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FROM MAIN STREET TO WALL STREET
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MEDICAL INFORMATION DISCLOSURE

Most employers are aware that, under the Americans with Disabilities Act, employee medical information is to be maintained in confidential files and is to be kept separately from personnel files. Medical information is to be available only to those employees with a need to know.

Questions frequently arise regarding under what circumstances can an employee's medical condition be disclosed to other employees. In a recent EEOC informal guidance letter (EEOC advisory letter, 6/17/04), the EEOC opined that the ADA prohibits the disclosure of an employee's Hepatitis C condition to co-workers. This informal guidance letter was provided by the EEOC in response to a request from an employer, and the EEOC characterizes this guidance letter as an informal discussion, not as an official EEOC opinion. The EEOC guidance letter states, "The ADA contains no provision requiring employers to notify employees that a co-worker has a disability." In fact, the EEOC points out that, "[t]o the contrary, [the ADA] prohibits employers from disclosing medical information about applicants and employees." Citing the ADA regulations (29CFR § 1630.14(b), (c)) the EEOC notes that such information is considered confidential, and it is the employer's obligation to keep it confidential. The employer's concern in this case, as often raised by employers, was that the disease might be transmitted if co-workers share the same drinking glass or the same plate. In rendering its opinion, the EEOC listed examples of circumstances under which an employer may inform co-workers about confidential medical information. The EEOC stated that, for example, a supervisor may be informed of an employee's medical condition in order to provide reasonable accommodation, or in other circumstances, safety personnel may be informed if an employee may require emergency treatment.

This opinion letter emphasizes the fact that employers should be extremely cautious about circumstances such as this under which a question arises concerning revealing an employee's medical condition/disability. The EEOC continues to take a very narrow view of the circumstances under which disclosing such information would be considered necessary.

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FAIR CREDIT REPORTING ACT

In April of 1999, the Federal Trade Commission ("FTC") issued an advisory opinion stating that the Fair Credit Reporting Act applied not only to background checks regarding employees and applicants, but that it also applied to workplace investigations concerning allegations of harassment conducted by "outside organizations." Under the Act, outside organizations such as HR specialists and law firms, fell under the broad definition of a "consumer reporting agency." In addition, reports from outside organizations such as HR specialists and law firms regarding investigations into allegations of harassment were considered "consumer reports" under the Act. Thus, in FTC's opinion, an employer who used the services of an outside party to investigate claims of workplace harassment was required to (1) provide the subject employees with notice of the investication and (2) obtain the employee's consent. Congress recently amended the Fair Credit Reporting Act to address the FTC's 1999 opinion letter.

Overview: The Fair Credit Reporting Act. The Fair Credit Reporting Act imposes limits on an employer's use of background checks conducted by third-parties. Background checks include, but are not limited to, inquiries into an employee's (or applicant's) criminal history, education, driving record, credit history, and employment history. Prior to conducting a background check, the Act requires that employers notify the employee or applicant regarding the employer's use of the background check. The Act also requires that employers and potential employers obtain the employee's or applicant's written consent to conduct the investigation. In the event an employer takes an adverse employment action based on the report, the Act requires that the employer (1) provide the employee or applicant with a complete copy of the report or the background check and (2) provide the employee or applicant with notice of their rights under the Act.

The Amendment: The Fair and Accurate Credit Transaction Act of 2003. The Fair and Accurate Credit Transaction Act of 2003 amended the Fair Credit Reporting Act to address employers' concerns raised by the FTC's 1999 advisory opinion. The amendment creates a class of communications that are exempt from the Fair Credit Reporting Act. Exempt communications include those made in the following circumstances: (1) investigations conducted in compliance with federal, state, or local law; (2) investigations pursuant to the rules of a self-regulatory organization; or (3) investigations pursuant to an employer's pre-existing written policies. Even if the communication is exempt, the communication must be kept confidential and can only be disclosed to the employer or its agents; any federal, state, or local governmental agency; or officer of a self-regulatory organization with authority over the employer's or employee's activities. If an employer takes an adverse action based upon an exempt report, the employer must provide the employee with a summary of the report containing the nature and substance of the communication. However, the employer is not required to disclose the source of its information, nor is it required to identify any witnesses. Communications regarding credit worthiness, credit standing, or credit capacity are not exempt under the Fair and Accurate Credit Transaction Act. Also, the Fair Credit Reporting Act's more stringent restrictions still apply to background investigations of employees and applicants.

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