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DRUG TESTING

Public employer's preemployment drug test is unconstitutional

by Robert J. Sniffen and Jeff Slanker
Sniffen & Spellman, P.A.

The U.S. District Court for the Southern District of Florida recently held that a public employer's policy of drug testing all job applicants was applied in an unconstitutional manner. The case highlights the importance of carefully drafting and implementing workplace drug-testing policies.

Working in Key West

The city of Key West conducts drug testing of all applicants for employment. Karen Cabanas Voss applied for a job as solid waste coordinator for the city. The city created the position in December 2012, and she was applying to be its first solid waste coordinator. The job primarily involves office duties and was designed to market and develop the city's recycling programs.

Along with her application for employment, Voss provided the city a copy of her driver's license, consent to perform a background check, references, an educational history, and a work history. The city chose her to fill the position subject to her completion of a drug test. She was given paperwork related to the drug test, including the city's drug-testing policy for job applicants, and instructed to submit a urine sample to a local testing facility for urinalysis to determine if any drugs or alcohol were present in her system.

Under the city's policy, if a job applicant tests positive for one of a number of drugs, including cannabis and alcohol, she is precluded from accepting employment with the city. An applicant is also precluded from employment with the city if she refuses to provide a sample for testing.

Voss refused to submit a urine sample for testing, and the city offered the solid waste coordinator job to another candidate. Voss then challenged the city's drug-testing policy, arguing that it was unconstitutional as it was applied to her. The U.S. District Court for the Southern District of Florida ruled in her favor, finding that the city's application of its drug-testing policy in her case was unconstitutional.

Court's decision

The district court held that the city's application of its drug-testing policy to Voss in this situation was unconstitutional. The court didn't necessarily deem the city's drug-testing policy itself unconstitutional, but it held that the policy as it applied to Voss as an applicant for the solid waste coordinator position was unconstitutional. The court found the drug-testing policy violated her right under the Fourth Amendment to the U.S. Constitution to be free from unreasonable searches and seizures.

The court held that drug testing that uses urinalysis to detect illicit

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substances is a "search" for the purposes of determining whether it falls within the confines of the Fourth Amendment. Thus, public employers that utilize urinalysis as a means to drug test employees could run afoul of the Fourth Amendment's prohibitions if the urinalysis isn't performed to satisfy a "special need" or further an "important governmental interest." The special need or important governmental interest calculation is one exception to the general rule that a search must be based on a government official's individualized suspicion that the subject of the search committed some wrongdoing.

Voss contended in her lawsuit that Key West didn't establish that the drug test satisfied the special need or important governmental interest exception to the Fourth Amendment's prohibitions on unreasonable searches and seizures. Further, she argued that the city established no reason to infringe on her Fourth Amendment rights.

The city countered Voss' arguments by asserting that it was generally interested in providing safe, effective, and efficient public services, which necessitated the urinalysis prior to her employment and demonstrated the government's "special need" to require her to submit to a drug test. The court rejected that argument, holding that a more specific showing of the special need or important governmental interest is required to overcome Fourth Amendment scrutiny and justify a search. The court similarly rejected the argument that the solid waste coordinator job was a position of special concern or that it was safety-sensitive and necessitated a preemployment urinalysis. *Karen Cabanas Voss v. City of Key West,* Case No. 13-10106-CV-King (S.D. Fla. May 9, 2014).

Employer takeaway

Obviously, this case is important for public employers that undertake some form of drug testing for employees and potential employees—particularly if they conduct preemployment urinalysis of all applicants for any position as a matter of course. It also clarifies that a general drug-testing policy that might be constitutional on its own may be unconstitutional when it's applied to certain individuals, depending on the nature of the job they hold or are seeking.

Public employers should carefully evaluate their drug-testing policies and the manner in which they apply to employees or job applicants to determine if they're being carried out within the confines of the Fourth Amendment. Before subjecting job applicants to urinalysis drug screens, the public employer must ensure it has a concrete, well-defined special need or important governmental interest for the screening. Courts may be hesitant to allow public employers the broad authority to drug test all job applicants using urinalysis regardless of the position sought.

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DISABILITY DISCRIMINATION

New mental disorders could lead to spike in ADA claims

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

What do forgetfulness, menstrual cramps, and social awkwardness have in common? They're all symptoms of new mental health disorders recognized in the latest version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which is published by the American Psychiatric Association (APA).

The DSM-5 is widely used by healthcare professionals to assess and diagnose mental disorders. The practical translation: More employees may qualify for protection under the Americans with Disabilities Act (ADA) than ever before, which means employers must be ready to address issues of mental disability accommodation. This article examines the challenges you face in assessing the new mental disorders and determining whether they constitute a mental disability under the ADA for a particular employee.

What is the DSM-5?

One of the biggest challenges facing employers today is the increasing number of lawsuits alleging discrimination based on mental disability. According to the National Alliance on Mental Illness (NAMI), one in four adults—approximately 57.7 million Americans—experience a mental health disorder each year. Major depression is the leading cause of disability for people between the ages of 15 and 44 in the United States.

If you struggle with understanding whether you must accommodate an employee with a mental disorder, you're not alone. The ADA has become a tricky law to navigate, and now that legal maze has become even more complicated.

Unlike other branches of medicine where a laboratory test can be conducted to determine whether a patient suffers from a specific disease (e.g., diabetes), in psychiatry, there's no simple lab test a doctor can perform to confirm the existence of a particular mental disorder. Psychiatrists and other mental health professionals must rely on the DSM-5 to diagnose patients, and inclusion of a disorder in the DSM is often required before it will be covered by health insurance.

Although the DSM-5 cautions that inclusion of a diagnosis in the manual doesn't imply a specific level of

impairment or disability, that distinction has little practical meaning given the definition of the term "disability" in the ADA Amendments Act of 2008 (ADAAA), which Congress decreed should be construed broadly in favor of coverage. The fifth edition of the DSM, released last summer, adds new diagnoses and loosens the criteria for other disorders, which will likely result in more people being diagnosed with disabling mental conditions. The additions and changes come with significant controversy and debate.

DSM-5 creates new disorders

At the heart of the debate are a number of new disorders, including:

- **Social (pragmatic) communication disorder (SCD),** which applies to people with persistent difficulties in the social use of verbal and nonverbal communications that limit their social relationships or occupational performance. Employees previously thought to be merely shy or socially awkward may now qualify for this new diagnosis.
- **Mild neurocognitive disorder,** which is a disorder that "goes beyond normal issues of aging" and "describes a level of cognitive decline that requires . . . strategies and accommodations to help maintain independence and perform activities of daily living." We're going to see this diagnosis with increasing frequency as more and more people are working to an advanced age.

ASK ANDY

Avoiding reverse disability discrimination claims

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *As part of my company's diversity efforts, I would like to reach out to some disability advocate groups to try to fill a few vacant positions. I'm afraid that by doing so, I may be opening up the company to reverse discrimination claims under the Americans with Disabilities Act (ADA). Are my fears justified?*

A First off, I applaud your company's diversity efforts, particularly with respect to the disabled—a group that sometimes is forgotten when it comes to outreach efforts. As for your fears, they are justified only to the extent that there is little (or nothing) you can do to stop a rejected nondisabled applicant from filing a failure-to-hire claim based on perceived reverse disability discrimination. Unfortunately, as many companies see from time to time, some disgruntled applicants and employees will sue for almost anything—even if the claims have no legal basis.

The good news is that from a purely legal standpoint, a nondisabled individual doesn't have a claim under the ADA premised on the belief that an employer gave a disabled applicant or employee preferential treatment over a nondisabled applicant or employee (even if it's true). So if a disgruntled applicant or employee who isn't disabled sues for reverse disability discrimination, you should have a strong defense under the ADA.

Unlike the ADA, the Florida Civil Rights Act (FLCRA) doesn't expressly protect against reverse disability discrimination claims. The FLCRA generally is interpreted in a manner consistent with the ADA, however, so there may be a good argument that reverse disability discrimination claims aren't recognized under the state law, either.

Note that the ADA is unlike Title VII of the Civil Rights Act of 1964 when it comes to reverse discrimination claims. Title VII protects men and women and people of all races, colors, religions, and national origins. So under Title VII, for example, a man can make a claim of reverse discrimination premised on the belief that his employer treated a woman better than it treated him with respect to the terms or conditions of employment.

The Age Discrimination in Employment Act (ADEA) is more in line with the ADA in that applicants and employees under the age of 40 can't make reverse age discrimination claims premised on the belief that an employer gave preferential treatment to somebody older than 40. But the FLCRA protects everybody, of any age, against age discrimination. So reverse age discrimination claims arguably may be brought under the FLCRA.

If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com. Your identity will not be disclosed in any responses. This column is not intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

- **Premenstrual dysphoric disorder (PMDD),** which describes extreme premenstrual syndrome (PMS) symptoms experienced before most menstrual cycles in a 12-month period. Symptoms include feelings of hopelessness, mood swings, emotional sensitivity, irritability, increased interpersonal conflicts, anxiety, tension, weight gain, or bloating. Symptoms must cause significant distress or interfere with relationships or with school or work (e.g., decreased productivity and efficiency).

As a result of these new diagnoses, forgetful, socially awkward, or female employees who experience severe PMS symptoms may qualify as disabled under the ADAAA. The line between mental conditions that employers must accommodate and conduct that's within the range of normal—and therefore need not be accommodated—has become more blurred.

What does this mean for employers?

The new mental disorders, along with other revisions in the DSM-5, have significant implications for the workplace and pose new challenges for employers. The DSM-5 threatens to make the already complex task of complying with the ADA more difficult by forcing employers to determine whether and how to accommodate employees with the newly recognized mental conditions under the ADAAA, which makes it easier to show that an impairment qualifies as a disability.

For example, a socially awkward employee could claim that she is "regarded as" disabled because she has SCD. Or an employee whose mental acuity is declining for whatever reason may claim that he suffers from mild neurocognitive disorder and request an accommodation for his alleged disability—e.g., more time to perform his job duties. So how should you respond when you're presented with a doctor's note by an employee seeking an accommodation for one of the new mental disorders?

You should continue to do the same things you've always done:

- Determine whether the mental disorder constitutes a mental disability (which shouldn't require extensive analysis). You have the right to ask for medical documentation if necessary. Don't forget to include the Genetic Information Nondiscrimination Act's (GINA) "safe-harbor" language in your letter requesting medical certification.
- Make sure there is a nexus between the disability and the need for an accommodation.
- Review the employee's essential job functions. (Remember, you never need to eliminate an essential job function as part of a reasonable accommodation.)
- Start the interactive process. Meet and confer with the employee, asking, for example, "How can we help you?"
- Review possible reasonable accommodations to help the employee perform her current job. If none is available, consider transferring her to a vacant position for which she is qualified.
- Consult with legal counsel or mental health professionals if necessary.
- Explore possible defenses to not providing a reasonable accommodation. For example, providing an accommodation would create an undue hardship on your business, or the employee poses a direct threat to himself or others that can't be eliminated by a reasonable accommodation.
- Document your defenses and the reasonable accommodation process.

Don't forget to mark your interaction with legal counsel "attorney-client privileged communication" to preserve confidential communications. You should refrain from having any written internal conversations that don't involve legal counsel because the attorney-client privilege may not apply to such communications. ✤

FITNESS FOR DUTY

Time to reassess your preemployment testing practices?

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

After extending a conditional offer of employment, many employers require prospective employees to undergo medical examinations to assess their "fitness for duty." Problems may arise, however, when an employer decides to rescind a job offer based on information obtained during the medical examination. A Florida employer recently learned that lesson the hard way after battling with the Equal Employment Opportunity Commission (EEOC) over a conditional offer medical exam.

Facts

American Tool & Mold (ATM) custom designs and manufactures molds for plastic parts. In October 2009, ATM's general manager recruited Michael Matanic for a process engineer position and eventually extended him a job offer. The company conditioned his employment on a medical exam.

In November 2009, Matanic went to a medical clinic for his preemployment medical exam. All prospective ATM employees, regardless of the position they were being hired for, were scheduled for a back screening and a lifting test. Before his exam, Matanic disclosed on a medical form that he sustained a back injury in 2003 for which he had surgery.

In light of that information, the clinic didn't proceed with the back screening or lifting test. Instead, the clinic completed a physical examination form assessing Matanic as "not fit for employment/work" absent a review of the medical documentation from his back surgery and a statement of restrictions from the physician who performed the surgery.

Termination and EEOC charge

Matanic provided the clinic with a release for his 2003 surgical records, and ATM permitted him to start work on a conditional basis. In January 2010, however, the company terminated his employment because the clinic didn't receive the requested medical documentation.

Matanic filed a charge of disability discrimination with the EEOC, and the agency found "reasonable cause" that discrimination had occurred. It filed a lawsuit on Matanic's behalf in federal court in Tampa alleging that ATM violated the ADA in its handling of his preemployment physical examination. The agency then filed a request for summary judgment with the court, essentially asking the court to rule in its favor on the ADA liability issues.

The EEOC argued that ATM regarded Matanic as disabled after he disclosed his 2003 back surgery. The company countered that it simply didn't have the information necessary to ascertain his level of physical ability and therefore couldn't deem him fit for duty. The court agreed with the EEOC, holding that ATM violated the ADA by regarding Matanic as disabled.

Victory for EEOC and Matanic

The court noted that the only reason ATM sought Matanic's medical records was because he disclosed a 2003 back surgery. By requiring him to produce documentation from his physician, the company essentially turned the tables on Matanic, asking him to prove that he was *not* disabled.

The court highlighted the fact that "ATM did not even undertake to conduct an examination to verify any residual problems from the prior medical intervention." Instead, the company assumed that Matanic's 2003 back surgery would put him at risk of further injury and would put it at risk of potential liability. It was that assumption that got ATM into trouble.

Individualized determinations required under ADA

The court recognized that under certain circumstances, employers may subject a prospective employee to a medical examination after extending a conditional offer of employment. But if prospective employees with disabilities are screened out as a result of the examination, the exclusionary criteria must be job-related and consistent with business necessity. Under that standard, the employer must make an individualized determination that the prospective employee's impairment would preclude him from performing the essential job functions.

ATM withdrew Matanic's job offer without making any individualized determination that he couldn't perform his essential job functions. The company just assumed that he couldn't perform the job. In fact, the evidence demonstrated that ATM didn't provide the medical clinic with a job description, and the clinic wasn't even aware of the process engineer's job duties. The court held that ATM couldn't avoid its obligation to evaluate Matanic's actual ability to perform the job "by blindly relying" on the medical clinic's assessment, particularly because the clinic wasn't in a position to perform any individualized assessment.

The ADA is aimed at stopping employers from jumping to conclusions about employees' abilities based on stereotypes.

As for ATM's request that Matanic produce his 2003 medical records, the court concluded that the company requested the information merely to dispel its fear of workers' compensation claims or future injuries. According to the court, "neither of those are permissible justifications under the ADA" when the prospective employee is currently able to perform the essential job functions.

Lastly, the court rejected ATM's argument that hiring Matanic would have posed a direct threat to his own safety or the safety of others. Without an individualized assessment, said the court, "ATM cannot rely on myths and fears regarding whether a back surgery performed years earlier might place ATM at risk of potential liability and possibly cause harm or irreparable harm" to Matanic. Simply put, "that is precisely what the ADA generally, and the 'regarded as' prong specifically, [was] designed to prevent." *EEOC v. American Tool & Mold, Inc.*

Takeaway

The ADA, like many other employment laws, is aimed at stopping employers from jumping to conclusions about employees' abilities based on stereotypes and generalized assumptions. Individualized determinations are critical, particularly when it comes to assessing an employee's ability to perform essential job functions. Failure to make an individualized determination about an employee's ability to perform the job will increase your risk of potential liability.

If you have questions about this article, you may contact the author at arodman@stearnsweaver.com. ✤

AFFIRMATIVE ACTION

Supreme Court addresses, upholds state bans on affirmative action

In a recent U.S. Supreme Court ruling, the court upheld a controversial ban on the use of affirmative action in public education, employment, and contracts in the state of Michigan. For details on the decision and whether it affects your business, read on.

Background

In 2003, two U.S. Supreme Court decisions addressed—and in one decision upheld—the use of racial preference in higher education admissions at the University of Michigan. Michigan voters responded to the polarizing issue in 2006 by amending the state constitution to prohibit discrimination or preferential treatment in public education, government contracting, and public employment. Proposal 2, as the measure was called, was approved by 58 percent of the state's voters—and then immediately challenged in federal court the following day.

Proposal 2 was struck down by the U.S. 6th Circuit Court of Appeals in 2012, creating a split from the 9th Circuit's prior decision to uphold California's similar statewide ban on affirmative action. The ruling also created uncertainty in the six other states with similar affirmative action bans: Arizona, Florida, Oklahoma, Nebraska, New Hampshire, and Washington.

High court settles the uncertainty

Through five separate opinions amassing over 100 pages of text, the Supreme Court addressed this uncertainty in a 6-2 decision upholding the Michigan ban. However, in doing so, the majority was careful to limit the scope of the question that was asked and addressed.

The majority opinion, written by Justice Anthony Kennedy, didn't discuss the merits or legality of affirmative action policies. Rather, the decision merely addressed whether Michigan voters had the power to pass Proposal 2.

Specifically, Justice Kennedy wrote that the case wasn't about "*how* the debate about racial preferences should be resolved" but "about *who* may resolve it." Justice Kennedy went on to note that there is no constitutional or judiciary authority to set aside the Michigan law and that it would be "demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."

Justice Sonia Sotomayor vehemently disagreed in her lengthy 57-page dissent, arguing that the Michigan law changes the rules of the political process in a manner disadvantageous to racial minorities. Her dissent called for further open discussion of affirmative action policies and race discrimination, but this case wouldn't be the forum for that dialogue. *Schuette v. Coalition to Defend Affirmative Action* (572 U.S. ___ (2014)).

The majority took a very narrow approach to resolving the split among federal courts.

What does the opinion mean for employers?

At the moment, not much, although we may now see additional states propose similar bans on the use of racial preference in education, contracts, and employment.

As noted, the majority took a very narrow approach to resolving the split among federal courts without digging into the details of affirmative action in general. Additionally, although Michigan's Proposal 2 applies not only to college admissions but also to public employment and contracting, the labor-related provisions of the law were never challenged in this case. So while the state affirmative action ban still holds and extends to public employment and contractors, the decision has limited applicability to the employment context.

Finally, note that affirmative action programs in the employment context generally operate differently than those in college admissions because employers focus more on ensuring a diverse applicant pool for hiring and promotion than on filling numerical quotas based on minority characteristics. For example, federal contractor regulations specifically prohibit the use of quotas and

don't allow diversity goals to supersede merit selection principles (a chief concern with the more controversial educational admissions processes). ✤

WASHINGTON UPDATE

Thanks, Obama! White House pushes for change through agencies, directives

Members of the Employers Counsel Network (ECN), including Florida Employment Law Letter editors Tom Harper and Andrew Rodman, met in Austin, Texas, from April 22 to April 24. David Fortney, ECN member and cofounder of Washington, D.C., law firm Fortney & Scott, LLC, shared his insights into how the current political and policy climate is affecting labor and employment issues, including White House directives, subregulatory guidance, and enforcement.

What's going on in D.C.

In his State of the Union address, President Barack Obama acknowledged that he has been blocked by the Republican Congress, so he is going to do what he can without Congress, which means White House directives and judicial appointments. Add to that federal agencies that are giving less compliance assistance while putting a greater emphasis on enforcement and stepping up information sharing and coordination among federal and state enforcement agencies, and it can feel like a very unfriendly environment to employers.

Currently, the Senate has a Democratic majority, and the House of Representatives has a Republican majority. Far-reaching legislation is rarely passed, and congressional debates and filibusters have become part of the political landscape. The midterm elections in November are key in determining how much latitude President Obama will retain in his last two years.

Fortney predicts the Republicans will keep the House. The real question is the Senate, where he thinks there is a strong possibility that Republicans will end up with more than 50 seats but won't be able to get the 60 seats needed to stop a filibuster. Fortney notes there is a sense in Washington that Obama knows that after November, it could become even harder to get things done, so there is a sense of urgency from the White House.

Smaller agencies now a big deal

According to Fortney, the Obama administration has relied on smaller agencies to implement broad changes. As a result, agencies few people had ever heard of are now being talked about. Recently, the National Labor Relations Board (NLRB) leapt into the national spotlight with the issue of unionizing college athletes, highlighting how the agency has reinvented itself to have greater influence in the workplace beyond the traditional organized workforces.

Fortney suggested that the Office of Federal Contract Compliance Programs (OFCCP) will be the next agency to get that public perception elevation as a result of Obama's move to make changes without Congress. Employers should care about the OFCCP because more than 25 percent of U.S. jobs are federal contractor jobs, and Fortney said many employers don't realize they are federal contractors subject to the agency's regulations.

Through a focus on federal contractors, the OFCCP now has a broader role under new Executive Orders, as part of the fair pay initiatives, and in compensation enforcement. Additionally, the agency is in charge of enforcing new regulations for individuals with disabilities under Section 503 of the Rehabilitation Act of 1973 and for protected veterans under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).

A look inside the DOL

Fortney said he has seen a positive shift at the U.S. Department of Labor (DOL), and while the agency may be tough on employers, leadership recognizes that the vast majority of employers are either in compliance or working hard and trying to be in compliance. Secretary of Labor Thomas Perez, confirmed in July 2013, is the former head of the Civil Rights Division of the U.S. Department of Justice. He also was the secretary of labor for Maryland, where he focused on misclassification. Fortney noted that Perez keeps lines of communication open with the "other side," specifically calling Senator Tim Walberg (R-Michigan) weekly.

Misclassification of workers is a key focus and current priority of the DOL.

According to Fortney, Secretary Perez is expected to expand the DOL's strong enforcement focus, including more audit and litigation initiatives. That prediction would seem to be reinforced by the DOL's fiscal year (FY) 2015 budget requests. Overall, the budget represents a 1.6 percent decrease from the FY 2014 budget, but increased amounts are proposed for key enforcement agencies, including:

- An increase of almost $30 million for the Wage and Hour Division (WHD) to hire 300 new investigators;
- An additional $4 million for the Occupational Safety and Health Administration (OSHA) to strengthen enforcement of whistleblower laws; and
- An increase of $1.1 million for the OFCCP to hire 10 compensation analysts.

While the DOL won't get everything it asked for, Fortney made the point that the budget is important

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because it represents what the White House would do if it could do whatever it wanted and is instructive on what the DOL wants to emphasize and where it wants to make an impact.

Misclassification of employees

Misclassification of workers as independent contractors rather than employees is a key focus and current priority of the DOL. As part of its misclassification initiative, the agency came to an information-sharing agreement with the IRS. Under the agreement, if the DOL finds an employer misclassified employees, it will transfer that information to the IRS, which will then investigate whether back taxes are owed and determine penalties. The DOL has more information on the initiative at www.dol.gov/whd/workers/misclassification/.

Further, a Presidential Memorandum issued in March 2014 directed Perez to update overtime regulations. Fortney said it is expected that the new regulations will increase the salary threshold and make the duties requirements more restrictive for exemption eligibility, increasing the number of workers who must be paid overtime. They also will make it more difficult for an employer to claim an overtime exemption for employees with both exempt and nonexempt duties.

Transparency and sharing employer data

Fortney noted that there has been expanded transparency of the DOL's enforcement data. The agency's Online Enforcement Database (available at http://ogesdw.dol.gov/) offers access to various enforcement data from the WHD, the OFCCP, OSHA, and other DOL enforcement agencies—some of which was previously unpublished—in one location. Users can search by employer name or other criteria to determine the compliance track records. Unfortunately for employers, Fortney said it's almost impossible to correct misinformation in the database.

Bottom line

Fortney emphasized that Obama is concerned about his legacy and will do what it takes to effect change, whether Congress helps him or not. A lot of that change is aimed at employers. Therefore, you need to stay informed about changes coming out of Washington beyond legislation. ✤

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