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Workplace Law Alert

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A Practical Guide to PPACA Health Care Reform

Now more than six months following the passage of the Patient Protection and Affordable Care Act a/k/a health care reform (the Act) people are still trying to sort the requirements in the 1,000 plus page bill. Indeed, some significant issues are unsettled as the entire country waits on federal agencies to issue implementing regulations. However, there are some basic known requirements in the Act of which all employers should be aware.

Know the Deadlines

The Act contains many compliance deadlines – some of which are immediate and some of which are years down the road. Some of the more important deadlines for employers are as follows:

Immediate – Break Time for Breastfeeders – Employers with at least 50 employees must provide unpaid break time and a private location other than a bathroom for breastfeeding employees to express milk up to one year after the birth of the child.

Immediate – Small Business Tax Credit – Small businesses with fewer than 50 employees are eligible for a tax credit equal to up to 35% of the health insurance premiums they pay. Employers with 10 or fewer employees with average annual wages of up to $25,000 can get the full credit while employers with more employees or larger payrolls have their credit phased out up to the limit of 50 employees and average annual wages of $50,000. In 2014, this credit goes from 35% of premiums to 50%.

June 22, 2010 – Early retiree health insurance benefits reimbursement became available earlier this year. Employers with retired employees aged 55-64 who receive health insurance benefits can apply for reimbursement from the federal government. Reimbursement is available for 80% of the cost of benefits per beneficiary between $15,000 and $90,000. The program is funded with $5 billion and is set to expire at the end of 2013 or when the appropriation is exhausted, whichever is earlier. Eligible employers would be well advised to apply as soon as possible.

July 1, 2010 – Elimination of pre-existing condition exclusions for certain eligible individuals.

September 23, 2010 – Beginning with the first plan year following this date, pre-existing condition exclusions cannot be imposed on children's coverage. The same becomes applicable to adults in 2014. Also, policies cannot be rescinded after a person becomes ill, no lifetime benefits limits can be imposed, and the use of annual limits becomes more tightly regulated. Annual limits are banned altogether in 2014. Preventive health care coverage must also be covered, and dependents must have coverage available until the child turns 26.

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A Practical Guide to PPACA Health Care Reform

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January 1, 2011 – Health insurance plans must report on the share of premium dollars spent on medical care and provide rebates where the ratio is not high enough.

2011 Tax Year – Employers may begin reporting the value of health insurance benefits provided to employees on the W-2 issued for the 2011 tax year. In 2012, this becomes mandatory.

October 1, 2012 – Long-term care insurance program funded by voluntary payroll deductions established.

2013 – Limit of $2,500 on contributions to health flexible savings account contributions goes into effect.

2014 – Small Business Health Options Program (SHOP) exchanges are established by the individual states and are available to employers with 100 or fewer employees. Health care premium tax credits become available to individuals based on income and family size.

2014 – Employers with 50 or more full time employees must provide affordable group health care coverage or face penalties. A full time employee is anyone working more than 30 hours per week, and part time employees' hours must be aggregated and counted on an equivalent basis. For failing to provide any coverage, an employer will pay $2,000 per employee over the first 30 if any one employee receives a tax credit. If the employer provides coverage but any employee becomes eligible for a tax credit, the employer will pay $3,000 per employee receiving a credit.

2018 – "Cadillac Plan" tax goes into effect. An excise tax of 40% on premiums in excess of the single coverage limit of $10,200 and $27,500 for family coverage is imposed. The thresholds are indexed to the consumer price index-urban plus one percent for years thereafter.

Grandfathered Plans

If your employer presently provides group health insurance benefits it is imperative that it is understood whether the plan is grandfathered and if the employer even wants the plan to be grandfathered. If a plan is "grandfathered," then certain requirements in the Act do not apply to it – such as coverage of preventative care benefits and the application of non-discrimination requirements of Section 105(h) of the Internal Revenue Code. Even if a plan is grandfathered, certain provisions of the Act are still imposed – most significantly dependent care coverage for children up to age 26 and the ban on rescission.

Any plan in existence on March 23, 2010, can be grandfathered, but to maintain that status very few changes to the plan are possible. If the employer switches insurers or goes to a new plan, the plan is not grandfathered. Elimination of benefits, increasing co-payments beyond a specified amount, decreasing employer premium contributions below a specified amount (more than 5% per year), imposing new annual limits, and many other actions can cause a plan to lose its grandfathered status and thus be subjected to the full brunt of the Act's requirements. However, merely renewing an existing plan for another year does not cause a plan to lose its grandfathered status.

Unfortunately, many of the decisions that cause a plan to lose its grandfathered status are outside an employer's control if they are using a third party insurer. Self-insured plans have much more control over the plan's grandfathered status, and unionized employers with self-insured plans must be careful in collective bargaining negotiations if they want to maintain grandfathered status.

The federal government has a useful website at www.healthcare.gov for further basic information about the Act. If you have any questions about the impact of the Act on your business or policies please contact Tom Scroggins at (205) 633-0227.

"Any plan in existence on March 23, 2010, can be grandfathered, but to maintain that status very few changes to the plan are possible."

Injury Suffered En Route to Work may be Compensable

Normally an employee who is injured on the employee's way to work is not covered by workers' compensation. However, there are certain scenarios where this general rule does not apply. Recently the Supreme Court of Alabama found such a scenario in which the employee had attended a safety meeting before traveling to his job site.

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Injury Suffered En Route to Work may be Compensable

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In *McDaniel v. Helmerich Payne International Drilling Company*, the employee was injured in a car wreck that occurred at 5:50 a.m. while en route to the employer's job site. At the trial court, the employer won the case on the basis that the accident did not arise out of the course of the employment because the accident had occurred en route to the job site before the work day had begun – a legal principle known as the "going and coming" rule.

However, in this case the employee, who was a resident of Louisiana, had temporarily relocated to Mobile County, Alabama, where he was living in a crew trailer provided by his employer in Chunchula. The accident occurred one morning as the employee left the crew trailer in Chunchula where he had been required to attend a safety meeting and was on the way to the job site in Creola. The Court reversed the decision in favor of the employer and held that summary judgment was inappropriate because there was evidence that the employee had already attended a safety meeting thus starting his workday prior to driving to Creola.

Certainly this case has direct impact on jobs where employees are routinely relocated temporarily to job sites such as in the construction industry. However, it has more far reaching implications in modern society where even office employees are frequently encouraged or even required to check electronic communications or perform other work related tasks before leaving their home. It would not be much of a stretch to assert that any accident that occurred on the way to work after the employee had performed some work-related tasks at home would be covered by workers' compensation.

This decision among many other reasons should cause employers to consider policies regulating the performance of work-related tasks before employees actually arrive at work or perhaps even prohibiting it. There are also issues regarding proper payment of hourly employees who perform such work. If you have any questions about the impact of this case on your operations or policies regarding employee travel or work performed away from the office please contact Tom Scroggins at (205) 633-0227.

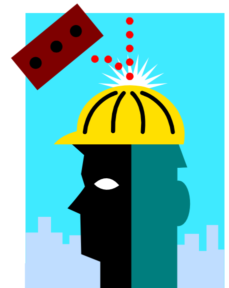
OSHA Cracks Down on Underreporting of Injuries

Last year the Occupational Safety and Health Administration (OSHA) created the National Emphasis Program on Recordkeeping (NEP) after recognizing that many companies underreport or incorrectly report workplace injuries and illnesses. The goal of the NEP is to increase accurate reporting and strictly enforce OSHA's rules and regulations. On September 28, 2010, OSHA issued a revised NEP directive resulting in a few significant changes:

- The scope of the NEP was expanded to include additional industries such as steel and iron forgers, concrete pipe manufacturers, and even nursing homes in some instances.
- The focus of the NEP will be on the manufacturing industry.
- The scope of the NEP was changed from companies with a days away, restrictions, and transfers (DART) rate of 4.2 or less to companies with a DART rate greater than 4.2 and less than 8.0. A company's DART rate includes injuries involving days away from work, restricted work activity, and transfers to another job.
- The deletion criterion for establishments with recalculated DART rates greater than 4.2 was removed.
- Records from calendar years 2008 and 2009 will be scrutinized.

"...the manufacturing industry establishment in each area that has the most employees will automatically be inspected."

Each OSHA Area Office will inspect five establishments. While the selection will be random, the manufacturing industry establishment in each area that has the most employees will automatically be inspected. If an area does not have five manufacturing industry establishments, nursing homes in the area will be randomly selected for inspection. Upon inspection, OSHA will take the following actions:



- Review of numerous records.
- Interview of designated record keeper.
- Employee interviews.

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OSHA Cracks Down on Underreporting of Injuries

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- Management interviews.
- Interviews with first-aid providers and health care professionals to determine consistency of records.
- Limited walkaround inspection.
- Issuance of citations and/or penalties when appropriate.

OSHA's decision to issue a revised NEP directive and expand the scope of the NEP's reach will affect many companies in manufacturing and other industries. If your business is in a targeted industry it may be time to audit OSHA injury recordkeeping procedures to ensure accurate records are being kept and OSHA reporting procedures are being followed. If you have any questions about the impact of the NEP on your operations or your company's OSHA policies and procedures please contact Brooke Nixon at (205) 633-0236.

Eleventh Circuit Holds that Offensive Clothing May Not Equal Unlawful Sexual Harassment

Retaliation claims have been on the rise for years and have caught many employers unaware because of the vague nature of what constitutes protected activity. However, a recent Eleventh Circuit Court of Appeals case did not excuse an employee who lied during a harassment investigation just because he had earlier aided the complainant and thus provides some protection to employers who take adverse job action against employees who thwart the investigative process – even if they helped initiate that investigation.

In *Ross v. City of Perry, Ga.,* the plaintiff was a black male employed as a firefighter by the City of Perry (the "Employer"). The case arose from an incident where a female co-worker and firefighter, filed a sexual harassment complaint. The female co-worker was "offended" when her supervisor wore a t-shirt displaying a male firefighter laying on the front of a fire truck, dressed in shorts, slippers, a hat, and a shirt pulled up exposing his stomach. His legs were spread apart and something appeared to be in his mouth. The supervisor showed the t-shirt to several firefighters during a shift change, including the plaintiff and the co-worker.

After this incident, the co-worker wrote a grievance letter detailing the incident. The plaintiff proofread the letter and eventually slid an envelope containing the letter under the door of the Deputy Chief's office. The Deputy Chief informed the City of Perry Department of Public Safety Chief (the "Chief"). The Chief ordered an internal affairs investigation. As part of the investigation, the plaintiff was interviewed. During his initial interview with the investigators, the plaintiff denied reading the female co-worker's grievance letter, but admitted that he had proofread the letter.

Once the investigators had completed their investigation, they determined that the plaintiff had lied during the course of a departmental investigation and then discharged him on that basis. However, the plaintiff was given an opportunity to present evidence at a show cause hearing. The plaintiff failed to appear at the hearing and was thus given the choice between resigning voluntarily or being discharged. The plaintiff then resigned.

The plaintiff sued under Title VII alleging that he was discriminated against because of his race and retaliated against because he assisted and supported his female co-worker in filing a sexual harassment grievance. The court stated that the issues were whether the plaintiff suffered an adverse employment act and whether he can show "an objectively reasonable and subjectively genuine belief that he was engaging in statutorily protected activity: opposing sexual harassment" when he assisted his female co-worker with her grievance letter.

Concerning the discrimination claim, the plaintiff claimed that he was coerced into resigning and that his resignation was not voluntary. In order to make a *prima facie* case for discriminatory discharge, a plaintiff must prove that he suffered an adverse employment act. An involuntary resignation that is

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Eleventh Circuit Holds that Offensive Clothing May Not Equal Unlawful Sexual Harassment

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essentially a constructive discharge is viewed as an adverse employment act.

The Eleventh Circuit Court of Appeals agreed with the district court that the plaintiff was not "coerced into resigning." The court determined that the plaintiff was given advance notice of his show cause hearing whereby he was notified of his violations and was presented with an opportunity to defend himself against the accusations. The plaintiff was given ample time to mull over his choices and to present an argument against his termination. However, he failed to do so. Also, the plaintiff could have sought a time extension to allow himself more time to review his options and to seek the advice of an attorney.

Concerning the retaliation claim, the Court of Appeals stated that in order to prove retaliation, a plaintiff must show that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. The court concluded that the plaintiff did not demonstrate that he subjectively believed that his employer "was engaged in unlawful employment practices." First, the grievance letter that the plaintiff proofread and delivered to the Deputy Chief contained no allegations of sexual harassment and second, the plaintiff testified that he did not find the t-shirt offensive. Finally, the court held that it was not objectively reasonable to believe that the t-shirt in question was unlawful, sexual harassment.

This case is illustrative of the thorny issues an employer faces when discharging any employee involved in a discrimination or harassment complaint – even those who did not make the complaint. Additional questions about protecting your company against employment discrimination and retaliation claims or policies

The Importance of Stating All Reasons for Termination at the Time of Discharge

Most Alabama employers are very familiar and comfortable with the employment at will doctrine that is prevalent in the State. Many human resource managers know the mantra of firing for a "good reason, a bad reason, or no reason at all" like quoting biblical scripture. However, the Alabama Supreme Court recently cast some doubt on the strategy of never stating a reason for the termination of employment at the time the employee is informed of their discharge.

In *Ex parte Wood*, the plaintiff-employee pulled a muscle in his left arm while on the job, and his employer's worker's compensation insurance carrier approved surgery to treat the injury. The employee's surgeon released him to do only right-handed work 37 days after his operation. During his first week back on the job, he had three physical therapy appointments, for which he left work an hour and half early on two days. The employer had a policy requiring employees to attempt to schedule medical appointments near the beginning, end, or after their shifts. Consequently, the employee was cited with a disciplinary warning for not following the policy, though he never actually received it.

The employee returned to his doctor the following week, where he complained of pain in his right arm. Although he told his employer's human resource manager that he would call her after his appointment if he would not return to work, he neither called nor returned and was written up a second time without his knowledge. The following day he returned to work, where he had an altercation with the human resource manager, including profanity. Following the altercation, the employee left work early without permission

That same day, the plant manager called the employee and told him that he had been discharged for leaving work without permission—he never mentioned the employee's earlier profane comments. The employee later filed a suit alleging retaliatory discharge for claiming workers' compensation benefits. The plant manager testified that both the employee's decision to leave work early and his profane comments led to his termination. The Supreme Court held that a jury could have reasonably inferred that the employee's use of profane language was relied upon only after his termination to conceal what was truly a

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> ***"Many human resource managers know the mantra of firing for a 'good reason, a bad reason, or no reason at all' like quoting biblical scripture."***

The Importance of Stating All Reasons for Termination at the Time of Discharge

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retaliatory termination, because the employee was not immediately notified of this reasoning.

Even if all reasons for termination are legitimate, withholding a reason for termination that is cited later could support an employee's claim of retaliatory termination. This decision should encourage employers to review their employment termination process and exercise greater diligence when notifying employees of the reasons behind their terminations and make sure all reasons for discharge are stated at the time of discharge. If you have any questions about the impact of this case on your policies or practices regarding employee discharge or the defense of retaliatory discharge claims, please contact Tom Scroggins at (205) 633-0227.

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