

2024

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Introduction



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Managing the Struggling Employee:

Mental and Emotional Health and the Law

Labor and Employment Law Fall 2023 Breakfast Briefing

Albany • September 19

Binghamton • September 14

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TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction / Agenda

Kristen Smith – (12:05PM-12:15PM)

- NYS Legislative Update – Labor Bills Signed in September

Howard Miller – (12:15PM-12:25PM)

- First Amendment & Academic Freedom – A Recent Second Circuit Decision

Louis DiLorenzo – (12:25PM-12:35PM)

- Some Discipline and Termination Considerations

John Harras – (12:35PM-12:45PM)

- Don't Choke and the Gag Clause Prohibition Requirements

NYS Legislative Update – Labor Bills Signed in September



Kristen E. Smith

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Recently Enacted NYS Labor/Employment Laws

- Labor Law 590(2): Requires employers to notify employees in writing upon separation **or reduction of hours** of their right to apply for unemployment benefits
 - “On a form furnished or approved by the Department.”
 - S. 4878-A /A. 398-A
 - **Effective 11/13/23**

Recently Enacted NYS Labor/Employment Laws

- Labor Law 201-i: Prohibits employers from requesting or requiring username, login information, and passwords, of personal accounts as a condition of hiring or employment, or for use in a disciplinary action – S. 2518/A. 836 – **Effective 3/12/24**
- Exceptions:
 - Accounts used for business purposes, if prior notice given
 - Devices paid for by the employer, where employee was notified that using the device was conditioned on employer's right to access
 - Viewing online information already made public
 - Employee/applicant voluntarily sharing account information

First Amendment & Academic Freedom – A Recent Second Circuit Decision



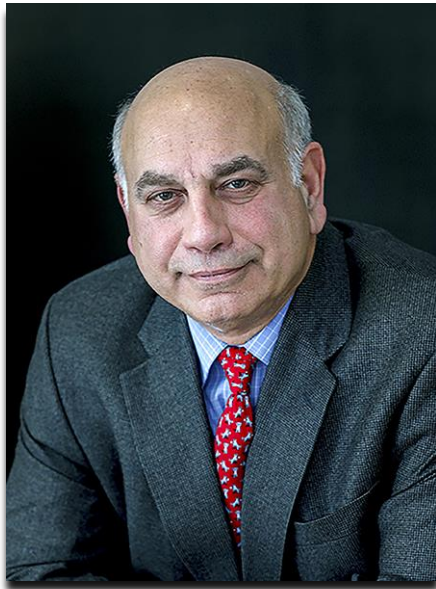
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Some Discipline and Termination Considerations



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Have Good Timing

- Do Not Delay — Do Not Overcook it.
- Take Time When Needed — Do Not Undercook it.

Be Careful With References

- Have a Policy
- Educate Supervisors and Managers in the Policy

Seven Steps of Discipline

1. NOTICE: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequence of the employee's conduct?
2. REASONABLE RULE or ORDER: Was the Employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Employer's business, and the performance that the Employer might properly expect of the employee?
3. INVESTIGATION: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Seven Steps of Discipline

4. FAIR INVESTIGATION: Was the Employer's investigation conducted fairly and objectively?
5. PROOF: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. EQUAL TREATMENT: Has the Employer applied its rules, orders, and penalties to all employees evenhandedly and without discrimination?
7. APPROPRIATE DISCIPLINE: Was the degree of discipline administered by the Employer in a particular case reasonably related to the seriousness of the employee's proven offense, and the record of the employee in his service with the Employer?

DiLorenzo's Corollaries

Corollary 1

- To be safe, employers must ask themselves another question -- “Is the employee entitled to reasonable accommodation for any reason, such as for a disability or religion?” If the employee is entitled to such consideration, then the nondiscrimination blindfold must be lifted and a careful, proactive examination of the job requirements and the employee's needs must be made before making a decision that could be considered adverse (See, Ansonia Board of Education v. Philbrook, 479 U.S. 60, 67 (1986))

DiLorenzo's Corollaries

Corollary 2

- Has the employee engaged in any protected activity? If so, due to the retaliation rules contained in the various anti-discrimination laws, whistleblower protections, National Labor Relations Act, etc., we want to make sure the adverse decision is being made independent of the protected activity. Remember, just because an employee has engaged in protected activity, they are not given a pass to violate rules and somehow be treated better than anyone else (See, Rollins v. Florida Department of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989))

Handbooks

- Check Accuracy
- Provide Notice and Management Rights
- Legal Compliance (NLRB)

Settlement Agreements

- Updated
- Legal Compliance

Practice Good Document Preparation

- Know Your Document Retention Policy
- Review Performance Evaluation Documents
- Review Termination Documents

Wage and Hour Issues

- Check the Overtime Areas
- Check Classification Issues
- Check the Deductions

Train Your Supervisors

- Discrimination Issues
- Discipline Philosophy
- Union Philosophy
- Internal Complaints
- Understanding Their Role in the Organization

Don't Choke and the Gag Clause Prohibition Requirements



John M. Harras

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Gag Clause Prohibition Compliance Requirements

- Background
- **Who** is subject to the requirements?
- **What** are the requirements?
- **How** to comply?
- **When** is compliance due?
- **Why** do these requirements exist?

Background

- **Consolidated Appropriations Act of 2021 (CAA)**
 - Omnibus spending bill - \$2.3 trillion
 - “No Surprises Act” – Div. BB, Title I
 - Aim: Promote greater awareness of healthcare costs and quality of care information
- *“Increasing Transparency by Removing Gag Clauses on Price and Quality Information”*
 - Internal Revenue Code (IRC) § 9824
 - Employee Retirement Income Security Act (ERISA) § 724
 - Public Health Service Act (PHS) § 2799A-9

Who Is Subject to Requirements?

- **Health Insurers**

- group health insurance coverage;
- individual health insurance coverage, including student health insurance coverage and individual health insurance coverage issued through an association; and

- **Group Health Plans**

- fully-insured and self-insured group health plans, including:
 - ERISA plans;
 - non-Federal governmental plans; and
 - church plans subject to the Internal Revenue Code.

- **Excluded Plans**

- Plans providing “excepted benefits,” such as dental, vision, FSA, and employee assistance plans.
- Plans consisting of HRAs, ICHRAs, and other account-based group health plans
- Plans offering only short-term insurance
- Federal Government plans (Medicare, Medicaid, CHIP, Tricare)

What are the Requirements? (1 of 2)

- **Gag Clause Prohibition**

- Agreements cannot have “Gag Clause” with respect to certain information
 - Relevant Agreements:
 - Agreements between group health plans or health insurance issuers and:
 - health care providers;
 - third-party administrators; or
 - any other service provider that controls participants’ access to information
 - Protected information (must be available electronically or through a “consumer engagement tool”):
 - provider-specific prices;
 - provider-specific quality of care; and
 - de-identified claims data for each enrollee of the plan or coverage.
 - Construed Broadly by Government
 - Under recent guidance from HHS, DOL, and IRS, this prohibition on “gag clauses” is violated even if the agreement implies that the plan, insurer, or service provider has “discretion” over the disclosure of such information.

What are the Requirements? (2 of 2)

- **Gag Clause Prohibition Compliance Attestation**

- Group health plans and health insurers must annually submit an attestation to HHS attesting that the plan/insurer is in compliance with the “gag clause” prohibition
- May submit the attestation electronically: <https://hios.cms.gov/HIOS-GCPCA-UI>



The screenshot shows the official website of the United States government for the "Gag Clause Prohibition Compliance Attestation". The page has a dark blue header with a "Home" link. Below the header is a large image of a doctor in a white coat holding a stethoscope. Overlaid on this image is a white box containing the title "Access the Gag Clause Prohibition Compliance Attestation Submission". Below the title are two input fields: "Enter email address" and "Enter the code that was sent via email". Below these fields are two buttons: a green "Login to the system" button and a blue "Don't have a code or forgot yours?" link. At the bottom of the page, there is a section titled "What is the Gag Clause Prohibition Compliance Attestation?" with a brief description.

How to Comply with Gag Clause Prohibition and Attestation Requirements?

- **Review Agreements with Service Providers**
 - Ensure that there are no clauses that could directly or indirectly inhibit access by a participant/enrollee to the information protected by the “gag clause” prohibition
- **Hire Third-Party to Coordinate Attestation Filing**
 - Self-Funded Group Health Plans
 - Consult with third-party administrator regarding filing the attestation on behalf of plan
 - **NOTE:** Even if TPA is contractually liable, the plan remains legally liable
 - **Recommendation:** Insert indemnification clause in contract with TPA
 - Fully Insured Group Health Plans
 - **Both** the insurer and the plan must submit an attestation
 - Insurer may do so on behalf of plan; but plan remains legally responsible
 - **Recommendation:** Consider indemnity clause in contract with insurer

Penalty for Non-Compliance with Gag Clause Prohibition and Attestation Requirements

- IRC § 4980D
 - \$100 per day for each individual affected by the violation
 - Potentially all participants in plan for entire plan year.

When Must Plans and Insurer Satisfy Gag Clause Prohibition and Attestation Requirement

- **Gag Clause Prohibition**
 - Effective **January 1, 2022**
 - Contracts must always be in compliance from the effective date
 - Modify pre-existing contracts
- **Gag Clause Prohibition Compliance Attestation Requirement**
 - **Annual Deadline: December 31**
 - First Attestation Due on December 31, 2022 and then annually thereafter.
 - Review TPA agreements to ensure this deadline is met every year.

Why Did Congress Impose these Requirements?

- **Address “Surprise” Medical Bills**

- Reduce occurrence unexpected gaps in insurance coverage that result in “surprise medical bills” when patients unknowingly obtain medical services from physicians and other providers outside their health insurance network

- **Educate Participants**

- Increase transparency
- Facilitate comparison of coverage options

Conclusion – Don't Choke!

- Review Contracts for “Gag Clause”
 - Remove any barriers to access to protected information
- Attest to Compliance with “Gag Clause” Prohibition of CAA
- Review contracts with service providers
 - Ensure service provider is timely filing attestation
 - Determine whether supplemental indemnification protection is necessary

Your Questions



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Don't Choke and the Gag Clause Prohibition Requirements

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
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