Inside 1Q2024

Association of Corporate Counsel
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President's Message

Shane Riley

Hello, Baltimore Chapter of the ACC! I hope everyone is enjoying the mostly balmy weather so far this winter. As the new president of the Chapter, I would like to thank outgoing president Taren Butcher and treasurer Kristin Dankos for their outstanding leadership in achieving a very successful year for 2022-2023. As we embark on 2024, I look forward to working with our new treasurer, Nathan Willner and our new secretary, Shawn McGruder. Shawn has a robust history as a board member and has always been a valuable contributor. Nathan has shown great enthusiasm for becoming involved, helping out, and improving the Chapter. I know we will have a successful year!

We have already taken advantage of some exciting opportunities in January. We participated in a cooking class at Schola in Canton, sponsored by Miles & Stockbridge. It was a fun experience learning to cook various Tex-Mex dishes and reconnecting with and getting to know many Miles & Stockbridge attorneys. We had a luncheon focused on the legal job market with speakers from Robert Half Legal, MLA Global, and Garrison and Sisson which was very up-to-date and informative, as always.

We have revamped our sponsorship packages this year by adding some new options for our sponsors. We are excited to offer an event focused on diversity, equity, and inclusion this Spring sponsored by Gordon Feinblatt (date to be announced). Also, two of our Board members, Laurice Royal and Brian Thompson put together a grant proposal to ACC to obtain funding for our proposed ACC Baltimore Speakership Series. We have already discussed several interesting options for topics and speakers for these events and we are anxious to get our first one scheduled.

As a reminder, the ACC Annual Meeting will be held in Nashville, TN October 6-9 this year. "Early Bird" registration at reduced rates is already open at https://www.acc.com/annualmeeting.

I look forward to seeing everyone at the upcoming events!

All the best,
Shane Riley

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

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CHAPTER ADMINISTRATOR

Andrew Lapayowker
MEMBER ADMINISTRATOR

4 Ways to Mitigate Vendor Cybersecurity Incidents

By Kate Kreps, American Electric Power and
Elizabeth Burgin Waller, Woods Rogers Vandeventer Black

In May 2023, the CL0P ransomware gang wreaked havoc on more than 2,500 organizations by infiltrating Progress Software's MOVEit file transfer platform, stealing copious amounts of data and posting it on the dark web to extort ransom from affected companies. This single exploit resulted in millions of data breach notifications to individuals. It also sparked a host of lawsuits and prompted dozens of corporations to file public disclosures about risks associated with third-party vendors' use of MOVEit's platform. Moving into 2024, third-party vendor risk mitigation is taking center stage in the cybersecurity and data privacy context. This article explores how to attempt to address that risk.

1. Define expectations for early notification

Early notice about a vendor's incident is critical to managing the potential impact on your organization. To ensure timely notice, build robust incident notification requirements into your vendor contracts. We recommend notice provisions that require vendor incident notice within a specific timeframe — preferably a matter of hours but no more than three days after suspicion or discovery of an incident. Standard notice provisions typically state vendors will provide "reasonable" notice, but that definition could be up for debate after an incident.

Artwork by Diyajyoti / *Shutterstock.com*

In ransomware incidents, cyber criminals may gain access to your organization's information through your vendor and post that stolen information on the dark web. As such, early notice of potential exposure is critical to managing your organization's regulatory concerns, crisis communications, and potential liability. Requiring notice within 24 or 36 hours — not just of an incident that impacts personally identifiable information — but of any incident that may impact any information belonging to your organization is an important step. Ensure your vendors alert you to an incident the moment they suspect your information is or could be compromised. Immediate notification affords an organization essential time to activate its own incident response plan.

Artwork by Bundit / *Shutterstock.com*

> Ensure your vendors alert you to an incident the moment they suspect your information is or could be compromised.

2. Establish requirements for breach remediation

Robust contract requirements for vendor management of an incident also help mitigate risk. Include a provision requiring vendors to provide a certification from an outside forensic team of the "all clear" after a ransomware incident can alleviate disputes after an incident occurs about whether they have properly remediated a breach.

3. Insist on robust indemnification provisions

Vendor contracts often agree to cover the cost of consumer breach notices and credit monitoring, but these expenses constitute only a small percentage of the overall cost of an incident. Credit monitoring, for example, costs only cents on the dollar. Include robust indemnification provisions to your vendor contracts aimed at recouping the larger expenses your organization will face — lost profits, regulatory fines and penalties, crisis response, and outside attorneys' fees.

4. Assemble your own incident response team

One of the most important steps in-house legal teams can take is to make sure that when an incident occurs, their security teams know to notify the legal department. Seemingly minor breaches can quickly balloon into big issues. Assembling your own incident response team to address even a third-party breach can be critical to understanding whether the vendor's breach is critical to your own operations.

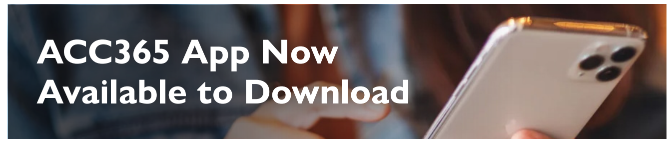
When notified of a potential vendor incident, set up a call with the vendor to learn more. Ask to speak directly with the forensic team involved in the incident. This allows you direct insight into what has occurred and what is being done to remedy a breach.

ACC News

ACC CLO Survey – Download Today

The Association of Corporate Counsel, in collaboration with Exterro, is excited to announce the launch of the 2024 Chief Legal Officers Survey.

Celebrating its 25th year, this research provides a critical lens into the evolving role of CLOs and how legal departments are adapting to the broader business environment. This year's report is a treasure trove of insights, directly from CLOs themselves, highlighting their expectations, challenges, and opportunities for the year ahead. This comprehensive survey, featuring responses from over 600 CLOs across 20 industries and 31 countries, reveals the intense pressures and challenges confronting legal departments.



Your work goes beyond your desktop and now so does the ACC member experience. The brand-new ACC365 app is now available to download. Stay connected and get the ACC experience in the palm of your hand. With one tap, you are plugged into the people, resources, and knowledge that accelerate your career.

Mark your calendars and get ready for the event of the year! The 2024 ACC Annual Meeting is heading to the vibrant city of Nashville, TN, from October 6-9, and you won't want to miss it.

This annual gathering is the world's largest for in-house counsel, attracting thousands of professionals like you for an unforgettable experience.

Maryland's "Draft" FAMLI Regulations – What Do They Say?

By Fiona W. Ong, Shawe Rosenthal LLP

On January 29, 2024, the Maryland Department of Labor's (MDOL) issued "draft" regulations (available at https://paidleave.maryland.gov/stakeholders/Pages/Home.aspx) to implement Maryland's paid family and medical leave insurance (FAMLI) law, and it invited public comment. Starting January 1, 2026 (caveat below), this law will provide most Maryland employees with 12 weeks of paid family and medical leave, with the possibility of an additional 12 weeks of paid parental leave. We previously provided a detailed overview of the law in our April 12, 2022 E-lert and last year's amendment to the law in our April 12, 2023 E-lert (both of which may be found on our E-lert webpage at https://shawe.com/e-category/e-lerts/). The regulations, however, go beyond the law itself to provide the MDOL's interpretation of how the law should be applied. And these interpretations, in many cases, are troubling for employers. We have identified the following items of interest or significance to employers in the regulations.

Definitions. The following definitions are important:

- "Employees" do not include those who meet what is known as the ABC test, which is used to determine independent contractor status under some, but not all, Maryland laws.
- "Equivalent-private insurance plan (EPIP)" applies only to either a purchased insurance policy from an insurance company approved by the State, or an MDOL FAMLI Division-approved self-funded private employer plan – not a combination of both.
- "Serious health condition" does not mimic the federal Family and Medical Leave Act's well-established definition, but more broadly includes continuing treatment including home care by a "competent individual" (undefined) and organ/tissue/body part donation.

continued on page 4

continued from page 3

Additional definitions are provided in the Claims section.

Contributions. The following points are significant:

- "Qualified employment" means employment that is performed in the State. In addition, employment that is performed partly in the State will be considered qualified in its entirety if the out-of-State employment is incidental to the State employment, including temporary or transitory employment and isolated transactions. It also includes employment where the base of operations or the place from which the employment is controlled or directed is in Maryland. It further includes remote employees living in Maryland where their employment is not performed in part in another State where the base of operations or place from which the employment is controlled or directed is located. These last provisions, which appear to deal with remote employees, are frankly unclear.
- The size of the employer is determined by their employees anywhere, not just in Maryland.
- Contributions and informational reports will be remitted quarterly, by the last day of the month following each quarter.

Equivalent-Private Insurance Plans. Many employers are interested in the option of an EPIP, rather than participating in the State program. It appears, however, that establishing an approved self-insured EPIP may be quite challenging, if not virtually impossible. Some of the more significant points include the following:

- For employer self-insured EPIPs, the employer must obtain a surety bond from an authorized surety company in the amount equal to one year of expected future benefits. There are extensive specific requirements applicable to the surety bond's form and contents.
- EPIPs must be recertified every 3 years.
- Self-insured EPIPs must also establish a separate account to hold the contributions and pay benefits.
- The EPIP must be equivalent in every way as to the reasons for the leave, the amounts and increments of leave, the benefit amounts, and the employee contribution amounts.
- The EPIP cannot impose additional conditions, restrictions or barriers on the use of leave.
- The EPIP must meet regulatory requirements for claims processing, reconsideration and appeals.
- EPIPs must still use the State plan's forms for employees and health care providers, as well as employer notices.
- If the EPIP fails to pay required benefits, the State may pay those benefits and the employer/EPIP administrator would be required to reimburse the State.
- The FAMLI Division may review EPIPs for compliance at any time, and employers/administrators must provide any requested information and documents within 10 business days.
- A specific list of records must be retained for at least 5 years.
- Informational reports will be remitted quarterly, by the last day of the month following each quarter.
- Employers may terminate an EPIP after a year, with 30 days' notice.
- The FAMLI Division may terminate an EPIP for various violations, including the failure to pay benefits (in whole or in part), failure to timely make benefit determinations, failure to maintain the surety bond, misuse of EPIP money, and failure to submit reports.
- There are extensive provisions regarding the situation where the employer intends to provide an EPIP but is not able to submit a complete application before August 31, 2025. However, an application must be submitted by November 1, 2025 for a self-insured plan and December 1, 2025 for a commercial plan.

Claims. This is a quite lengthy and detailed section of the regulations. Of particular note, there are extremely limited options for an employer to report fraud, and no guidance on how the FAMLI Division will handle such reports. Other important points include the following:

- Employers must respond to a notice of claim application within 3 business days, otherwise the application is considered complete. The FAMLI Division will investigate any employer challenges. But the Division may consider a late submission and negate any ongoing benefits. Job and anti-retaliation protections cease when benefits cease in such a case. Notably, this appears to be the only path for employers to report fraud, and it is wholly lacking in any kind of detail as to how the FAMLI Division will handle such information. Problematically, it appears that the employer must wait for the FAMLI Division to stop benefits before taking any kind of employment action based on the fraud.
- "Alternative FAMLI purpose leave (AFPL)" means employer-provided leave specifically designated as a separate bank of time off for medical leave, family leave, and/or qualified exigency leave. With written notice, employers may require employees to use AFPL concurrently or in coordination (i.e. to supplement) with FAMLI benefits, as long as it is paid, not accrued, not subject to repayment upon employee departure, not available for general purposes, and available without requirement to exhaust another leave first. If the employee then declines to apply for FAMLI, their FAMLI eligibility will be reduced by the amount AFPL time taken. An employer may deduct the full amount of leave taken under both AFPL and FAMLI from the AFPL balance, even if only partial AFPL benefits were used.

continued on page 5

continued from page 4

- "General purpose leave" means employer-provided paid leave – such as general paid time off, personal leave, vacation leave, or sick leave – that is not AFPL. Neither the employer nor employee may require the substitution of general purpose leave for FAMLI leave. They may agree, in writing, to have it supplement FAMLI leave. Only the actual amount of supplemental leave used may be deducted from the general purpose leave balance. Employees may use sick leave prior to receiving FAMLI benefits without employer agreement, however.
- "Good cause" for not filing a complete claim application includes the employee's serious health condition that prevents the timely filing, the demonstrated inability to access a means to timely file (e.g. natural disaster, power outage, prolonged Departmental system outage), or the employer's failure to provide the requisite notice.
- "Kinship care," which is one of the reasons for leave, includes both informal and formal kinship care as already defined in the Maryland Code.
- Applications may be submitted up to 60 days before the first day of requested FAMLI leave.
- In seeking FAMLI leave for bonding or care for another, the employee must submit proof of relationship, including an affidavit or official documents. The employee must also submit official documentation of the qualifying event.
- The various certifications for the employee's own or family member's serious health condition, military exigency leave, and military caregiving leave generally track the FMLA's requirements.
- Employees are to update their claim application within 10 days for any changes to the leave basis, start, end, duration, and receipt of workers' compensation benefits.
- If an employee is taking leave to care for a family member and the family member dies, benefits are paid until the earlier of 7 days after the death or the previously approved end date. This effectively may provide paid bereavement leave. The employee must provide notice of the death within 72 hours.
- For intermittent FAMLI leave, requests must be submitted every two weeks. Intermittent leave must be taken in increments of at least 4 hours, unless the shift is less than 4 hours. Benefits will not be paid for leave that exceeds the certified amount without an updated certification.
- Employers must give notice of FAMLI leave and benefits: 6 months prior to the commencement of benefits, at hire, annually, 30 days prior to changes to the FAMLI procedures or plan, and when the employer knows that a leave may be eligible for FAMLI benefits. The employee is considered notified if there is a written or electronic signature of receipt.
- Employees must give notice of their need for foreseeable (30 days) and unforeseeable (as soon as practicable) FAMLI leave. Employers may waive notice, and waiver is presumed if the employer did not notify the employee of the need to provide notice to the employer, or if the employer fails to assert this in response to a notice of claim from the FAMLI Division.
- Employees taking intermittent leave must make a reasonable effort to schedule the leave so as not to unduly disrupt business operations. They must also provide reasonable and practicable notice of the reason and duration of their intermittent leave, although apparently not as to the leave itself, which is not helpful for employers.
- If employees fail to provide such notice of intermittent leave, they may be held accountable under the employer's attendance policy. But since the notice provision only applies to the overall need for intermittent leave, and not each incident of leave, it is unclear how this would apply. In addition, the employer must notify the FAMLI Division of the notice failure.
- In addition, if the employee's intermittent use is inconsistent with their State approval, the employer may request additional information about their use of leave. But there is no provision that allows employers to request additional information with regard to the use of FAMLI leave in a block.
- Employees are not eligible for FAMLI benefits if they are receiving either unemployment or workers' compensation benefits.

Dispute Resolution. Of particular note, employers are not permitted to be involved in the dispute over claims:

- The parties to the dispute resolution procedures include a claimant, an EPIP administrator and the Division, but oddly not the employer.
- Employers may request supervisor review if their application for an EPIP was denied or their EPIP was involuntarily terminated. Requests for review must be filed within 10 business days, in writing, with an explanation of why the decision was in error. Decisions will be made within 20 business days, and there may be an informal conference to discuss the review request during that time.
- Employees may request reconsideration of a denial of benefits within 30 days (apparently not business days), in writing, with an explanation of why the decision was in error. Notice is provided to all "parties," which, as noted above, does not include employers. Decisions will be made within 10 business days, and there may be an informal conference to discuss the review request during that time.
- Employees may also appeal a claim denial, following a request for reconsideration. The appeal must be filed within 30 days. Again, notice is provided to "parties." There may be an informal mediation process at the discretion of the FAMLI Division. A hearing will normally be held within 30 days of the filing, with notice to the

continued on page 6

continued from page 5

"parties." There are detailed procedures related to the hearing itself.

Enforcement. Although there is a section on enforcement, there are no actual draft regulations provided at this time.

The Regulatory Process and the Law's Status. Normally when a government agency is directed by law to issue regulations, they first issue official "proposed regulations" that are published in the Maryland Register, and the public is invited to submit comments for some period of time. After the public comment period is closed, the agency then considers the submitted comments and may make changes before issuing "final regulations."

Here, however, the MDOL's FAMLI Division has taken a decidedly different and much more informal and inclusive approach. Over the summer, it engaged in a phased process in which the public was invited to participate in the discussion of six different topic areas, leading to the release of "Draft Outlines" of possible regulations for each topic area. The public was then again invited to provide comments on the Draft Outlines, which the MDOL apparently took into account before issuing these "draft" regulations. These are not the official proposed regulations, however. The MDOL intends to release yet another set of draft regulations for additional input, and then will issue the proposed regulations at a later point for public comment in accordance with the formal regulatory process. But for now, interested parties may submit comments to the FAMLI division: FAMLI.policy@maryland.gov.

Above, we noted a caveat with regard to the effective date of benefits, which also applies to the employer/employee contributions. As some may recall, this law was passed in the 2022 General Assembly session, with contributions beginning in October 2023 and benefits beginning in January 2025. There were changes to the law during the 2023 session, however, including a delay in contributions to October 2024 and benefits to January 2026. At this point, the MDOL is behind a bill in the current session that would further delay the effective dates – this time to July 1, 2025 for contributions and July 1, 2026 for benefits – in addition to making some additional changes. Depending on what happens this session, the "draft" regulations may require additional changes.

Stay posted for additional developments, of which there will be many.

Author:

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Fiona W. Ong

The opinions expressed are those of the author and do not necessarily reflect the views of the firm or ACC Baltimore, or any of their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Maryland Appellate Decision Offers Guidance for Trade Secret Disputes

By Jonathan A. Singer and Douglas A. Sampson, Saul Ewing LLP

Maryland's intermediate court created new and binding precedent for cases related to misappropriation of trade secrets under the Maryland Uniform Trade Secrets Act ("MUTSA"). In the reported opinion of *Ingram, et al. v. Cantwell-Cleary Co., Inc.*, the Appellate Court of Maryland held that customer lists and pricing information constitute trade secrets under the MUTSA, even if such secrets were memorized by defecting employees. As a matter of first impression among Maryland appellate courts, the Court considered the question of how to measure lost profits in assessing a plaintiff's actual loss of misappropriation of trade secrets, ultimately clarifying how to properly calculate such damages in trade secret cases under MUTSA. The case could have wide-sweeping implications on jurisprudence under the MUTSA.

What You Need to Know

- Information in a company's internal database, including customer lists, vendor pricing, profit margins, and other pricing information, can constitute trade secrets under the MUTSA where, among other considerations, it has independent economic value and the company takes reasonable steps to maintain the secrecy of its trade secrets.
- A physical misappropriation is not necessary; a former employee memorizing and later using trade secrets can establish liability for misappropriation.
- Circumstantial evidence, such as a competing company using identical packaging and pricing as plaintiff, can prove misappropriation of trade secrets.
- When sufficient information is available, a plaintiff's damages should be based on the actual sales that were diverted by a competitor's use of misappropriated information. The use of past sales by plaintiff, without justification, is more speculative and does not account for lost business that had nothing to do with the misappropriation.
- Damages are only available for the period of time it would have taken for defendant to independently obtain the trade secrets.

continued on page 7

continued from page 6

The Court's Analysis in *Ingram, et al. v. Cantwell-Cleary Co., Inc.*

The case involved a feud over a family-run business, Cantwell-Cleary, Co., Inc. ("Cantwell-Cleary"), which sold packaging materials, cleaning and office supplies, and paper products. A disgruntled family member started a competing company, Cleary Packaging, LLC ("Cleary Packaging"), taking numerous employees, clients, and trade secrets with him. Cantwell-Cleary sued three former employees (the "Defendants") for breach of contract and misappropriation of trade secrets under the MUTSA. Following a bench trial, the circuit court found in favor of Cantwell-Cleary and awarded nearly $2 million in damages.

The Appellate Court affirmed the trial court regarding liability, finding that Cantwell-Cleary's confidential customer lists, vendor pricing, profit margins and "pricing to customers" were trade secrets under the MUTSA. The statute sets forth a two-part test: (1) whether the information derived independent economic value after having been developed by the company; and (2) whether the company took reasonable efforts to maintain the information's secrecy. The Court held that because Cantwell-Cleary developed the information over time that was not generally known to competitors, and because Cantwell-Cleary restricted access to the information in an internal database, prohibited removal thereof via an employee handbook, and required employees to sign agreements acknowledging a duty to keep the information confidential, Cantwell-Cleary established that the information constituted trade secrets.

There are several ways to establish misappropriation of a trade secret under the MUTSA, including by establishing: (1) it was acquired by a person who knows or has reason to know that the trade secret was acquired by improper means; (2) it was acquired without consent through improper means; (3) it was acquired without consent under circumstances giving rise to a duty to maintain secrecy or limit its use; or (4) it was obtained from or through a person who had a duty to keep the information secret or limit its use.

The Court held that there was sufficient evidence to establish the Defendants had misappropriated trade secrets because, among other things, customers testified that they received identical packaging and pricing from the Defendants as they did from Cantwell-Cleary. The Court held that even if the Defendants didn't physically take company documents, memorizing trade secrets and later using them still constitutes misappropriation. The Court further held that circumstantial evidence was sufficient to establish misappropriation in this case.

The Appellate Court reversed the trial court's decision to award lost profit damages to Cantwell-Cleary based on its expert's improper methodology. As a matter of first impression, the Appellate Court clarified that, when there is sufficient data available, damages should be measured by evaluating the actual sales a defendant made due to the misappropriation of trade secrets. The trial court, however, improperly relied on expert testimony based on past gross sales Cantwell-Cleary made to its customers, rather than on Cleary Packaging's *actual* sales to those same customers. By relying on past sales, Cantwell-Cleary's expert wrongly incorporated alleged damages for customers who left, but did not defect to Cleary Packaging as a result of the misappropriation. The Appellate Court stated that past sales could still be used to measure damages in some instances where a plaintiff provides a justifiable reason. However, when sufficient information is available, the preferred method is to base damages on the actual sales diverted by the misappropriated information, rather than modeling based on past sales.

Finally, the Court clarified that the damages period for a trade secrets case is limited. Damages are only appropriate "for the period of time that information would have remained unavailable to the defendant in absence of the misappropriation," as measured by "the time it would have taken the defendant to obtain the information by proper means such as reverse engineering or independent development." Once the defendant(s) had sufficient time to obtain the contested information through ordinary business means, plaintiff was not entitled to further damages.

Looking Forward

The *Ingram* decision provides critical clarification on certain liability and damages questions in trade secret cases under the MUTSA that have obscured the lines representing actionable misappropriation and recoverable lost profits. With clearer guidance, companies can now better assess the strengths (and weaknesses) of potential misappropriation claims, and lost profit damages flowing therefrom, to make more informed business decision when such conflicts arise.

If you have any questions about this alert, please feel free to reach out to the authors or connect with your regular Saul Ewing contact.

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Jon Singer is a litigator and business lawyer who serves as a trusted advisor to companies on legal issues affecting their operations. Jon represents publicly-traded and privately-held international, national, and local businesses in trials and on appeal in state and federal courts across the country. He handles complex commercial, consumer protection, product liability, real estate and employment disputes, including class actions and other "bet-the-company" litigation, that frequently involve claims for trade secret misappropriation, unfair competition, product defect, breach of contract, breach of fiduciary duties, and breach of restrictive covenants imposing non-compete, non-solicitation, and confidentiality obligations.

Douglas A. Sampson

Doug Sampson assists with a variety of matters involving commercial litigation, real estate and telecommunications. Doug draws on knowledge from a number of relevant work experiences, including a judicial internship for the Honorable Deborah K. Chasanow in the U.S. District Court for the District of Maryland, and a clerkship for Cohan, West and Karpook, P.C.

NLRB's General Counsel Says Employers Cannot Bar Outside Employment

By Rebecca A. Leaf, Miles & Stockbridge

The National Labor Relations Board (NLRB) is chipping away at employment agreements and other restrictive covenants one clause at a time. In a recent memorandum, the General Counsel said she believes restricting employees from holding outside or secondary employment violates federal labor law, and she intends to urge the NLRB's Democratic-appointee-controlled Board to reach the same conclusion.

The General Counsel was providing a regional office advice about the lawfulness of various provisions in a company's employment agreement when she took issue with the company's "Duties of Employees" provision, which reads much like a standard duty of loyalty clause:

> Except as hereinafter provided, the Employee shall at all times during the continuance of this AGREEMENT devote her full time to the conduct of the business of the Employer and shall not directly or indirectly, during the term of this AGREEMENT engage in any activity competitive with or adverse to the Corporation's business or welfare whether alone, or as a partner, officer, director, Employee, advisor, agent or investor of any other individual corporation, partnership, joint venture, association, entity or person.

The General Counsel said she believes any rule or agreement interfering with an employee's right to moonlight or access other employment is unlawful. Because this provision prevented employees from being an "employee" of another entity, it could be read as prohibiting secondary employment and would be unlawful. The company's rule, she added, implicitly prohibits "salting" – that is, the tactic of union agents acquiring jobs in particular workplaces for the sole purpose of unionizing that business – in violation of the National Labor Relations Act.

The General Counsel also said she would find the clause unlawful because employees could reasonably read it to prohibit union organizing or speaking out publicly about terms and conditions of employment because an employer may deem such actions "adverse" to their business.

Though taking issue with the "Duties of Employees" clause, the General Counsel found the company's noncompete and confidentiality provisions lawful.

Noncompete/Nonsolicitation

The General Counsel said the provision limiting an employee from soliciting or seeking the business of a customer, client or account of the employee's former employer for a one-year period was lawful. The key was that the noncompete did not prevent employees from accessing other employment opportunities, and the restriction on soliciting customers was for a limited time. However, if there were a very limited pool of customers in the industry such that the noncompete effectively foreclosed other employment opportunities, the General Counsel said she may find such provision unlawful.

Confidentiality/Business Disclosures

Employers are often wondering if their confidentiality clauses are overbroad under the Act, and the General Counsel provided some helpful guidance in this memorandum. The employer's agreement prohibited employees from disclosing or using "any information related to the employer's business and the business of the employer's present or prospective customers, including, but not limited to, any promotional concepts, marketing plans, strategies, drawings, customer lists or other information not otherwise made available to the general public."

The General Counsel approved of this provision because it listed things that are clearly proprietary and trade secrets, and there was no reference to employee information, wage information or anything related to working conditions – all topics that employees are free to discuss with their colleagues and other third parties under the Act.

Citing the Board's recent decision in *Stericycle*, 372 NLRB No. 113 (2023), the General Counsel reiterated that the Board evaluates whether a rule is overbroad from the perspective of an employee who is "economically dependent on their employer and who contemplates Section 7 activity."

Employer Takeaways

The NLRB continues to limit an employer's right to manage its workforce. All employer-employee communications are on the table and should be evaluated for overbreadth. For more information about the NLRB's crackdown on work rules and restrictive covenant agreements, please see these recent blog posts by Miles & Stockbridge's Labor and Employment team:

- NLRB Restricts Use of Confidentiality and Nondisparagement Clauses in Severance Agreements
- NLRB's General Counsel Offers More Guidance on Confidentiality and Non-Disparagement Decision
- NLRB Targets Noncompete Agreements
- NLRB's New Work Rules Standard Skews in Favor of Employees and Unions

Author:

Rebecca Leaf

Rebecca Leaf represents public and private employers on a wide range of traditional labor matters. A veteran litigator in the labor space, Rebecca began her career as a trial attorney at the National Labor Relations Board, where she spent eight years developing a deep knowledge of the National Labor Relations Act, collective bargaining and the unionized workplace.

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HEALTH PLAN COVERAGE OF TRANSGENDER BENEFITS

What Employers Need to Know

By Tia Martarella, Additional Contributors: Kellie Thomas and Andrea Rosato, Jackson Lewis P.C.

Historically, many employer-provided health plans have excluded coverage for services related to transgender care. However, the anti-discrimination provisions of the Affordable Care Act ("ACA"), along with a spate of federal lawsuits regarding transgender rights, have brought into question whether a universal carve-out for transgender coverage violates federal law - a question not yet settled with any degree of certainty. In addition to federal law concerns, some employer-provided health plans are also subject to state insurance law regulating the provision of transgender coverage for insurance policies issued in the state. The combination of the unsettled federal law and the patchwork of potentially applicable state insurance laws leave employers with many open questions regarding health plan coverage of transgender benefits. In this article, we break down the status of the federal and state laws that may affect coverage of transgender benefits and provide some guidance for employers as they navigate this developing area.

Applicable Federal Law

Section 1557 of the Affordable Care Act.

Section 1557 of the ACA[2] generally prohibits discrimination on the basis of race, color, national origin, sex, and disability in the context of federally funded health programs or activities. In July 2022, the U.S. Department of Health and Human Services issued proposed guidance under Section 1557 of the ACA[3] ("Proposed Rule") which provides, in part, that an individual shall not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance" on the basis of one of the factors enumerated under Section 1557. The Proposed Rule specifies that discrimination based on sexual orientation and gender identity constitutes discrimination on the basis of sex for purposes of Section 1557. Under the Proposed Rule, Section 1557 would apply only to insurers and third-party administrators that receive federal financial assistance, such as Medicare Part D subsidies for retiree coverage or funds received on account of the entity marketing policies on a healthcare marketplace or exchange. That means that, if finalized, the Proposed Rule may affect the design and administration of a group health plan if the underlying insurer or third-party administrator receives federal funding.

Title VII of the Civil Rights Act.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from taking adverse employment actions (such as termination or a failure to hire) based on an individual's "protected class." For this purpose, a "protected class" includes race, color, religion, national origin, and sex. In *Bostock v. Clayton County*,[4] the U.S. Supreme Court held that an employer who terminates an employee due to sexual orientation or gender identity impermissibly discriminates against the employee "on the basis of sex" within the meaning of Title VII.[5]

While the *Bostock* case focuses on employment termination, Title VII also prohibits employment discrimination with respect to "compensation, terms, conditions, or privileges of employment," including employer-provided benefits. Following the *Bostock* ruling, there have been a flurry of cases arguing that Title VII's prohibition on discrimination on the basis of gender identity also applies to Title VII's prohibition against employment discrimination with respect to employer-provided benefits. The plaintiffs in those cases have generally argued that a categorical exclusion for transgender coverage under an employer-provided health plan, in light of *Bostock*, is impermissible employment discrimination with respect to the "compensation, terms, conditions, or privileges of employment" under Title VII. For example:

- In *Lange v. Houston Cnty.*,[6] Houston County, Georgia repeatedly denied sheriff's deputy Anna Lange's claims for gender-affirming care under the County's employee health plan. Lange sued the County, arguing (among other things) that the plan's exclusion violates Title VII. The court agreed with Lange, holding that, based on the Bostock ruling, denying gender-affirming benefits constitutes discrimination on the basis of sex in violation of Title VII. The County has appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit.
- In *Kadel v. Folwell*,[7] the District Court for the Middle District of North Carolina ruled that the State of North Carolina violated the 14th Amendment's Equal Protection Clause and Title VII's anti-discrimination requirements by providing a health insurance plan for state employees and their dependents that categorically

continued on page 10

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2 Affordable Care Act, Pub. L. No. 111-148, Section 1557(a) (https://uscode.house.gov/statutes/pl/111/148.pdf).

3 Notice of Proposed Rulemaking on Nondiscrimination in Heath Programs and Activities (https://www.govinfo.gov/content/pkg/FR-2022-08-04/pdf/2022-16217.pdf).

4 140 S. Ct. 1731 (2020).

5 42 U.S. Code Section 2000e-2 (https://www.law.cornell.edu/uscode/text/42/2000e-2).

6 608 F. Supp. 3d 1340 (M.D. Ga. 2022).

7 620 F. Supp. 3d 339 (M.D. N.C. June 10, 2022).

continued from page 9

excludes coverage for treatments "leading to or in connection with sex changes or modifications." According to the court, a claims administrator cannot determine whether the plan's exclusion for "sex changes or modifications and related care" applies to a particular claim without knowing the claimants pre-and post-procedure biological sex. Thus, the court found the exclusion constitutes prohibited discrimination under Title VII.

- On September 21, 2023, a full panel of Fourth Circuit judges heard oral arguments on appeal in *Kadel*, and *Fain v. Crouch*,[8] a case in which the plaintiff is challenging the West Virginia Medicaid program's exclusion of transgender coverage. The Fourth Circuit judges seemed to be divided during the hearing, with some judges appearing ready to rule that an employer-provided health plan's blanket exclusion of transgender coverage is discriminatory and other judges appearing to lean in the opposite direction. Other courts are weighing similar challenges to state health care plans that exclude coverage for gender-affirming surgeries, but the Fourth Circuit could be the first federal appeals court to rule on the issue.

Though yet to be heard by Supreme Court, the above cases illustrate that arguments challenging the exclusion of transgender coverage in employer-provided health plans brought under Title VII have the potential to be viewed favorably in federal court.

Mental Health Parity.

Under the Mental Health Parity and Addiction Equity Act ("MHPAEA"), a plan may exclude coverage for mental health and substance use disorders. However, to the extent that a plan covers a mental health and substance use disorder, the plan must provide coverage for the condition "in parity" with medical/surgical benefits provided under the plan. It is unclear whether certain or all transgender services would be considered services provided in connection with a mental health condition under MHPAEA. However, the current Department of Labor has made MHPAEA enforcement a priority, so it is an issue for employers to consider in their plan design.

Constitutionality of State Law Prohibitions on Transgender Treatment for Minors.

As of the date of this article, at least 20 states have enacted laws restricting access to transgender treatments for minors.[9] Generally, these state laws prohibit doctors from treating minors' gender dysphoria with puberty-blocking drugs and hormone treatments, with a handful of states making treatment a felony crime. Certain states also criminalize conduct that "aids and abets" the provision of such care.[10] Nearly half of the states' laws restricting transgender treatments for minors are in various stages of federal litigation,[11] with the plaintiffs arguing, among other things, that the state laws violate the Fourteenth Amendment's Equal Protection Clause.[12] The Fourteenth Amendment's Equal Protection Clause restrict states' ability to enact a law that discriminates on the basis of a protected category, such as sex, race, or religion. The question of whether transgender is a "protected category" for purposes of the Equal Protection Clause, however, is an open issue. The majority of the cases challenging these state laws are in the early stages of review, but the cases appear to be headed toward a circuit split, making this issue ripe for review by the U.S. Supreme Court.[13]

While these cases do not directly impact employer-provided health plans, they are important for employers to follow. If the federal courts find that categorical plan exclusions for transgender benefits is prohibited discrimination under Section 1557 or Title VII, but that states' bans on transgender treatments for minors do not violate the Equal Protection Clause, employers may find themselves subject to conflicting requirements under federal and state law.

State Insurance Law Concerns for Fully Insured Plans

Fully insured employer-provided health plans are generally subject to state insurance law as well as applicable federal law. As such, fully insured plans must provide coverage compliant with the insurance mandates in the state in which the policy is issued. As of the date of this writing, 14 states plus the District of Columbia have applicable nondiscrimination requirements or coverage mandates prohibiting a health insurance plan from <u>excluding</u> coverage of certain transgender services.[14] This means that employers with fully insured health plans in one of those states must provide transgender coverage under state law requirements. This could lead to confusion for a multi-state employer with insured coverage in a state that requires transgender coverage and coverage in a different state in which transgender treatment for minors is prohibited.

continued on page 11

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8 540 F. Supp. 3d 575 (S.D. W.Va. Aug. 2, 2022).
9 E. Londoño & A. Ghorayshi, Fight or Flight: Transgender Care Bans Leave Families and Doctors Scrambling, N.Y. Times (July 6, 2023), https://www.nytimes.com/2023/07/06/us/transgender-health-care-bans.html.
10 *See e.g.*, Indiana's SB 480, Iowa's SF 538, and Mississippi's H.B. 1125.
11 *See e.g.*, Van Garderen et al. v. State of Montana, No. DV-23-541 (Mont. State D. Ct.); L.W. v. Skrmetti, No. 23-5600 (6th Cir.).
12 *See e.g.*, Fain v. Crouch, 618 F. Supp. 3d 313 (S.D. W. Va. 2022); Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021).
13 *See* Tay v. Dennison, 457 F. Supp. 3d 657, 680 (S.D. Ill. 2020) (stating that neither the Seventh Circuit nor the Supreme Court have determined whether transgender individuals constitute a protected class, while other district courts outside the Seventh Circuit have recognized transgender individuals as either a suspect or quasi-suspect class).
14 Movement Advancement Project, Equality Maps: Transgender Healthcare 'Shield' Laws, www.mapresearch.org/equality-maps/healthcare/trans_shield_laws (accessed Oct. 26, 2023) (illustrating which states have enacted "shield" or "refuge" laws protecting access to transgender health care).

continued from page 10

Practical Considerations for Employers

In light of the uptick in litigation and legislation with respect to transgender benefits, employers with broad-based exclusions for transgender benefits may want to consider alternative plan designs. For example, the plan could be designed so that services triggered by transgender diagnosis codes are subject to the same coverage and claims review requirements to which those services are subject if triggered by other diagnosis codes. The transgender claims would be subject to the plan's medical necessity or review requirements at the same level of review as similar claims triggered by non-transgender diagnosis codes. In this way, the plan might avoid a potential discrimination allegation, while utilizing the same cost-containment strategies applicable to similar claims.[15]

Additionally, until states have become more aligned in their laws on gender affirming care, multi-state employers are advised to consult their benefits attorneys, third-party administrators, and insurance providers to ensure their plans are compliant in the states in which they operate.

Lastly, as this area of law is being litigated at both the federal and state levels, it will be important for employers to monitor any legal developments. As the cases move higher through the court systems, multiple different standards can exist concurrently in multiple jurisdictions until the U.S. Supreme Court makes a definitive ruling. Employers are encouraged to reach out to their benefits attorneys with any questions.

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15 According to a September 2013 study from the Williams Institute at the University of California School of Law, employers reported low or no costs due to the addition of gender-affirming care to their health plans. See Costs-Transition-Health-Plans-Sep-2013.pdf (ucla.edu) (last accessed October 22, 2023).

DOJ Announces New Voluntary Safe Harbor Policy for Mergers & Acquisitions

By Holly Drumheller Butler, Miles & Stockbridge

Deputy Attorney General Lisa Monaco recently announced a new safe harbor policy for voluntary self-disclosures made in connection with mergers and acquisitions. Pursuant to this new policy, the DOJ will not prosecute companies that self-report potential violations occurring within an acquisition target's business. Here are the key parameters of the M&A self-disclosure policy:

- The self-disclosure must be made within six months of a deal's closing.
- The six-month threshold applies whether the misconduct was discovered pre- or post-acquisition.
- The acquirer will have one year after the close to fix the issues.
- These deadlines could be extended "depending on the specific facts, circumstances and complexity of a particular transaction." (Conversely, the deadlines do not apply to companies that detect misconduct threatening national security or involving ongoing or imminent harm. Those companies must disclose and remediate immediately.)
- Disclosure must be coupled with cooperation in the ensuing investigation, appropriate remediation and potentially, payment of certain fines, restitution or disgorgement.
- The safe harbor applies across the Department of Justice. (However, it

continued on page 12

continued from page 11

would not be binding if the company is investigated by other agencies or the Securities and Exchange Commission.)

- Misconduct disclosed under the policy will not be factored into future recidivist analysis for the acquiring company.

Beyond offering this self-disclosure carrot, Monaco also reiterated DOJ's willingness to use the stick, warning that "if your company does not perform effective due diligence or self-disclose misconduct at an acquired entity, it will be subject to full successor liability for that misconduct under the law."

More generally, Monaco emphasized the importance of corporate compliance. She highlighted that well-designed compliance programs should "align executives' financial interests with the company's interest" by tying compensation systems to the compliance program (including through executive compensation clawbacks).

This is a good reminder for companies that their compliance programs must be effective, tested and designed to address the DOJ's recent recommendations. Effective compliance programs and strong corporate governance are important tools to help mitigate against enormous financial risks and penalties. Miles & Stockbridge's white collar, fraud and government investigations team is available to discuss and assist.

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