

Employment Law Newsletter

*by Sven S. Collins**edited by L. Anthony George*

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EMPLOYERS' TO-DO LIST UNDER THE HEALTH CARE REFORM ACT

The Patient Protection and Affordable Care Act ("PPACA"), contains the most significant health care changes in decades and will have lasting impacts in the workplace for years to come. For employers, deadlines for complying with PPACA are fast approaching. This Newsletter alerts employers to changes on the immediate horizon that should be addressed now and changes, such as the 2014 employer mandate, that should be factored into long-term planning.

2011 – The Immediate Must-Do List

Employers should take prompt action to comply with the first wave of mandated changes that will take effect with the first benefit plan year beginning on or after September 23, 2010. For most employers with calendar year plans, this means January 1, 2011. Below are changes to benefit plan documents that employers should be prepared to implement:

Determine if You Have a "Grandfathered" Plan

A grandfathered plan is a group health plan (including self-insured plans or individual health insurance coverage) in existence when PPACA was enacted, i.e. March 23, 2010. PPACA exempts grandfathered plans from certain new requirements (e.g., coverage of preventive care and immunizations without cost sharing, coverage for certain clinical trials, and various requirements under the "Play or Pay" Mandate that will take effect in 2014). Employers should evaluate whether they have "grandfathered plans." They must be cautious about changing coverage or other terms of those plans, because doing so may cause loss of grandfathered status. Details as to what changes will trigger the loss of such status will be provided in forthcoming HHS regulations.

Remove Applicable Benefit Limits and Exclusions

Plans will be prohibited from setting lifetime limits on "essential health benefits." Plans may, however, still set annual limits on certain "essential health benefits," to be defined in regulations that will be issued by HHS. Examples of "essential health benefits" include maternity care, ambulatory care, and pediatric dental and vision care. Plans will also be prohibited from imposing pre-existing condition limitations on children under the age of 19.

Extend Coverage to Adult Dependents

Group health plans are required to provide coverage to dependents until they turn 26, regardless of their marital or student status. Further, these adult children who apply for coverage need not have been previously covered under their parents' plan. PPACA does not require coverage for dependents' children except where the plan otherwise covers the participant's grandchild. There is also a tax exclusion for plans that extend coverage to adult dependent children now rather than waiting until 2011.

Amend Plans to Give Discretion to Rescind Coverage for Fraud

PPACA prohibits rescission of group health plan coverage except in cases of fraud or misrepresentation as defined in the plan. Therefore, plan documents should be amended to give the plan administrator the discretion to rescind coverage for those reasons.

Preventive Care

Plans must cover preventive care, with no co-pays, and such care must be exempt from deductibles. Preventive care includes annual checkups, healthy child visits, breast cancer screenings, immunizations, and the like. HHS will clarify in regulations. Also, there is a ban on co-pays if a wellness program is offered. The government will offer grants to small (less than 50) employers. Grandfathered plans are exempt from these requirements.



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Review Self-Insured Plans for Possible “Salary Discrimination”

Currently, self-insured employers may not have eligibility rules for coverage that have the effect of discriminating in favor of high-wage employees. This anti-discrimination rule will be extended to insured plans. Violators are subject to an excise tax penalty of \$100 per day per participant. Grandfathered plans are exempt.

Determine if You Qualify for Small Business Tax Credit (Effective Now)

Some small employers with fewer than 25 employees who chose to offer health care coverage and meet other requirements could be eligible for a small business health tax credit to help offset costs. Specifically, small employers and exempt organizations with fewer than 25 employees, who pay their workers average annual wages of less than \$50,000, and pay at least 50 percent of the cost of single coverage, are eligible to receive a tax credit. For tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by the employer for small businesses and 25 percent of premiums paid by the employer for exempt organizations. After 2013, the maximum credit will be 50 percent of employer contribution, capped at \$50,000. The credit operates on a sliding scale, with the credit decreasing as the average wage and number of employees increases.

Get Payroll Ready for New W-2 Reporting Requirement

Employers are required to report the aggregate value of the health care provided under a plan in their employees’ 2011 W-2 forms.

Be Aware of New Whistleblower Protection (Effective Now)

PPACA prohibits discrimination or retaliation against an employee who: (1) provides or is about to provide information to the employer, the state attorney general or the federal government regarding his/her “reasonable belief” that PPACA is being violated; or (2) objects to or refuses to participate in an activity that the employee “reasonably believes” will violate PPACA. Employees may file a whistleblower claim with OSHA and may have a right to a jury trial in federal court in some cases.

2014 – Planning for the Employer “Play or Pay” Mandate

Starting in 2014, many employers will be required to offer health care coverage for employees, pay penalties, or both. Generally, this “employer mandate” is structured based on how many full-time employees the employer has and whether its health insurance provides “minimum essential coverage,” which will be defined in forthcoming regulations. Penalties for failure to comply with the mandate can be substantial for companies with a large number of employees.

Employers Covered by “Play or Pay” Mandate

The Act creates a number of employer tiers and affects employers differently depending on the number of full-time employees. Generally, employers with more than 50 full-time employees are covered by the mandate. Employers with fewer than 50 full-time employees are exempt.

Calculating Number of Employees

Calculations are based on the average number of full-time employees employed during the prior calendar year. PPACA has additional specific instructions for classifying part-time employees and other potential employment arrangements. Hours worked by part-time employees affect the total employee count, and non-employee workers, such as independent contractors and leased employees, also count if they could be reclassified as employees.

Failure to Offer Coverage Penalty

If an employer covered by the mandate fails to offer “minimum essential coverage” to all full-time employees, it will be penalized. The penalty provisions have two major components. First, if qualifying coverage is not offered to all full-time employees, the employer must pay a tax penalty of \$2000 per full-time employee per year. Second, if qualifying coverage is offered, but an employee declines and instead buys independent coverage (to save money), the employer must pay \$3000 per year for each employee opting out whose independent coverage is eligible for taxpayer subsidies under PPACA. In effect, PPACA provides a strong incentive for covered employers to offer both adequate and affordable health insurance coverage.

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Annual Reporting for Covered Employers

PPACA requires employers covered by the mandate to file annual health plan reports with the IRS on employee numbers, coverage offered, and other details to ensure the compliance with the mandate.

2018 – An Excise Tax on “Cadillac” Plans Takes Effect

Although PPACA’s provisions for taxing “high cost” health care plans do not take effect until 2018, employers should be aware of the provisions and begin preparing for any plan amendments or adjustments they may wish to make. The excise tax is designed to help defray the costs of PPACA’s health care reform program, and will target health care plans valued at more than \$10,200 for individual coverage and \$27,500 for family coverage.

Mechanics of the Excise Tax Provision

The tax will be imposed against the “coverage provider” (i.e., the insurer, plan administrator, or employer for self-insured plans), but the cost is likely to be passed down. The excise tax is a 40 percent tax penalty on the value of a health care plan that exceeds the established plan value threshold. For example, in 2018, an individual plan valued at \$11,000 would be hit with a 40 percent tax on the \$800 that exceeds the \$10,200 limit for that year. The value threshold will be adjusted annually for inflation.

Labor Look *by L. Anthony George*

FEDERAL CONTRACTORS MUST POST NOTICE OF LABOR LAW RIGHTS

Effective June 21, 2010, most federal contractors and subcontractors must notify employees of their rights under the National Labor Relations Act (NLRA). An employer that posts notices for its employees must physically post the required notice in the employer’s workplaces and in places where the employer’s NLRA-covered employees engage in activities relating to performance of the contract. An employer that posts notices electronically must also post this notice electronically. Where a significant portion of the employer’s workforce is not proficient in English, the employer must provide the notice in the language the employees speak. A copy of the required notice can be found on the U.S. Department of Labor’s website at: http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster2page_Final.pdf.

Among other things, the notice advises employees of their right to engage in the following conduct without threat, discrimination or other adverse action from the employer:

- Form, join or assist a labor union,
- Bargain collectively with the employer,
- Discuss wages and other conditions of employment with co-workers,
- Strike or picket,
- Engage in union solicitation on employer property during non-working time,
- Distribute union literature on employer property in non-working areas during non-working time,
- Wear union hats, buttons, t-shirts and pins in the workplace except under special circumstances,
- Be free from employer interrogation about the employee’s union activities or support.

The new requirement does not apply to employers that are not covered by the NLRA, to prime contracts below the “simplified acquisition threshold” (currently \$100,000), or subcontracts of \$10,000 or less. Penalties for violation may include suspension or cancellation of the government contract, as well as debarment from future contracts.

The requirement was imposed by President Obama in Executive Order 13496 (Jan. 30, 2009) and implemented by regulation in 29 CFR Part 471 (May 20, 2010). The Obama order eliminates a Bush-era requirement that such notices also inform employees of their “Beck” right to refuse to pay union dues and instead pay only a smaller “agency fee” based on the portion of union dues that is actually used to benefit the bargaining unit.

Employers can expect rigorous enforcement of the new requirement, coupled with uncertainty over the meaning and application of several provisions, such as the scope of the physical posting requirement and the number of non-English-speaking employees necessary to trigger the translation requirement.

HRO's Going Green

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California Corner *by Nicole D. Gomes*

HIGH COURT CLARIFIES WHO IS "EMPLOYER"

On May 20, 2010, the California Supreme Court clarified the definition of "employer" under California wage and hour law. In *Martinez v. Combs*, the plaintiffs were seasonal strawberry pickers who brought claims for unpaid wages against their employer and the merchants who bought the strawberries. At issue was whether the merchants could also be considered the workers' "employers" because their representatives (a) went to the worksite to ensure quality control and contract compliance, and (b) encouraged the workers to keep working rather than quit due to non-payment.

The California Supreme Court upheld the Court of Appeals' holding that the merchants did not exercise sufficient control over the plaintiffs or the nominal employer to be considered "employers" under California law. The Court held that to be an "employer" under the California Industrial Wage Commission's wage orders, one must: (a) exercise control over wages, hours or working conditions; (b) suffer or permit to work; or (c) engage, thereby creating a common law employment relationship. Regarding prong (b), the Court held that anyone who suffers or permits another to work must have the power to stop or prevent the employee from working. As to prong (c), it held that "to engage" an individual to work means to be the entity that actually hired the employee to do the work. Under these standards, the merchants were not "employers."

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