Considerations for Health Care Employers Operating in New Jersey

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Introduction

Companies engaged in the health care industry – whether they provide direct patient care, develop information technology or research new drugs or medical devices, among a range of other services – are subject to complex regulatory and business risks. In addition, there are a number of employment law concerns specific to employers in the health care industry. Staving off the risks associated with these concerns can help prevent disputes and costly litigation.

Fox Rothschild's Labor & Employment Department has prepared this guide to serve as a resource for health care employers in New Jersey. This guide outlines some of the common employment issues faced by companies that provide health care-related services.

Restrictive Covenants

A doctor may be precluded from practicing near a former employer if he or she signed a well-drafted restrictive covenant with the former employer. Generally, a restrictive covenant is enforceable in New Jersey provided the covenant is "reasonable." To be reasonable, the covenant must: (1) protect a legitimate interest of the employer, (2) impose no undue hardship on the employee and (3) not harm the public interest. Moreover, the agreement need not be signed at the beginning of employment. New Jersey courts have held that merely continuing to provide employment is adequate consideration for enforcing a restrictive covenant. In addition, the New Jersey Supreme Court in recent years has reiterated that post-employment restrictive covenants are enforceable against physicians.

Background Checks

New Jersey's Health Care Professional Responsibility and Reporting Enhancement Act requires every person who possesses a license or certificate as a health care professional to undergo a criminal history record background check. Examples of the professionals

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licensed/certified by the Division of Consumer Affairs are doctors, nurses, home health aides, pharmacists and physical therapists. Other employees who also provide direct one-on-one contact with patients – such as housekeeping, cafeteria, laundry and transportation employees – are not covered by the law.

Under a separate statute, nursing home administrators, nurse aides and personal care assistants must undergo criminal background checks. For nurse aides and personal case assistants, the background checks are required upon certification and then every two years for recertification. Nursing home administrators are required to have the background checks in order to be licensed and then again every three years for license renewal. Additionally, staff at residential child care facilities must undergo both criminal background checks and child abuse record information checks.

Employers also should be aware of the federal Patient Safety and Abuse Prevention Act (pending at the time this guide is being published), which would require states to establish coordinated criminal background check systems for all people working in skilled nursing facilities.

Finally, the New Jersey Fair Credit Reporting Act largely mirrors the federal Fair Credit Reporting Act, which requires the potential employee be notified of and give written authorization for a credit report conducted by an outside agency. The results of the report must be disclosed to the potential employee. The New Jersey Identity Theft Prevention Act, enacted in 2006, requires that an employer destroy all records containing personal information that it does not intend to retain and to disclose any potential security breaches to employees. Additionally, it restricts allowable uses for Social Security numbers.

Mandatory Overtime

Since 2004, under New Jersey law, mandatory overtime is banned for hourly health care workers. This ban, however, does not apply to doctors or workers without direct patient care responsibilities. Additionally, the law provides an exception for emergencies,

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meaning unforeseeable or unavoidable situations relating to immediately required health care. Health care facilities – meaning those licensed by the Department of Health and Senior Services, a state or county psychiatric hospital, a state developmental center or a health care service firm registered by the Division of Consumer Affairs – must conspicuously post the "New Jersey Mandatory Overtime Restrictions for Health Care Facilities."

Personnel Files

New Jersey does not grant an employee any rights to view his or her personnel file. Indeed, New Jersey is one of only a few states with no legislation governing employee access to personnel files. As such, if an employer's policy does not allow employee access, the employee has no right to inspect his or her file. However, employers should exercise caution in cases where there is an allegation of discrimination. The New Jersey Supreme Court has held that an employer retaliated against an employee who it fired for requesting to see her personnel file to prove an allegation of discrimination.

National Labor Relations Act § 8(g) and Non-Solicitation

Under Section 8(g) of the National Labor Relations Act, a labor organization must give health care employers 10 days written notice before "engaging in any strike, picketing or other concerted refusal to work." Recently, the National Labor Relations Board held that the refusal to work voluntary overtime was a "concerted refusal to work," triggering the 10-day notice requirement.

A health care institution may prohibit its employees from conducting union activities in areas of its facility in which such activity would adversely affect patient care. For example, employees can generally be prohibited from engaging in union activities in operating rooms and patient care lounges. Conversely, employees may engage in union activities in or around the cafeteria or gift shop – unless the facility can demonstrate that the unionized activity is somehow disruptive to patient care. Employers that have a valid no-solicitation, no-distribution policy may also limit employee solicitation during non-working time.

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Where reasonable, alternative means of communication exist, a health care institution may prohibit non-employee union organizers from soliciting on its property. However, if a health care facility adopts a non-solicitation policy, the policy must apply to all non-employee groups and it must be enforced in a non-discriminatory manner. For example, a health care institution may not ban solicitation by union organizers in its lobby or parking lot but permit solicitation by a charitable organization in those same areas.

Employment-at-Will

Generally, New Jersey follows the employment at-will doctrine, meaning employees may be discharged without cause. However, New Jersey recognizes some limited exceptions to the at-will rule. Indeed, an employer's grounds for termination cannot be contrary to public policy based on such sources as legislation, administrative rules, regulations or decisions and judicial decisions. Also, an employment manual can create an implied contract between an employer and employee, altering the employee's at-will status. For instance, absent a valid disclaimer, where handbook language regarding job security is "explicit and clear" and where comprehensive provisions outlining termination and discipline are articulated in the handbook, this may be binding on an employer. *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 306, modified, 101 N.J. 10 (1985). Finally, all employment contracts in New Jersey are subject to an implied covenant of good faith and fair dealing, meaning neither party may interfere with the other party's contracted for benefits.

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