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MESSAGE FROM THE CHAIR

To the friends of Cozen O'Connor:

Our *Summer 2010 Labor and Employment Law Observer* covers topics of interest to in-house counsel, human resources professionals and corporate management. These articles include:

- A discussion of the Supreme Court's recent decision in *Lewis v. City of Chicago* regarding the timeliness of disparate impact claims;
- The Third Circuit's recent decision holding that the side effects of medical treatment can qualify as a disabling impairment under the ADA;
- Whether unpaid student interns may be considered employees under the Fair Labor Standards Act; and
- The Dos and Don'ts of designing corporate wellness programs.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

Have a wonderful summer.

Very truly yours,



Mark J. Foley

Chair, Labor & Employment

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The confidence to proceed.

THE SUPREME COURT OPENS THE DOOR FOR MORE DISPARATE IMPACT CLAIMS

Debra S. Friedman

L*ewis v. City of Chicago*, 78 U.S. 4437 (May 24, 2010) is a recent U.S. Supreme Court case that may be a wake-up call for employers using employment practices without regard to their potential disparate impact. *Lewis* involves a written, entry-level test administered by the city of Chicago in 1995 to applicants seeking firefighter positions with the city.

In early 1996, the city used the test results to classify candidates into one of three groups based on their test results: not qualified, qualified and well-qualified. The city then announced that those candidates in the unqualified group would not be considered for hire, those in the qualified group would not likely be called for further processing and those in the well-qualified group would be selected for further processing by using a random lottery. The city also announced that it was disappointed by the racial make-up of the three groups. Notably, there were many more whites than minorities in the well-qualified group.

In March 1997, several African-American applicants whose scores were in the qualified range filed discrimination charges, alleging unlawful disparate impact under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). These charges were filed within 300 days of when the city used the results from the 1995 firefighter exam to select candidates for further employment consideration. However, the charges were filed more than one year after the city announced how it would use the firefighter test results.

Under Title VII, individuals have 180 days from the date of an alleged violation to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in a state that does not have a state or local administrative agency authorized to remedy Title VII violations. If a state has such an agency, as does Illinois, an individual must file a charge of discrimination within 300 days of an alleged Title VII violation.

In *Lewis*, the U.S. Supreme Court was asked to determine whether a plaintiff asserting a disparate impact claim must file an EEOC charge within 180 or 300 days of:

- (a) when an employer adopts an alleged unlawful employment practice; or

- (b) when the employer uses the alleged unlawful employment practice to make an employment decision.

The U.S. District Court for the Northern District of Illinois found that the plaintiff firefighters' claim was timely and that the city's actions violated Title VII. The city appealed the timeliness issue to the U.S. Court of Appeals for the Seventh Circuit.

The Seventh Circuit reversed the district court and ruled that the plaintiff firefighters' claim was untimely. In reaching this decision, the Seventh Circuit measured the statute of limitations from when the city adopted its test score cut-offs and notified the candidates of how they were classified based on their test scores, not from when the city used the resulting eligibility lists in its hiring decisions.

In a unanimous decision authored by Justice Scalia, the U.S. Supreme Court reversed the Seventh Circuit's ruling. The Supreme Court held that an aggrieved individual can state a valid disparate impact claim based upon an employer's use of an unlawful employment practice, as well as upon an employer's adoption of an unlawful employment practice. Accordingly, the Supreme Court viewed each use of an employment practice with a disparate impact as a "present violation" of Title VII — not solely a consequence of a prior unlawful act.

"The Supreme Court held that an aggrieved individual can state a valid disparate impact claim based upon an employer's use, as well as...an employer's adoption of an unlawful employment practice."

In reaching its decision, the Supreme Court acknowledged that because disparate impact claims, unlike disparate treatment claims, do not require discriminatory intent, some claims "would be doomed under one theory [but] will survive under the other." Justice Scalia further commented, "that is the product of the law Congress has written."

WHAT EFFECT DOES THE SUPREME COURT'S DECISION HAVE ON EMPLOYERS' USE OF EMPLOYMENT PRACTICES OVER TIME?

As a result of the Supreme Court's decision, it may be more difficult to fully assess an employer's potential exposure to Title VII disparate impact liability. Not only do employers face risk exposure in adopting an employment practice that could have an unlawful disparate impact, but now employers also face potential liability each time they use an employment practice with an unlawful disparate impact.

Additionally, employers may face serious hurdles in defending against disparate impact claims arising from employment practices adopted many years ago. Some of these hurdles may include mobility of the workforce, deceased or otherwise unavailable witnesses, faded memories and lost or destroyed documentation.

POTENTIAL SIDE-EFFECTS MAY INCLUDE LITIGATION

Emily S. Miller

The saying that the cure is sometimes worse than the disease has taken on new meaning for employers in light of a recent decision by the U.S. Court of Appeals for the Third Circuit. In *Sulima v. Tobyhanna Army Depot*, No. 08-4684, 2010 U.S. App. LEXIS 7459 (3d Cir. Apr. 12, 2010), the Third Circuit held that the side-effects of medical treatment can qualify as a disabling impairment under the Americans with Disabilities Act ("ADA"), even if the underlying condition does not.

The ADA prohibits covered employers from discriminating against employees on the basis of disability, and requires covered employers to reasonably accommodate disabled employees. A person is considered "disabled" under the ADA if he or she has a physical or mental impairment that substantially limits a major life activity. The phrase "major life activity" encompasses a wide array of activities, such as standing, walking, driving, seeing, speaking and working, to name just a few. Regulations issued by the Equal

The Supreme Court recognized the dilemma its decision presents for employers, specifically acknowledging that evidence and/or witnesses may be unavailable by the time a lawsuit is brought. However, Justice Scalia commented that if its ruling was not the effect that Congress intended, "it is a problem for Congress, not one the federal courts can fix."

WHAT CAN EMPLOYERS DO?

This decision demonstrates that employers need to continually assess their employment practices, regardless of when they were adopted. Complicating matters, however, is the reality that such assessments may not be protected from disclosure in subsequent litigation challenging the legality of the employment practices. Accordingly, employers should consult with counsel to determine if, when and how to conduct audits of their ongoing employment practices.

For more information, please contact Debra S. Friedman at 215.665.3719 or dfriedman@cozen.com.

Employment Opportunity Commission define "impairment" as "any physiological disorder, or condition...affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine."

Sulima centered on an ADA claim brought by a plaintiff suffering from morbid obesity and sleep apnea. He alleged that he was forced into participating in his employer's voluntary layoff program because he was disabled. The disability at issue, however, was neither the obesity nor the sleep apnea. Rather, it was the side-effects of the medications he took to treat those conditions, including both over-the-counter and prescription weight loss pills and laxatives. These medications caused him to require frequent visits to the restroom, which amounted to as many as two hours during a given work shift, according to his supervisor. Mr. Sulima's doctor changed the medication regimen, but Mr. Sulima's employer transferred him to a different position nevertheless. Mr. Sulima accepted his employer's voluntary layoff offer only a few days later, and then brought his claim under the ADA.

Significantly, Mr. Sulima presented no evidence to show that his obesity or his sleep apnea substantially limited any of his major life activities. Rather, his ADA claim centered on his gastrointestinal problems, which he admitted were caused solely by the medications he was taking to help him lose weight. Thus, the case presented a question of first impression in the Third Circuit: Can a plaintiff sustain a claim under the ADA based solely on a condition caused by treatment of an underlying condition that is not itself disabling?

Sulima makes clear that in certain circumstances, the answer is “Yes.” The side-effects of medical treatment can constitute an impairment under the ADA if (1) “in the prudent judgment of the medical profession,” the treatment is **required**; and (2) there is no equally effective treatment option that would not cause such severe side-effects. Mr. Sulima did not meet this standard, because he did not convince the court that the medication was required in the prudent judgment of the medical profession, and summary judgment was granted to his employer.

RAMIFICATIONS FOR EMPLOYERS:

Employers now must be particularly sensitive to employees who claim that they are substantially limited in a major

life activity by side-effects of medication for a condition that does not itself substantially limit any of their major life activities. For example, an employee with high blood pressure could suffer from severe dizziness as a side-effect of her medication, which in turn could substantially limit her ability to stand or walk. While the high blood pressure itself might not have limited her major life activities in any significant way, the side-effects of her medication could drastically change her life.

If presented with such a situation, it is important for employers to take the matter seriously. Most employers are not in a position to determine whether any given treatment is required “in the prudent judgment of the medical profession,” nor whether any other equally effective treatment options are available. Therefore, employers should err on the side of caution and engage in the interactive process with the employee to avoid an ADA claim — and if an employee does file a charge of disability discrimination, employers should contact their labor & employment counsel immediately.

For more information, please contact Emily S. Miller at 215.665.2142 or esmiller@cozen.com.

NEW EEOC CHAIR GETS EXPANDED BUDGET

Nickolas G. Spiliotis

Employers are likely to face a reinvigorated Equal Employment Opportunity Commission (“EEOC”) following changes to the commission, increased federal spending, staff increases and expanded federal legislation. In light of the enhanced enforcement, employers should be prepared to handle and cooperate with EEOC investigations, while insisting that the EEOC remain neutral in investigating charges.

COMMISSION CHANGES

Jacqueline A. Berrien, the former associate director-counsel of the NAACP Legal Defense and Educational Fund, was sworn in as chair of the EEOC on April 7, 2010. Chai Feldblum was sworn in as a commissioner of the EEOC on that same date. Feldblum is the first open lesbian to serve as a

commissioner and she has been a leading scholar in the efforts to achieve equality for lesbians, gay men, bisexuals and transgender people. Victoria Lipnic, a former assistant secretary of labor and the only republican, was sworn in as a commissioner of the EEOC on April 20, 2010. All three will serve no longer than the end of the congressional session in 2011 unless confirmed by the Senate for a full term. By virtue of these appointments, which gives the commission a full slate of five commissioners, the Obama administration has indicated its intent to pursue a pro-employee agenda.

The administration has also targeted the EEOC for major budgetary and staff increases, as is evidenced by the president’s request for an additional \$18 million in the EEOC’s 2011 budget. Most of these funds are committed to adding more than 150 new investigators to help process charges of discrimination filed in 2010, which the EEOC projects will exceed 100,000 by year’s end for the first time.

Along with the increase in charges filed, employers can expect a rise in lawsuits brought by the EEOC.

ENFORCEMENT PRIORITIES

Moving forward, employers should expect the EEOC to conduct more investigations and to bring more lawsuits, especially in the amended areas of disability discrimination and discrimination in compensation. The Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) makes clear that it intends to provide a “broad scope of protection” to individuals with disabilities. The ADAAA’s broad coverage mandate, its expanded definition of “major life activity,” the virtual prohibition on employers from considering the effects of mitigating measures (such as medication), and the easing of the burden of plaintiffs to meet the “regarded as disabled” standard, suggest employers can expect a surge in disability charges filed with the EEOC. The ADAAA explicitly granted the EEOC authority to issue regulations implementing the definition of “disability” and the commission is currently focused on drafting final regulations (due out in July) to implement the “broad” effect intended.

Also, the Lilly Ledbetter Fair Pay Act of 2009 (“LLFPA”), which allows employees to file a charge of discrimination within 300 days of the last paycheck paid pursuant to a discriminatory compensation decision, will increase the scrutiny employers face. The EEOC’s investigation of allegedly discriminatory decisions that occurred many years in the past, along with an overall increase in charges filed, multiplies the information available to the EEOC in its search to identify and target “systematic discriminators.” The EEOC’s renewed focus on identifying and litigating discrimination cases involving large classes of individuals was unanimously approved in 2006, and is now in full effect.

EEOC MISSTEPS

While a proactive EEOC is a cause of concern for most employers, recent case law reveals that employers are not helpless when interacting with the EEOC. In theory, the EEOC must investigate charges as a neutral, conciliate in good faith, and cease enforcement when a claim lacks merit. In *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. LEXIS 11125 (N.D. Iowa Feb 9, 2010) a federal district court awarded \$4.5 million in attorneys’ fees and expenses to an employer in a failed sexual harassment case where the EEOC did not

conduct an investigation of the woman’s specific allegations before filing suit. The award has been appealed to the U.S. Court of Appeals for the Eighth Circuit. Also, in *EEOC v. Agro Distib. LLC*, 2009 U.S. App. LEXIS 959 (5th Cir., Jan. 15, 2009) the Fifth Circuit awarded fees and costs of \$225,000 against the EEOC. In that case, the EEOC proposed a high offer to settle a disability discrimination lawsuit for \$250,000. The employer’s \$3,000 counteroffer was not responded to for ten months and then was rejected by the EEOC. When the subject party effectively negated his claims at deposition, the employer requested a dismissal of the lawsuit. The EEOC responded with an offer to settle for \$42,000. The court found that the EEOC acted without justification in continuing the lawsuit, granted summary judgment, and awarded fees and costs from the point of the deposition on.

RECOMMENDATIONS

To prepare for a reinvigorated EEOC, employers should:

1. Re-evaluate policies and practices to ensure compliance with relevant laws and regulations (especially those due out this summer regarding the ADAAA);
2. Self-audit past compensation decisions and pay disparities; revisit document retention guidelines, as the LLFPA could expose an employer to liability for compensation-related discrimination decades after the allegedly discriminatory decision was made;
3. Avoid treating the EEOC investigators as adversaries, and instead, engage in measured and honest cooperation while attempting to narrow broad requests for information;
4. Participate in the EEOC’s mediation process as a good faith attempt to resolve disputes and a method of better assessing the overall situation;
5. Tailor responses so as to fully comply with the EEOC’s request, without providing unnecessary information that could expose the employer to increased scrutiny; and
6. Use counsel to express any perceived EEOC bias to the EEOC or the courts.

For more information, please contact Nickolas G. Spiliotis at 832.214.3903 or nspiliotis@cozen.com.

BE CAREFUL WHAT THEY SAY: NEW FTC RULES PROVIDE A FURTHER IMPOSITION ON SOCIAL MEDIA USE

By *Michael C. Schmidt*

Many commentators—including our firm—have analyzed and described the potential perils to employers in conjunction with the use of social media. The focus of many of those discussions has been centered on issues such as potential liability for discrimination, alleged violation of privacy rights, and the likelihood of unauthorized disclosure of trade secrets and other confidential or proprietary information.

However, effective Dec. 1, 2009, the U.S. Federal Trade Commission (“FTC”) revised its rules pertaining to the use of endorsements and testimonials in advertising in a manner that has a direct impact on the use of social media by businesses and their employees. The new FTC rules highlight the need for employers to understand the need to pay attention to what their employees do and say as it may relate to the products and services offered to the general public, and to create and effectively communicate workplace policies on social media use.

The purpose of the FTC’s new rules is to apply the use of advertising endorsements to Section 5 of the FTC Act, which prohibits certain unfair and deceptive practices in commerce. An “endorsement” is defined by the FTC’s rules to include:

“any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”

The FTC’s rules should be considered by any company that has employees who may be blogging opinions about the company’s products or services. An employer can face potential liability for opinions offered by its employees, even if the opinions are not authorized or sponsored by the company in the first instance. According to the FTC’s rules, any endorsements “must reflect the honest opinions, findings, beliefs, or experience of the endorser,” and “may not

convey any express or implied representation that would be deceptive if made directly by the advertiser.” Under these regulations, the company would be the “advertiser” and an employee blogger would be an “endorser.” In fact, the rules specifically address blogging and the duty to monitor blogging when an individual (particularly those paid) are speaking about the company’s products or services:

“In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.”

“An employee who provides testimonials about her employer’s products would need to disclose...she is an employee of the company.”

Beyond the general considerations set forth, the FTC’s rules generally address (i) endorsements by consumers, experts, and organizations, and (ii) disclosure of relationships between the endorser and the advertiser of the product or service. Thus, certain guidelines must be followed when one is deemed to be a consumer speaking about the performance of a product or service, as well as when one holds himself or herself out to be an “expert” in the particular field discussed, as it relates to some aspect of a product or service such as quality, price or uniqueness. Again, an employee discussing any aspect of the employer’s products or services may fall within the reach of the FTC’s guidelines.

Finally, the FTC’s rules provide that any individual who is endorsing a product or service, and who also has a “connection” with the seller of the product or service, must disclose that connection. Thus, for example, an employee who provides testimonials about her employer’s products would need to disclose the fact that she is an employee of the company.

In light of the FTC’s rules, it is imperative that employers adopt an appropriate policy on social media use by their

employees, and communicate and train employees on those policies. Such policies should include, at a minimum, the types of posts and statements that are inappropriate and unacceptable, prohibitions on certain company- and client-related disclosures, and appropriate direction for disclosing the employee's relationship with the company. Maintaining effective policies will minimize the risk of potential liability

for statements made by employees about the employer's products and services through blogs and other forms of social media.

For more information, please contact Michael C. Schmidt at 212.453.3937 or mschmidt@cozen.com.

INTERNSHIPS POSE HIDDEN LIABILITY TRAPS

Jeffrey I. Pasek

This summer, more than 2.5 million students are expected to work as interns — most of them unpaid. Internships have become a critical step on the road to successful job placement for many college students, giving them professional experience in furtherance of their education.

They also promote valuable business interests such as promoting the image of a business in the local community, providing the opportunity to evaluate potential job applicants and sometimes performing important work that might not otherwise get done.

A for-profit business runs significant legal risks by agreeing to take on an intern, and companies should be aware of how those risks can be minimized.

“Unpaid interns may acquire the status of ‘employees’ under the wage and hour laws and...be paid at least the minimum wage and overtime”

EMPLOYEE STATUS?

Unpaid interns may acquire the status of “employees” under the wage and hour laws and may be entitled to be paid at least the minimum wage and overtime for working more than 40 hours in a week.

Under the federal Fair Labor Standards Act, there are six tests that must each be met so that a student intern will not be considered to be an employee:

- The intern must receive training similar to that which the student would get in school, even if it means actually operating the employer's facilities;
- The training must be for the benefit of the trainee — not the employer;
- The intern must not displace a regular employee, but must work under close supervision;
- The employer hosting the intern must derive no immediate advantage from the activities of the trainee and, on occasion, the employer's operations may actually be impeded;
- The intern must not necessarily be entitled to a job at the completion of the training period; and
- The employer and the intern must understand that the intern is not entitled to any wages for the time spent in training.

For almost 60 years the Department of Labor has consistently applied these factors to determine if a student intern should be classified as an employee. In each case, the determination rests on all the facts and circumstances. That is why it helps an employer significantly to have a written description of the internship program that spells out how each of these criteria is met.

Of course, compliance with federal wage and hour laws is only one step. If any state or local laws impose a higher obligation on the business, then the employer must comply with them as well.

CHILD LABOR RESTRICTIONS

The Fair Labor Standards Act also contains restrictions on the employment of youth. Some work is prohibited because it is deemed to be hazardous such as operating certain types

of power equipment. But even driving a motor vehicle is deemed to be hazardous for those under age 18. There are also hours of work protections for students under age 16. The Department of Labor maintains a useful website (<http://www.dol.gov/elaws/esa/flsa/cl/default.htm>) that can guide employers through many of the basic questions they may have. But as with the minimum wage laws, care must be taken to ensure compliance with any more stringent state or local law requirements.

LIABILITY FOR INJURIES

Through their program of compulsory workers' compensation insurance coverage, every state provides some form of immunity from tort liability for employers whose workers suffer an injury in the course of their employment. Some states extend this immunity to cover loaned employees or individuals whose services are provided through temporary help agencies. So, what about student interns?

The test of who is an employee may not be the same under the state wage and hour laws as it is for workers' compensation purposes. In New York, for example, a student intern providing services to a for-profit business, a nonprofit or a government

entity is generally considered to be an employee of the organization and is covered by the workers' compensation policy even if the intern is unpaid. On the other hand, student interns, whether paid or unpaid, providing non-manual services to a religious, charitable or educational institution are exempt from the mandatory coverage of the New York workers' compensation statute. In Florida, however, a court ruled that a student intern was not covered for workers' compensation benefits when the internship was required for graduation.

If the student will be deemed to be covered by the workers' compensation law, then the employer normally has an obligation to provide notice of coverage and any limitations that might apply, such as the obligation to seek initial medical care from a designated group of providers. It is therefore advisable to determine at the outset how a student intern will be classified in your state and what additional obligations must be met.

For more information, please contact Jeffrey I. Pasek at 215.665.2072, 212.453.3835 or jpasek@cozen.com.

WELLNESS PROGRAMS – DO'S AND DON'TS

Victoria L. Zellers

Many employers are implementing wellness programs to improve employee health and create a healthy work environment. These programs are valuable because improved employee health leads to decreases in absenteeism, increased productivity and lower health care costs. Wellness programs vary greatly. In the past, wellness programs often included discounted gym memberships, educational materials and changes in vending machine selections. Wellness programs are becoming far more sophisticated and now often include health risk assessments and biometric screenings which test employees' blood pressure, cholesterol, glucose levels and body fat. Many programs also include smoking cessation programs, weight loss programs, walking programs and personal counseling sessions. These programs have been credited with helping

employees live healthier lives and even saving lives.

While these programs are bringing positive results to the workplace, employers must be careful to make sure their programs comply with numerous state and federal laws including but not limited to: Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act as Amended by the ADA Amendments Act of 2008 ("ADA" and "ADAAA"), the Genetic Information and Nondiscrimination Act ("GINA"), the Employee Retirement Income and Security Act ("ERISA") as amended by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), state employee privacy laws, and state laws against lifestyle discrimination.

According to Equal Employment Opportunity Commission guidelines, wellness programs are permitted under the ADA as long as they: (1) are **voluntary**; (2) any employee can participate regardless of disability; (3) the information is not used for the purpose of limiting health insurance or advancement in employment; and (4) any and all medical

records acquired as part of the wellness program are kept confidential and separate from personnel records. A wellness program is considered voluntary as long as an employer neither requires participation nor penalizes employees who do not participate. Programs are generally considered voluntary if the incentive to participate does not exceed 20 percent of the cost of the employee only or employee and dependent coverage under employer provided health plans. Proposed ADA regulations also require an employer to provide reasonable accommodations to allow all employees to participate in wellness program offerings.

GINA prohibits group health plans and insurers from collecting genetic information, including but not limited to family medical histories, as part of a wellness program before or in connection with enrollment or at any time for underwriting purposes. GINA also prohibits group health plans from adjusting premiums or contributions on the basis of genetic information. Additionally, GINA prohibits employers from collecting genetic information (including family medical history) as part of a health risk assessment for a wellness plan if that information is linked to any incentive offered through the wellness plan. Thus, if a health risk assessment is part of an employer's wellness program and there is an incentive (financial or otherwise) for participating in the program, then the health risk assessment should not request any genetic information or family medical history. An employer may include an addendum to the health risk assessment which requests family medical history, but such addendum **must** state that employees who do not fill out the addendum will still receive the incentive for completing the rest of the health risk assessment.

HIPAA prohibits group health plans and plan sponsors from using certain health factors to discriminate against workers when determining enrollment eligibility or premium contribution. If an employer's wellness program is linked to the employer's health plan, then it must comply with HIPAA's nondiscrimination provisions. There are two types of HIPAA compliant wellness programs: (1) participation-only wellness programs where an employee does not need to meet any requirements or standards; or (2) standard-based wellness programs which must satisfy additional requirements. Standard-based wellness programs are permitted if: (1) the individual incentive to participate does not exceed

20 percent of the total cost of employee-only coverage; (2) the program is reasonably designed to promote good health and disease prevention; (3) the individual must have the opportunity to qualify at least once a year; (4) a reasonable alternative standard or waiver of the otherwise applicable standard must be available for those with medical conditions that make satisfaction of the applicable standard unreasonably difficult or for whom it is medically inadvisable to attempt to satisfy the otherwise applicable standard; and (5) materials describing the wellness program must disclose the availability of the reasonable alternative standard or waiver. Participation-only programs may include: reimbursement for membership at a fitness club or weight management program; diagnostic testing program that provides reward for participating rather than outcomes; programs that encourage preventative care by waiving co-payments (such as waiver co-payments for prenatal care appointments); and programs that reimburse employees for the cost of a smoking cessation program without regard to whether the employee quits smoking.

Employers should also look into state laws prohibiting discrimination based on lifestyle choices and make sure that information or results obtained in connection with wellness programs are kept confidential and not used as a basis for making employment decisions. Employers should also be careful to ensure that any incentives for participating in wellness programs or meeting wellness standards do not have an adverse impact on older workers to be compliant with the ADEA.

Although there are many issues for employers to be aware of when implementing employee wellness programs, such programs have been successful at reducing costs and increasing employee morale. Additionally, the recently signed Patient Protection and Affordable Care Act has designated significant funds to provide grants to small employers who establish wellness programs. The funds will be available starting in 2011. Under the Patient Protection and Affordable Care Act, starting in 2014, employers may offer incentives of up to 30 percent of the cost of coverage for participating in wellness programs.

For more information, please contact Victoria L. Zellers at 215.665.4707 or vzellers@cozen.com.

WEIGHT BIAS CLAIMS SURFACING

Nickolas G. Spiliotis

Increased attention is being given to the issue of whether or not weight (and to some extent, other physical characteristics such as height and appearance) are protected characteristics under existing federal anti-discrimination laws. In the Americans with Disabilities Act's ("ADA") implementing regulations, the Equal Employment Opportunity Commission ("EEOC") states that "except in rare circumstances, obesity is not considered a disabling impairment." 29 C.F.R. § 1630.16. Its Compliance Manual does the same with respect to "normal deviations" in weight. However, "severe obesity," which is defined as "100 percent over the norm," is "clearly an impairment," although whether it rises to the level of a disability is determined by the "substantial limitation" test. Of course, those who are morbidly obese may have underlying or related disorders which do qualify as impairments.

The courts have reached conflicting conclusions regarding whether morbid obesity must be the result of a physiological disorder in order for it to be covered under the ADA (or Rehabilitation Act). In *Cook v. Rhode Island Dep't of Mental Health*, 10 F.3d 17 (1st Cir. 1993), the U.S. Court of Appeals for the First Circuit allowed a

"regarded as disabled" claim to proceed where the plaintiff produced evidence that while morbidly obese individuals can treat the manifestations of metabolic dysfunction by fasting, the "physical impairment itself—a dysfunctional metabolism—is permanent. However, both the Second and Sixth Circuits have found that there must be a physiological or psychological cause for the obesity. See *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); *EEOC v. Watkins Motor Lines*, 463 F.3d 436 (6th Cir. 2006).

Currently, only the state of Michigan and numerous municipalities, including Washington, D.C., protect against weight-based discrimination. The Third and Fifth Circuits have yet to address the specific issue of weight-based discrimination. The ADA Amendments Act of 2008 ("ADAAA") regulations due out in July should provide some added clarification moving forward. In the interim, employers should only make employment decisions based on weight where there is clear proof that the individual's weight interferes with his or her performance of essential job duties. That likely requires allowing an applicant to prove he/she can perform any physical job requirements an employer deems essential.

For more information, please contact Nickolas G. Spiliotis at 832.214.3903 or nspiliotis@cozen.com.

ATLANTA

SunTrust Plaza
303 Peachtree Street, NE
Suite 2200
Atlanta, GA 30308-3264
P: 404.572.2000 or 800.890.1393
F: 404.572.2199
Contact: Kenan G. Loomis

CHARLOTTE

301 South College Street
One Wachovia Center, Suite 2100
Charlotte, NC 28202-6037
P: 704.376.3400 or 800.762.3575
F: 704.334.3351
Contact: T. David Higgins, Jr.

CHERRY HILL

LibertyView
457 Haddonfield Road, Suite 300
P.O. Box 5459
Cherry Hill, NJ 08002-2220
P: 856.910.5000 or 800.989.0499
F: 856.910.5075
Contact: Thomas McKay, III

CHICAGO

333 West Wacker Drive, Suite 1900
Chicago, IL 60606-1293
P: 312.382.3100 or 877.992.6036
F: 312.382.8910
Contact: Tia C. Ghattas

DALLAS

Comerica Bank Tower
1717 Main Street
Dallas, TX 75201-7335
P: 214.462.3000 or 800.448.1207
F: 214.462.3299
Contact: Anne L. Cook

DENVER

707 17th Street, Suite 3100
Denver, CO 80202-3400
P: 720.479.3900 or 877.467.0305
F: 720.479.3890
Contact: Brad W. Breslau

HARRISBURG

305 North Front Street, Suite 400
Harrisburg, PA 17101-1236
P: 717.703.5900 or 877.868.0840
F: 717.703.5901
Contact: Frances R. Roggenbaum

HOUSTON

One Houston Center
1221 McKinney Street, Suite 2900
Houston, TX 77010-2009
P: 832.214.3900 or 800.448.8502
F: 832.214.3905
Contact: Joseph A. Ziemianski

LONDON

9th Floor, Fountain House
130 Fenchurch Street
London, UK
EC3M 5DJ
P: 011.44.20.7864.2000
F: 011.44.20.7864.2013
Contact: Simon D. Jones

LOS ANGELES

777 South Figueroa Street
Suite 2850
Los Angeles, CA 90017-5800
P: 213.892.7900 or 800.563.1027
F: 213.892.7999
Contact: Howard Maycon

MIAMI

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 4410
Miami, FL 33131
P: 305.704.5940 or 800.215.2137
F: 305.704.5955
Contact: Richard M. Dunn

NEW YORK DOWNTOWN

45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
P: 212.509.9400 or 800.437.7040
F: 212.509.9492
Contact: Geoffrey D. Ferrer

NEW YORK MIDTOWN

277 Park Avenue
New York, NY 10172
P: 212.883.4900 or 888.864.3013
F: 212.986.0604
Contact: Abby M. Wenzel

NEWARK

One Gateway Center, Suite 2600
Newark, NJ 07102-5211
P: 973.353.8400 or 888.200.9521
F: 973.353.8404
Contact: Rafael Perez

PHILADELPHIA

1900 Market Street
Philadelphia, PA 19103-3508
P: 215.665.2000 or 800.523.2900
F: 215.665.2013
Contact: Vincent R. McGuinness, Jr.

SAN DIEGO

501 West Broadway, Suite 1610
San Diego, CA 92101-3536
P: 619.234.1700 or 800.782.3366
F: 619.234.7831
Contact: Blanca Quintero

SANTA FE

125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501-2055
P: 505.820.3346 or 866.231.0144
F: 505.820.3347
Contact: Harvey Fruman

SEATTLE

1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
P: 206.340.1000 or 800.423.1950
F: 206.621.8783
Contact: Jodi McDougall

TORONTO

One Queen Street East, Suite 1920
Toronto, Ontario M5C 2W5
P: 416.361.3200 or 888.727.9948
F: 416.361.1405
Contact: James I. Tarman

TRENTON

144-B West State Street
Trenton, NJ 08608
P: 609.989.8620
Contact: Rafael Perez

WASHINGTON, DC

The Army and Navy Building
1627 I Street, NW, Suite 1100
Washington, DC 20006-4007
P: 202.912.4800 or 800.540.1355
F: 202.912.4830
Contact: Barry Boss

WEST CONSHOHOCKEN

200 Four Falls Corporate Center
Suite 400, P.O. Box 800
West Conshohocken, PA 19428-0800
P: 610.941.5400 or 800.379.0695
F: 610.941.0711
Contact: Ross Weiss

WILKES-BARRE

120 South Franklin Street
Wilkes-Barre, PA 18701
P: 570.970.8030
F: 570.826.1408

WILMINGTON

Chase Manhattan Centre, Suite 1400
1201 North Market Street
Wilmington, DE 19801-1147
P: 302.295.2000 or 888.207.2440
F: 302.295.2013
Contact: Mark E. Felger

