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HEALTH CARE REFORM UPDATE – FIVE COMPLIANCE ISSUES EMPLOYERS SHOULD FOCUS ON NOW *By Eric N. Athey*

The Patient Protection and Affordable Care Act ("PPACA"), otherwise known as Health Care Reform, is now 2 ½ years old. It narrowly survived its first major legal challenge with the Supreme Court's decision in July. Time will tell whether PPACA survives the upcoming elections – although it seems likely that many of PPACA's pre-2014 requirements will remain in effect regardless of which party wins the presidency. In the meantime, employers and health plans must be mindful of the flurry of compliance requirements that will soon take effect under the Act. Here is a quick look at the PPACA compliance issues that employers and health plans should be focused on now:

1 Is Your Health Plan Ready to Disclose SBCs?

This new disclosure requirement takes effect for open enrollment periods beginning on or after September 23, 2012 (or plan years beginning on or after that date). In a nutshell, insurers must now provide four-page summaries of benefits and coverage to group health plans ("GHPs") within 7 days after a plan applies for coverage with the insurer. GHPs must, in turn, provide SBCs to plan participants without charge as part of any written application materials that are distributed for enrollment. Individuals also have the right to request an SBC at any time and must receive it within 7 days of the request. A sample SBC is available on the U.S. Department of Labor's ("DOL") website at www.dol.gov/ebsa. Additionally, a 60-day advance notice requirement now applies to "material modifications" affecting the content of an SBC; however, special disclosure rules apply in plan renewal situations. Willful failures to comply with these disclosure requirements may trigger a fine of up to $1000 per violation; however, the DOL has indicated that the agency's focus will be primarily on compliance assistance, not enforcement, as employers work to comply with this new requirement in the coming months.

2 Is Your Company Prepared for W-2 Reporting of Health Coverage?

W-2 forms for 2012 (to be issued in early 2013) must report the aggregate cost of applicable employer-sponsored group health plan coverage – this includes both employer and employee cost shares. Employers filing fewer than 250 W-2 forms for the preceding calendar year are currently exempt from this requirement. Ancillary benefits such as long-term care, HIPAA excepted benefits (i.e., certain dental and vision plans), disability and accident benefits, workers' compensation, fixed indemnity insurance and coverage for a specific illness or disease are excluded from the value to be reported. Similarly, the IRS has issued guidance allowing employers to exclude reporting of contributions to consumer-directed health plans such as HRAs and FSAs in most instances. The value of coverage under an Employee Assistance Program ("EAP") may also be excluded if the coverage does not qualify as a COBRA benefit. The IRS has issued guidance (Notice 2012-9) approving three methods for calculating the value of coverage: 1) the COBRA applicable premium method (COBRA premium less the 2% administrative charge); 2) the premium charged method (for insured plans); and 3) the modified COBRA method (when an employer subsidizes the COBRA premium).

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Which of Your Employees Qualify as "Full-time" Under PPACA?

PPACA defines a full-time employee as one who is employed on average at least 30 hours per week. This definition is significant for several reasons under the Act. First, only employers who employ 50 or more full-time equivalent employees are subject to the "shared responsibility" penalties that take effect in 2014. Secondly, the shared responsibility penalties are only triggered if an employer has a full-time employee who is certified to receive a premium tax credit or cost-sharing reduction due to the employer's failure to provide affordable coverage that meets minimum value requirements. Finally, the 90-day maximum waiting period for coverage that takes effect in 2014 only applies to full-time employees.

Since so much under PPACA turns on an employee's "full-time" status, it is critical for employers to understand which of their employees fall under this classification. Employers do not always know whether an employee will regularly work 30 hours per week at the time of hire – particularly in the case of seasonal and variable hour employees. On August 31, 2012, the IRS issued Notice 2012-58 to clarify how these situations should be handled. In brief, an employer may use an "initial measurement period" of between 3 to 12 months to determine whether a newly hired seasonal or variable hour employee has worked an average of 30 hours per week. Upon making this determination, the new employee's coverage status remains in effect for the duration of a "stability period." A new employee's initial stability period may not be more than one month longer than the initial measurement period. Under the guidance, an "ongoing employee's" full-time status is thereafter subject to redetermination under similar measurement rules. Of course, if an employee is expected to regularly work full-time when hired, the 90-day maximum waiting period that takes effect in 2014 applies.

Is Your Coverage "Affordable" and of "Minimum Value"?

The "shared responsibility" penalties apply to employers with over 50 employees that either do not offer health coverage or offer coverage that is either not "affordable" or does not provide "minimum value" under PPACA. Although these penalties are not scheduled to take effect until 2014, it may take some time for employers to weigh their options and plan accordingly. Coverage that costs an employee over 9.5% of his or her gross household income is not considered affordable under PPACA. One question that remains unanswered at this point is how an employer is to determine an employee's gross household income since that amount will presumably include income from dependents as well as non-wage income. The DOL has announced that coverage costing an employee no more than 9.5% of his or her wage earnings will fall under an affordability "safe harbor." This may lead some employers to set employee health care contributions as a percentage of their earnings rather than as a percentage of the premium cost or fixed amount.

In order for a plan to be of "minimum value", it must offer "minimum essential coverage" and the plan must pay at least 60% of covered expenses. The federal agencies have yet to issue comprehensive guidance on these key concepts; however, as employers consider changes to their health plans, they must keep minimum essential benefits, minimum value and affordability in mind.

Will Your Health FSA Be Ready for 2013 Changes?

Effective for plan years beginning in 2013, health FSA plans may only reimburse up to $2500 in qualifying expenses per participating employee. Employers offering health FSA plans will have until December 31, 2014 to amend their plans to reflect this new limit. This change, in combination with PPACA's already-effective prohibition on reimbursement for non-prescribed over-the-counter medications, will likely steer more employers away from health FSAs and toward other types of consumer-directed health plans, such as HRAs and HSAs.

PPACA compliance has become a time-consuming responsibility for many HR and benefits professionals. Companies that are ready to tackle these five issues will be well-positioned to take on the major changes that are scheduled to take effect in 2014. For additional information and updates, visit www.palaborandemploymentblog.com. ■

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FEDERAL COURT HOLDS THAT FLSA'S "FLUCTUATING WORKWEEK" METHOD OF OVERTIME COMPENSATION VIOLATES PA LAW

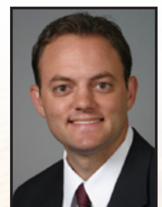
By Adam R. Long

In the wage and hour realm, even the most knowledgeable Pennsylvania employers often are unaware of potential compliance pitfalls presented by state law. Like the FLSA, the Pennsylvania Minimum Wage Act ("PMWA") contains overtime and minimum wage requirements applicable to Pennsylvania employers. The PMWA is similar, but not identical, to the FLSA, and compliance with the FLSA does not always guarantee compliance with this state law. For example, unlike the FLSA, the PMWA does not contain a specific overtime and minimum wage exemption for employees in computer-related occupations. Thus, a computer professional in Pennsylvania who safely falls within the FLSA exemption still may be entitled to overtime compensation pursuant to the PMWA. In other words, compliance with the FLSA could result in overtime liability for the unwary Pennsylvania employer.

Recently, a federal court in Pennsylvania highlighted another area where the requirements of the FLSA and PMWA arguably differ. In *Foster v. Kraft Foods Global, Inc.*, the employer compensated non-exempt employees pursuant to the "fluctuating workweek" method of overtime compensation. Under the fluctuating workweek method, an employee receives a guaranteed fixed weekly salary for all straight-time earnings, regardless of the number of hours worked, and an additional one-half of the employee's regular rate for all hours worked over forty in the workweek. The employee's regular rate may change (or "fluctuate") from week to week, because it is based upon the employee's actual hours worked. The fluctuating workweek method of overtime compensation is expressly permitted by the FLSA's regulations and used by many employers to compensate non-exempt employees on a fixed salary basis while minimizing overtime costs.

The court in Foster held that, contrary to the FLSA's regulations, the PMWA's regulations do not allow payment of only an additional one-half of the regular rate for overtime hours pursuant to the fluctuating workweek method. Instead, the court found that the PMWA requires that employees compensated under this method receive an additional one and one-half of their regular rate for overtime hours, essentially eliminating this method of compensation's primary advantage to employers.

Pennsylvania employers who compensate non-exempt employees pursuant to the fluctuating workweek method should reevaluate their practices in light of the Foster decision. The decision serves as a stark reminder for all Pennsylvania employers, even those who do not use the fluctuating workweek method, that FLSA compliance may be only half the wage and hour battle. All Pennsylvania employers should be aware that the requirements of the FLSA and the PMWA are not identical and ensure compliance with both laws. ■



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RECENT DECISION CALLS "AT-WILL DISCLAIMERS" INTO QUESTION UNDER NLRA

By Joseph S. Sileo

The National Labor Relations Board (NLRB) continues its quest to protect (read: expand) employee rights, even in non-union settings, this time by attacking at-will employment disclaimers. It is common for employers to include at-will employment disclaimers in employee handbooks. Typically, these statements include an acknowledgment that the employment relationship is terminable at-will and that the employer can change employment terms at any time.

In a recent decision, an NLRB Administrative Law Judge ("ALJ") determined that the American Red Cross Arizona Blood Services Region violated Section 8(a)(1) of the NLRA by including an at-will disclaimer acknowledgement in its employee handbook. The acknowledgement at issue included typical disclaimer language defining at-will employment, along with a statement that the employee "agree[s] that the at-will employment relationship cannot be amended, modified or altered in any way." Employees were required to sign the acknowledgment following receipt of the handbook.

The ALJ considered whether the at-will disclaimer violated Section 8(a)(1) of the NLRA by analyzing "whether the rule would reasonably tend to chill employees in the exercise of [their rights to engage in protected concerted activities]." The ALJ concluded that there was "no doubt" employees would reasonably construe the disclaimer language to prohibit certain protected activity under the Act. More specifically, the ALJ reasoned that the disclaimer operated as a waiver by which employees relinquished their rights under the Act. The disclaimer, in the opinion of the ALJ, conveyed to employees the unlawful message that continued employment was conditioned on agreement that they not enter into any contract (including a union contract) or engage in efforts to alter the at-will employment relationship. The ALJ concluded that the employer violated the Act because its at-will disclaimer "chilled" the exercise of employee rights, including the rights to collectively negotiate new employment terms, seek union representation or a collective bargaining agreement.

This case illustrates the NLRB's continued focus on expanding its reach and enforcement efforts into the non-union employment setting. Other recent examples include restricting an employer's right to discipline employees for disparaging social media postings and prohibiting employers from instructing employees to maintain confidentiality in connection with workplace investigations. These rulings are also based on the theory that such employer actions violate employees' Section 7 rights. These decisions require employers to keep NLRA rights in mind when communicating with employees (including non-union employees) about their rights and obligations. In light of the NLRA's new crusade on these issues, employers are well-advised to carefully draft disclaimers and similar employee communications in a manner that would withstand scrutiny by the NLRB. ■

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EMPLOYERS REQUIRED TO USE NEW FCRA NOTICES EFFECTIVE JANUARY 1, 2013

By Jodi M. Frankel

The newly created Consumer Financial Protection Bureau ("CFPB") recently issued regulations that modify the notices required under the Fair Credit Reporting Act ("FCRA"). The new regulations include one change that is significant to employers who regularly obtain criminal background reports, credit history reports, and other background checks on their applicants and employees.

The CFPB's regulations modify the "Summary of Consumer Rights under the FCRA." The FCRA requires that employers provide this standard notice to applicants and employees when, among other things, a pre-adverse action notice is sent. The regulations require that employers begin using the new form on January 1, 2013; until then, employers should continue to use the old form.

NLRB DECISION COULD INTERFERE WITH WORKPLACE INVESTIGATIONS

By Rick L. Etter

The National Labor Relations Board recently issued a decision holding that an employer violates the National Labor Relations Act by establishing workplace investigation procedures, policies, or forms that attempt to prohibit employees from discussing ongoing workplace investigations with their coworkers. Specifically, the Board concluded that such a rule violates Section 7 of the NLRA, which protects employees' rights to engage in "concerted activities" for their mutual aid and protection.

In *Estrella Medical Center*, the employer established a standard investigation process that included the reading of six introductory statements before each witness interview. One of the six statements was a confidentiality statement instructing the witness that he or she was prohibited from discussing matters related to the investigation until the investigation was complete. The Board determined that the employer failed to establish that its interest in protecting the integrity of the at-issue investigation outweighed the employee's Section 7 rights because the employer developed a "blanket approach" of reading this statement before every interview. The Board explained that it is the employer's burden to determine – on a case-by-case basis – whether the circumstances of each specific investigation are such that witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up. Only when one of these concerns is present will the employer's interest in protecting the integrity of the investigation outweigh the employees' Section 7 rights.

As a result of this decision, it would be prudent for all employers – union and non-union – to review their investigation policies, procedures, and forms to ensure that they cannot be interpreted as creating a blanket prohibition against employee discussion of workplace investigations. ■

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The biggest change to the notice is that consumers are now directed to the CFPB to obtain information about their rights under the FCRA, rather than to the Federal Trade Commission. (The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama in 2010, transferred rulemaking authority over the FCRA to the CFPB.) The CFPB made similar changes to the notices that consumer reporting agencies are required to provide.

Model forms are available in the appendix to the FCRA regulations at 12 C.F.R. § 1022 and likely will be posted on the CFPB's website, www.consumerfinance.gov, come the new year.

In light of the significant changes to the regulatory framework surrounding the FCRA and the increasing concern about consumer privacy, we can expect that this will not be the CFPB's last word on employee screening and background checks. We will keep you updated on additional changes to the FCRA in the future. ■

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FEDERAL APPEALS COURT GIVES WELLNESS PROGRAM A CLEAN BILL OF HEALTH

By Eric N. Athey

Employers and wellness advocates have long been confounded by the complex gauntlet of federal laws and regulations that must be considered when structuring wellness programs. HIPAA's non-discrimination requirements, the Genetic Information Nondiscrimination Act ("GINA") and, perhaps most daunting, the Americans with Disabilities Act ("ADA") are among the laws that come into play when an employer is considering its wellness plan options.

Perhaps the most closely watched legal issue concerning wellness programs is this: May an employer offer a health coverage premium discount to those employees who complete a "health risk assessment" ("HRA")? Or, put another way, may employees who choose not to complete an HRA be subject to a premium surcharge? HIPAA regulations clearly allow employers to offer "bona fide wellness programs" with limited premium discounts; however, tying a discount to completion of an HRA presents a potential rub under the ADA.

Under the ADA, an employer may only require current employees to submit to medical inquiries or examinations that are "job-related and consistent with business necessity." Accordingly, an employer may not ask a current employee to provide medical information unless there is a legitimate basis to suspect that the employee's medical condition may prevent him from safely performing his job. In light of this restriction, employee advocates have argued that tying a premium discount to completion of an HRA is an impermissible inquiry under this standard. To date, the Equal Employment Opportunity Commission has not taken a clear position on this issue. However, Commission representatives have stated that GINA would prohibit any financial incentive that is tied to a participant's disclosure of genetic information (e.g. family medical history).

Lacking any guidance from the EEOC on the issue, employers have carefully watched one well-publicized federal court case that was filed in Florida in 2010. In *Seff v. Broward County*, the County implemented a wellness program that consisted of four components: 1) a biometric screening (i.e. finger stick for glucose and cholesterol); 2) disease management for five specified conditions; 3) an online HRA; and 4) a $20 bi-weekly charge for employees who participated in the health plan but who did not participate in the wellness program. Bradley Seff and a group of County employees filed a class action suit alleging that the County's $20 charge to non-participants violated the ADA's prohibition against non-job related medical examinations and inquiries. After the case was dismissed by the trial court, Seff and his cohorts appealed to the U.S. Court of Appeals for the Eleventh Circuit.

In a decision dated August 20, 2012, the Eleventh Circuit upheld the trial court's dismissal of the case. The court observed that the ADA contains a "safe harbor" provision exempting certain insurance plans from the ADA's restrictions on medical examinations and inquiries. The safe harbor provides that the ADA shall not be interpreted to prohibit an employer from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks" so long as the terms are consistent with state law. Agreeing with the trial court, the Eleventh Circuit found that Broward County's wellness program qualified as a "term of a bona fide benefit plan" under the safe harbor provision. Accordingly, the limitations on medical examinations and inquiries did not apply to the wellness program.

Although the Eleventh Circuit's decision should come as welcome news for employers and wellness advocates, there are several reasons not to overstate the importance of the decision. First, the Eleventh Circuit has jurisdiction over only Alabama, Florida and Georgia; courts in other states may rule differently. Secondly, the Court based its decision on the fact that the County offered its wellness program as a term of its health plan; the County's carrier sponsored the wellness program as part of its contract to provide coverage, and the program was only available to plan enrollees. The Court may have ruled differently if the County's wellness program was offered independent of its group health plan. Finally, the EEOC may or may not agree with the Seff decision–employers outside of the Eleventh Circuit should continue to monitor the Commission's position on this issue.

Until the EEOC issues guidance or other courts rule on the issue, the practice of tying premium discounts to HRAs will continue to be debated. However, the Seff decision is certainly a favorable development for employers. We will keep you apprised of further developments through our blog at www.PaLaborAndEmploymentBlog.com. ■

EEOC STRATEGIC ENFORCEMENT PLAN

By Kelley E. Kaufman

Last month, the Equal Employment Opportunity Commission ("EEOC" or the "Agency") released a draft of its Strategic Enforcement Plan for Fiscal Years 2012 through 2016. The Agency is seeking public comment on the Plan, which describes its strategy for targeted enforcement and the integration of administrative and legal enforcement activities. These efforts are meant to help the Agency meet its responsibilities in the face of increasing demand and limited resources.

Most notably for employers, the EEOC's Plan outlines the nationwide priorities for its enforcement efforts in private, state and local government, and federal sectors. These priorities include:

- Eliminating systemic barriers in recruitment and hiring, which includes targeting not only class-based intentional hiring discrimination, but also facially-neutral hiring practices that have an adverse impact on certain protected groups (e.g., race, age, gender). Those topics of particular interest to the EEOC under this initiative will include pre-employment testing, background screening, and date of birth screenings in Internet applications.

- Protecting immigrant, migrant and other vulnerable workers by targeting practices such as disparate pay, job segregation, harassment and trafficking, as well as policies that may include discriminatory language.

- Targeting retaliation, as well as policies and practices that are designed to discourage or prohibit the exercise of rights under the anti-discrimination laws. Retaliation claims represent the largest category of EEOC charges filed. The Plan indicates that this initiative will, in part, also target over-broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information in EEOC and other legal proceedings, and the failure to retain records as required under the EEOC regulations.

- Addressing "emerging employment issues" including a variety of issues under the Americans with Disabilities Act, as amended, and those involving pregnancy leave. Another emerging issue in the EEOC's crosshairs include coverage for lesbian, gay, bisexual and transgender individuals under the anti-discrimination laws. Most recently, the Agency has taken the position that discrimination based upon an individual because he or she is transgender is discrimination because of sex. *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012).

- Continued targeting of harassment, including a renewed focus on national education and outreach for both employees and employers. As the EEOC notes in its Plan, this targeted approach on clearly-identified issues and strategies "shifts the enforcement paradigm from complaint-driven to priority-driven."

The Plan took effect on October 1, 2012. Employers should take note of the target areas, which highlight the areas on which the Agency will be focusing in the coming years – and areas on which employers should be focusing now. Taking time to review company policies, procedures and training in these target areas now may help avoid costly and time-consuming claims in the future. ■

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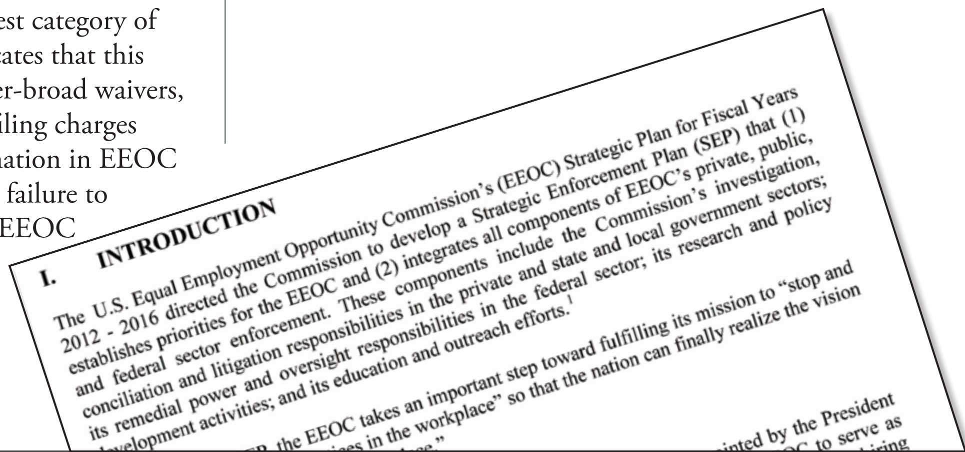

I. INTRODUCTION

The U.S. Equal Employment Opportunity Commission's (EEOC) Strategic Plan for Fiscal Years 2012 - 2016 directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities for the EEOC and (2) integrates all components of EEOC's private, public, and federal sector enforcement. These components include the Commission's investigation, conciliation and litigation responsibilities in the private and state and local government sectors; its remedial power and oversight responsibilities in the federal sector; its research and policy development activities; and its education and outreach efforts.[1]

... the EEOC takes an important step toward fulfilling its mission to "stop and ... in the workplace" so that the nation can finally realize the vision ...

... by the President ... to serve as ...

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