DYKEMAGOSSETT PLLC

EMPLOYMENT LAW DEVELOPMENTS

RECENT CORPORATE SCANDALS RESULT IN NEW PROTECTIONS FOR WHISTLEBLOWERS

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In reaction to the recent wave of corporate scandals, President Bush signed into law the Sarbanes-Oxley Act (the "Act") on July 30, 2002. The Act significantly expands the federal protection offered for employees of publicly traded companies who report certain allegations of corporate misconduct. The federal nature of the Act means that its protections are available to all employees of public companies across the nation.

In a nutshell, the Act has three major components. First, it prohibits discrimination against certain whistleblowers who provide information or otherwise assist in an investigation or proceeding regarding conduct that they "reasonably believe" to be a violation of federal securities laws, rules, or regulations. In order to have engaged in "protected activity" under the Act, an employee must make the disclosures to a federal agency, a member of Congress, a person with supervisory authority over the employee, or any other person within the company with the authority to investigate the alleged misconduct. Under the Act, an employer may not take adverse action against an employee because he has engaged in this protected activity.

Secondly, the Act gives whistleblowers a private right of action against their employers. In order to bring a claim under the Act, a whistleblower must first file a complaint with the U.S. Department of Labor ("DOL") within 90 days of the alleged discriminatory action. The Secretary of Labor will then investigate the complaint to determine whether there is "reasonable cause" to believe that a violation occurred. If so, upon the completion of the Secretary of Labor's investigation, the whistleblower has the right to file a lawsuit in federal court within 60 days of the DOL's final order.

Finally, the Act provides for the imposition of *criminal* penalties (including imprisonment) for retaliation against whistleblowers. Specifically, any individual who knowingly takes any "action harmful" to a person who has provided truthful information relating to the commission (or possible commission) of a federal offense to a law enforcement officer may be subject to fines and/or imprisonment of up to 10 years.

Don't Forget About Michigan's Protections for Whistleblowers

When Michigan's Whistleblower's Protection Act ("WPA") was enacted back in 1981, it was the first such statute put

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in place to protect whistleblowers from discriminatory treatment by employers. Over the years, other states have enacted similar legislation, but few of those statutes rival Michigan's in terms of the protection extended to complaining employees.

Today, more than twenty years after the passage of the WPA, whistleblower litigation continues to grow, both in Michigan and elsewhere. Each year, there are a substantial number of claims brought in Michigan under the WPA by disgruntled former employees, and this statute remains a source of confusion for many employers. Given the increasing popularity of these claims, it has become more important than ever for employers to have a clear understanding of the WPA.

Michigan's WPA Protects Both Employees Who Have Actually Reported Suspected Illegal Activity and Those Who Are "About to Report" at the Time of Discharge

In order to succeed on a claim under the Michigan WPA, a plaintiff must first make out a prima facie case of discrimination by showing that: (1) he was engaged in "protected activity"; (2) he was discharged; and (3) a causal connection existed between the protected activity and the discharge. If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. If the employer carries this burden, the plaintiff has the opportunity to prove that the legitimate reason offered by the employer was not the true reason for the discharge but was only a pretext for discrimination.

In most WPA cases, the court must consider whether the plaintiff engaged in "protected activity." In Michigan, two classes of employees are said to have engaged in "protected activity"—those who "report" and those who are "about to report" a violation or suspected violation of law to a qualifying government agency. Under Michigan law, **even if an employee has not actually reported illegal activity to an outside agency, the employee may still have engaged in protected activity if he was "about to" do so**.

Over the years, Michigan courts have struggled with what it means to be "about to report" a violation or suspected violation of law. Several decisions have wrestled with the question of how close an employee must be to reporting in order to meet this requirement, eventually concluding that a mere threat to report may be enough if the employee is "on the verge of" reporting. Recently, courts have faced a different but equally challenging issue—is it enough for an employee to show that, at some point in time prior to his discharge, he was about to report, or must he have been about to report *at the time of his discharge?* Earlier this summer, in *Koller v. Pontiac Osteopathic Hospital,* an unpublished opinion, the Michigan Court of Appeals weighed in on this issue, holding that an "about to report" plaintiff must have been about to report illegal activity *at the time of his discharge.*

In *Koller,* the plaintiff, an emergency room nurse, brought an action against her former employer under the WPA. The plaintiff alleged that, for nearly 1½ years, beginning in April of 1997, she had complained to her supervisors (both verbally and in writing) of patient abuse. According to the plaintiff, once she started voicing her concerns, she was repeatedly harassed. In August of 1998, the plaintiff met with the hospital's CEO, at which time she again threatened to "go outside of this hospital to a licensing agency to report her allegations of patient abuse." Three months later, the plaintiff resigned her position, alleging that the continued harassment she had suffered after reporting her allegations of patient abuse had resulted in her constructive discharge.

In analyzing whether the plaintiff had engaged in protected activity within the meaning of the WPA, the court focused on whether the plaintiff had established that she was "about to report" allegations of patient abuse to an appropriate

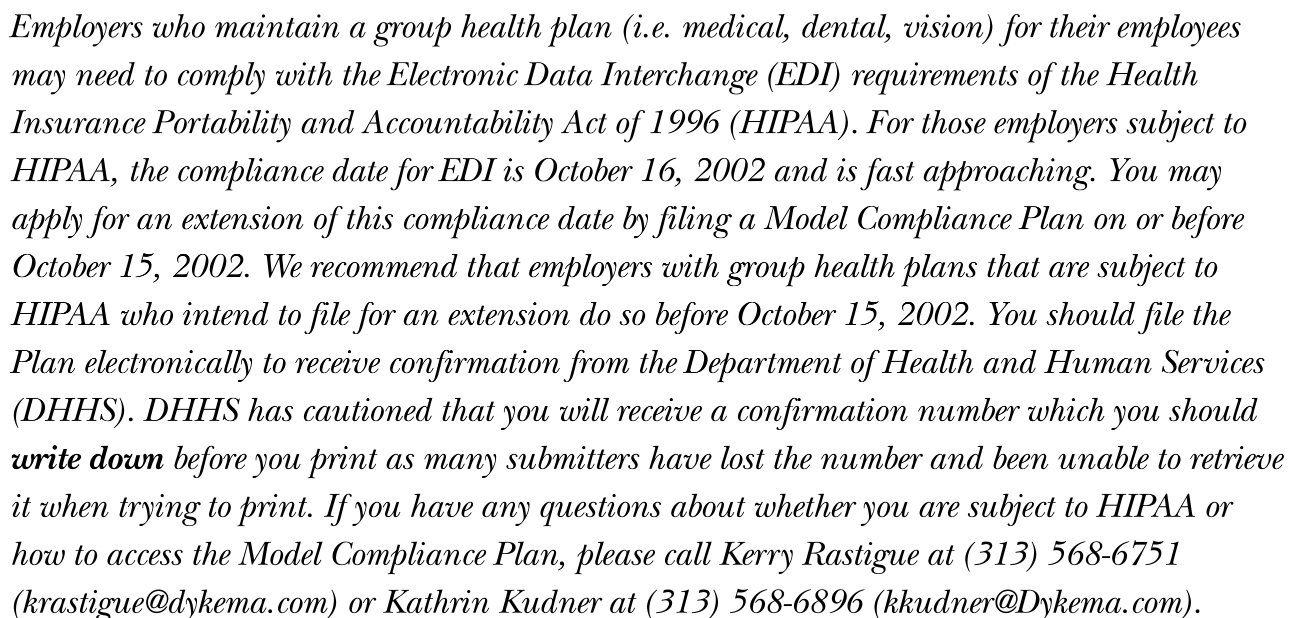
government agency *at the time of her discharge*. Giving the plaintiff the benefit of the doubt, the court acknowledged that, beginning in June 1997 and continuing until August 1998, the plaintiff had threatened to report instances of alleged patient abuse to the state. However, the court rejected the plaintiff's WPA claim, focusing on the fact that she did not resign until three months after her last threat to report as evidence that she was not "about to report" illegal activity at the time of her alleged constructive discharge. Citing earlier precedents and the legislative history behind the WPA, all of which indicate that "about to" means "on the verge of," the court held that the plaintiff in *Koller* was not "about to report" within the meaning of the statute.

This ruling makes clear that, at least for now, in order to be protected by the WPA, a plaintiff must have been "about to report" at the time of his discharge. Under the *Koller* court's reasoning, a plaintiff can no longer point to threats to report made months before his termination as evidence that he was engaged in "protected activity" within the meaning of the WPA.

Conclusion

In light of the growing popularity of whistleblower claims, it is crucial that all employers be aware of the varying levels of protection available to employees. Employers should examine their employment policies and practices with regard to whistleblowers to ensure that all reasonable steps are being taken to prevent discrimination and to protect the company against civil and criminal liability. At the same time, this does not mean that employers should be afraid to take action against non-performing employees for legitimate reasons. It simply means that—now more than ever—employers must develop effective procedures for responding to employee complaints of illegality, investigating such allegations, and taking prompt remedial action to address such complaints.

HIPAA Reminder!



Employers who maintain a group health plan (i.e. medical, dental, vision) for their employees may need to comply with the Electronic Data Interchange (EDI) requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). For those employers subject to HIPAA, the compliance date for EDI is October 16, 2002 and is fast approaching. You may apply for an extension of this compliance date by filing a Model Compliance Plan on or before October 15, 2002. We recommend that employers with group health plans that are subject to HIPAA who intend to file for an extension do so before October 15, 2002. You should file the Plan electronically to receive confirmation from the Department of Health and Human Services (DHHS). DHHS has cautioned that you will receive a confirmation number which you should ***write down*** *before you print as many submitters have lost the number and been unable to retrieve it when trying to print. If you have any questions about whether you are subject to HIPAA or how to access the Model Compliance Plan, please call Kerry Rastigue at (313) 568-6751 (krastigue@dykema.com) or Kathrin Kudner at (313) 568-6896 (kkudner@Dykema.com).*

DYKEMA BRIEFS...VICTORIES

Dykema attorneys Todd Shoudy and Leigh Greden recently won summary disposition in a sex and reverse age discrimination case. The plaintiff, a 28-year old female, sued her employer alleging that her discharge was due to illegal sex discrimination and reverse age discrimination. She also sued for breach of contract, claiming that her former employer owed her a tuition reimbursement for college courses she had taken. Mr. Shoudy and Mr. Greden successfully argued that the plaintiff's position had been eliminated during a reduction-in-force, thus refuting any claims of discrimination. They also defeated the plaintiff's breach of contract claim by pointing out that she had not followed company procedures for requesting tuition reimbursement, and was therefore not entitled to any reimbursement. The judge agreed, and dismissed the plaintiff's entire lawsuit.

Mark Your Calendars!

Thursday, October 10, 2002

EMPLOYMENT SEMINAR 2002

Employment Law Developments Issues Affecting Employers

Eagle Crest Conference Resort ~ Ypsilanti, Michigan

As part of our service to you, we regularly compile short reports on new and interesting developments in employment law and the issues the developments raise. You should recognize, of course, that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Your comments on Employment Law Developments are always welcome. © 2002 DykemaGossett PLLC.