CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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Panel Session 5: Thursday, April 10, 2014 (2:00 pm – 3:00 pm)

Diversity and the Changing Developments in the Insurance Marketplace

I. Same Sex Marriage and Coverage of Claims

On June 26, 2013, in its decision in United States v. Windsor, 133 S. Ct. 2675, the U.S. Supreme Court found Section 3 of the Defense of Marriage Act ("DOMA"), which had barred federal recognition of same-sex marriages to be unconstitutional. This decision impacts a variety of areas that professionals should be aware of.

On August 29, 2013, the IRS announced that any same-sex marriage that is legal in the jurisdiction in which the marriage was performed will be recognized for federal tax purposes. Under the IRS rules, those who purchased same-sex spouse health insurance coverage from their employer on an after-tax basis may treat the costs of that coverage as pretax and excludable from income for federal tax purposes. State income taxes may still apply.

Many employers require proof of marriage. Employers should be aware that any inconsistency between how same-sex married couples are treated as compared to opposite-sex married couples may give rise to claims. What are the coverage implications of any claims of this nature?

The effective date of the IRS ruling is September 13, 2013. Guidance for same sex marriages occurring prior to that date remains pending.

On September 18, 2013, the DOL announced that the IRS rule concerning same-sex marriages applies for purposes of the Employee Retirement Income Security Act ("ERISA").

Carriers should be aware that same-sex couples in civil unions are not considered married under the Supreme Court decision. In these cases, a determination must be made for these employees as to whether they are married under state law or remain in a civil union. This determination is crucial under the current state of the law with regard to coverage determination of claims.

An Employer's decision to exclude same-sex married couples from benefits may violate State and Federal anti-discrimination laws.

Concerning per quod claims, is the coverage question for same-sex married couples different than the coverage determination for opposite-sex married couples?

II. Pre-Employment Criminal Background Checks and Claims Related to the Topic

A. The EEOC takes the position that employer policy or practice of excluding applicants from employment based on the applicant's criminal history has an adverse impact on African American and Hispanic applicants. Although this has been challenged in court, the EEOC maintains the position and all practitioners should be aware of the EEOC position. Therefore, in the eyes of the EEOC, any policy or practice that considers an applicant's criminal history may be unlawful under Title VII unless it is job related and justified by business necessity.

This raises the issue of how an employer can determine whether criminal background screening is job related and justified by business necessity.

First, the employer may use a validation study that meets the EEOC Uniform Guidelines standards.

Second, the employer may utilize the Green Factors, as articulated in Green v. Mo. Pac. R.R., 549 F.2d 1158 (8th Cir. 1977). The Green Factors are:

a. The nature and gravity of the offense or conduct
b. The time that has passed since the offense, conduct, and/or completion of the sentence
c. The nature of the job held or sought.

The EEOC will apply this test to determine whether the criminal background check is job related and justified by business necessity.

B. Some states, including New Jersey, and cities, have "ban the box" legislation pending or enacted that would bar employers from conducting pre-offer criminal background checks.

Under the New Jersey law, companies with at least 15 employees would be barred from conducting a criminal background check on candidates during the interview process. The check could be conducted only after the employer has judged the applicant qualified and has given that applicant a conditional offer of employment.

The New Jersey law would also set limits to how criminal convictions could be used. A conviction would have to occurred within the last 10 years for all but the most serious offenses such as murder and terrorism. For disorderly persons offenses, that window would be reduced to five years. And employers would also need to consider, in writing, mitigating factors including "the degree of the candidate's rehabilitation and good conduct," "the accuracy of the criminal record" and "the nature and circumstances surrounding the crime." What is the impact on claims related to a violation of these new laws? What factors should be considered in determining coverage questions for these claims?

III. Recent U.S. Supreme Court Decisions

1. Vance v. Ball State University, 133 S.Ct. 2434 (2013)

This case broadens the definition of Supervisor in the employment discrimination context to one who can "take tangible action" and effect a significant change in employment status or benefits." These employees can be considered as acting for the employer and, therefore, their actions may subject the employer to vicarious liability.

Therefore, under Vance, employers need to be careful as to who has the power to hire, fire, demote, etc., because those employees may subject the employer to vicarious liability for workplace harassment.

2. University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013).

In Nassar, a lower court held that a plaintiff in a retaliation claim needed only show that retaliation was a motivating factor in order to prevail in an adverse employment action.

The U.S. Supreme Court vacated and remanded, holding that in a Title VII retaliation claim, the plaintiff must show "but for" causation to support the claim. Although "motivating factor" is used for discrimination claims alleging discrimination on the basis of race, sex, or religion, it is not used in a retaliation claim.