Weekly Wright Report (02/05/18)

Maryland Healthy Working Families Act - UPDATE
By Gregory Currey

Bottom line: **The February 11, 2018 compliance deadline stands.**

Details: On January 12, 2018, the Maryland General Assembly overrode Governor Hogan's veto of the Maryland Healthy Working Families Act. By virtue of its passage through a veto override, the Maryland Healthy Working Families Act becomes effective on February 11, 2018.

In response to practical concerns related to the short time-frame for companies to amend or implement new policies, on January 22, 2018, Senate Bill 304 was introduced, prohibiting the Commissioner of the Department of Labor, Licensing and Regulation (the "DLLR") from enforcing the Act for 60 days from its effective date, effectively extending the time for companies to come into compliance until April 12, 2018. The bill was introduced as an emergency measure and requires a three-fifths (3/5) vote in both chambers to pass. The bill was not voted on immediately and instead was referred to the Senate Finance Committee. No additional hearings are currently scheduled on the measure, rendering it unlikely that the measure will pass before the February 11, 2018 implementation date. As a result, all employers should continue to prepare policies and procedures as though the bill will be in full effect the week of February 11, 2018.

Wright, Constable and Skeen will continue to monitor the emergency measure and provide updates if its status changes. We will also provide updates on other legal, policy and operational developments, as well as day-to-day implementation matters as best practices evolve over time.

Government Knowledge Defense to False Claims Act Suits
By Michael Stover

Last month the Third Circuit became the most recent court of appeals to adopt the government knowledge inference defense to False Claims Act ("FCA") suits. In *U.S. ex rel. Spay v. CVS Caremark Corp.*, the Third Circuit stated that it was joining its sister circuits in holding that the government's knowledge of the facts underlying an allegedly false record or statement can negate the knowledge or intent required for an FCA violation as long as the defendant knows the government knows. *Spay*, involved coding "dummy" prescriber IDs in the submission of Medicare claims to the government. The government knew that pharmacies and insurance companies were having trouble obtaining the unique physician identifier number necessary to populate the associated field and allowed the practice to continue.

The Third Circuit held that the government knowledge inference may arise when the government knows and approves of the facts underlying an allegedly false claim prior to presentment and the defendant knows that the government is aware of the false information in a claim. In other words, there is a two-prong test that must be met before the government knowledge inference can preclude liability. Essentially, the test helps distinguish, in FCA cases, between the submission of a false claim and the *knowing* submission of a false claim, by negating scienter.

The *Spay* Court also noted that the use of dummy IDs was not "material" for purposes of the FCA because the government regularly paid the claims in full despite knowledge of the alleged false statements. In 2016, the Supreme Court in *Universal Health Systems v. Escobar* explained that "if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." The *Spay* Court also considered the context of the alleged falsity and noted that the dummy ID's were a technical "workaround" to ensure payment of legitimate claims for reimbursement. Accordingly, in light of the technical nature of the violations and the government's knowledge of the use of dummy ID's, the court affirmed dismissal of the FCA claim.

FCA claims are on the rise and it is important to know and understand the available defenses to such claims.

The EEOC Issues Its FY 2017 Performance Report

By Laura L. Rubenstein

During FY 2017, the U.S. Equal Employment Opportunity Commission (EEOC) resolved 99,109 charges and reduced its charge workload by 16.2 percent to 61,621, the lowest level of inventory in 10 years. It handled over 540,000 calls to its toll-free number and more than 155,000 contacts about possible charge filing in field offices, resulting in 84,254 charges being filed.

The EEOC secured approximately $355.6 million in monetary relief for those who work in the private sector, which included $42.4 million in monetary relief through litigation. In fiscal year 2017, the EEOC filed 184 lawsuits, including 124 suits on behalf of individuals, 30 non-systemic suits with multiple victims, and 30 systemic suits. This is more than double the number of suits filed in fiscal year 2016.

Of the 84,254 new charges filed with the federal agency in 2017, retaliation was the claim most frequently alleged, followed by discrimination or harassment charges of race, disability, sex/gender and age.

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