR. The mandatory audits are further evidence of the HHS's increased enforcement efforts.

What we learned from the pilot audit program

From November 2011 through December 2012, KPMG conducted a yearlong pilot audit program that included 115 audits of covered entities on behalf of the HHS. The audits focused on key compliance requirements under HIPAA, including (1) various requirements of the privacy rule, such as notice of privacy practices and uses and disclosures of protected health information (PHI), (2) security rule requirements for administrative, physical, and technical safeguards, and (3) requirements of the breach notification rule.

The majority of entities that were audited were providers rather than health plans or clearinghouses (all of which are covered entities under HIPAA). The preliminary results from the pilot audit program revealed that 65% of the compliance issues were related to the security rule, while only 26% and 9% of the compliance issues were related to the privacy rule and the breach notification rule, respectively. Generally, smaller covered entities, such as physician practices and smaller providers, had more compliance issues than larger covered entities. In the future, both covered entities and business associates will be subject to audits.

The OCR is currently evaluating the pilot program to assess whether changes should be made before routine audits commence. The evaluation will focus on the pilot program's effectiveness, analyze the program's strengths and weaknesses, and make recommendations for future audits. The evaluation process is scheduled to conclude in September 2013. We anticipate that routine audits will begin after that.

Audit process

An OCR audit begins when a document request is sent to the audit target. The letter contains an introduction to the audit contractor and a request for required HIPAA documents, including copies of privacy policies and procedures, workforce training documentation, incident response plans, risk analyses, and risk mitigation plans. That documentation will generally be due to the OCR within 10 business days of the request for information.

Following review of the documentation, the auditor will conduct a site visit. During the site visit, the OCR will interview key personnel. Covered entities and business associates should ensure that all members of management and high-level staff members are familiar with their privacy and security policies, procedures, and compliance efforts—the entity's privacy officer will not be the only workforce member interviewed by the auditor.

After the site visit is completed, the auditor will provide the covered entity with a draft final report. The entity will then have 10 business days to review the report and provide written comments to the auditor. The auditor will complete a final audit report within 30 business days after the entity's response and submit it to the OCR. The reports will be used by the OCR to determine which types of technical assistance should be developed and whether a compliance review is necessary to address any serious issues detected during the audit.

How to prepare for an audit

The audit protocol can be found on the OCR's website (www.hhs.gov/ocr/) and is a great resource for entities looking to perform self-evaluations of their HIPAA compliance. Using the audit protocol to conduct a self-audit can help entities identify compliance gaps and prepare for an OCR audit.

Covered entities and business associates should ensure, at a minimum, that they are taking the following HIPAA compliance measures:

- In the case of a covered entity, provide the Notice of Privacy Practices (NPP) form to every patient, and update the NPP to reflect the changes under the Omnibus Final Rule (required by September 23, 2013).
- Have written and signed business associate agreements with all entities that are considered business associates.
- Conduct an accurate and thorough assessment of the risk to electronic PHI (ePHI).
- Implement required physical, technical, and administrative safeguards to protect ePHI.
- Have formal policies and procedures for the privacy and security of PHI, and ensure they are updated to reflect the changes under the Omnibus Final Rule (required by September 23, 2013).
- Train all employees on privacy and security policies and procedures. Employees whose job duties are affected by the changes resulting from the Omnibus Final Rule will need to receive additional training on those changes.

- Maintain all documentation required under HIPAA, including documentation of all employee training, disclosure logs, breach analyses, and sanctions taken against employees for violations of privacy and security policies. ✤

OSHA ROUNDUP

OSHA facilitates 'backdoor' organizing in nonunion facilities

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The Occupational Safety and Health Act (OSH Act) was written to allow union representatives to participate in Occupational Safety and Health Administration (OSHA) inspections of unionized facilities—a logical outgrowth of the union's status as representative of the employees in the facility being inspected. Thus, the OSH Act authorizes participation in the walk-around portion of an OSHA inspection by "a representative authorized by [the employer's] employees." OSHA also has a complementary regulation that allows the compliance officer to permit nonemployees—historically, representatives of the union that represents the employees—to join in the inspection if it's deemed "reasonably necessary to the conduct of an effective and thorough physical inspection."

Now, in a parting shot just before his recent retirement, Richard Fairfax, OSHA's deputy assistant secretary, issued a letter of interpretation opining that an OSHA compliance officer conducting an inspection in a *nonunion* facility can grant an employee's request that a union representative join in the inspection of the facility. The opinion letter's strained rationale is that the right to have a representative join the inspection isn't limited to unionized employees, and there consequently is nothing that prohibits a nonemployee representative from being a union organizer even though the facility has no union status.

Thus, perhaps not inadvertently, the Obama administration has given unions backdoor entry into organizing attempts at nonunion facilities. Imagine this scenario: A union plants an employee in a facility. The employee files a complaint with OSHA, triggering an inspection. The employee then asks a union rep to join in the inspection. OSHA's inspection results in a citation and the removal of the allegedly unsafe condition. The union then claims credit and uses the "employee-protective" victory to organize the facility.

Not too surprisingly, the Service Employees International Union (SEIU) requested the letter of interpretation—the same folks who recently had presidential appointments to the National Labor Relations Board (NLRB), which, incidentally, continues to take a shellacking from the courts (see the article on pg. 1).

OSHA's letter of interpretation can be found at www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604.

OSHA launches initiative to protect temporary workers

OSHA has announced an initiative to enhance protections from workplace hazards for temporary employees. On April 29, the agency sent a memo to its regional administrators directing field inspectors to assess whether employers that use temporary workers are complying with their responsibilities under the OSH Act. Inspectors will use a newly created code in their information system to denote when temporary workers are exposed to safety and health violations. Additionally, they will assess whether temporary workers received required training in a language and vocabulary they could understand.

According to OSHA, in recent months, it has received a series of reports of temporary workers suffering fatal injuries during their first days on the job. OSHA has issued citations when the employer allegedly failed to provide adequate protections, including safety training.

DOL issues census of fatal injuries

The Bureau of Labor Statistics (BLS) of the U.S. Department of Labor (DOL) recently issued its final count of fatal workplace injuries. The final numbers reflect updates to the 2011 Census of Fatal Occupational Injuries (CFOI) made after the release of preliminary results in September 2012.

Here are the highlights of the updated report:

- Fatal injuries involving contractors accounted for 12 percent of all fatal workplace injuries in 2011.
- For a fifth consecutive year, fatal workplace injury totals declined in the private construction sector in 2011. The 2011 figure is also the lowest total for the private construction industry since the CFOI began using the North American Industry Classification System (NAICS) to define each industry in 2003.
- The largest net increase in fatal workplace injuries among occupations involved drivers of tractor trailers or other heavy trucks.

In addition, OSHA posts on its website a running list of workplace fatalities and catastrophes resulting in the hospitalization of three or more workers (see "FY13 Fatalities and Catastrophes to Date" at www.osha.gov/dep/fatcat/dep_fatcat.html). ✤