Dinsmore & Shohl LLP
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Health Care Reform: How Will it Affect School Districts?

On March 23, 2010, the federal Patient Protection and Affordable Care Act ("PPACA") was signed into law. The legislation mandates widespread health care reform that will be implemented over the next several years. The following is a brief summary of those provisions of the PPACA that may affect health insurance plans provided by school districts.

W-2 Reporting

For taxable years beginning after December 31, 2010, employers must report on their employee's W-2 form the full premium value of their employee health coverage, including but not limited to the value of prescription drug plans and employee assistance programs.

Market Reforms

The PPACA will mandate new coverage requirements for health insurance plans, often referred to as market reforms. These market reforms include, but are not limited to: participant's choice of primary care providers; full coverage for preventative care; reimbursement of emergency service expenses as in-network even if an out-of-network provider is used; certain limitations on when insurance may be rescinded; and no lifetime limits on the dollar value of essential health benefits.

Grandfathered Plans

Grandfathered health plans (i.e. plans which an individual has been continuously enrolled since the March 23, 2010 enactment of the PPACA) are exempt from many of the PPACA's new market reforms. However, even grandfathered health plans must comply with the following:

- no lifetime limits on the dollar value of certain essential health benefits
- prohibition on recessions (only for fraud and misrepresentation)
- no preexisting condition exclusions on enrollees under the age of 19
- adult children covered up to age 26 regardless of their marital status or whether they are still enrolled in school

A health plan will lose grandfathered status if:

1. *Benefits are significantly cut or reduced.* (i.e. the new plan no longer provides coverage for certain diseases or medical conditions that were previously covered)
2. *Co-insurance charges are raised.* Grandfathered plans cannot increase the percentage that an employee pays on a particular charge (i.e. the percentage paid on a hospital bill, etc.).

3. *Co-pays are significantly increased.* Grandfathered plans will be able increase co-pays by no more than the greater of $5 (adjusted annually for medical inflation) or a percentage equal to medical inflation plus 15 percentage points.
4. *Deductibles are significantly raised.* Grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points from the plan that was in effect on March 23, 2010.
5. *Employer's contribution rate is significantly reduced.* Grandfathered plans cannot reduce the amount of an employer's contributions by more than 5 percentage points below the contribution rate in effect on March 23, 2010.
6. *The plan adds or tightens the limit on what the insurer pays.* If no cap exists, new plans cannot add a cap on the amount an insurer pays for covered services and still retain grandfathered status. If a cap already exists, the new plan cannot tighten any dollar limit that was in place on March 23, 2010.
7. *The Employer changes insurance companies.* This does not apply when employers that provide their own insurance to their workers switch plan administrators or to collectively bargained agreements.

Collectively Bargained Plans

Collectively bargained health plans that were in effect prior to March 23, 2010 are exempt from the requirements of the new law until the date on which the CBA providing health coverage terminates. After the CBA terminates, any proposed new plan must be reviewed in comparison to the plan in effect on March 23, 2010 under the general grandfather provisions set forth above.

Conclusions

Any school district contemplating a plan change to control costs should proceed with caution. School districts should assess whether a plan change will cause it to lose grandfathered status. Increased coverage requirements mandated by the loss of grandfathered status could potentially offset the potential cost savings brought about by implementing a new health plan.

Teacher Furloughs not a Change in Placement Under IDEA

The Ninth Circuit Court of Appeals in *MD ex rel. Parents Acting as Guardians Ad Litem v. State of Hawaii Department of Education* recently held that Hawaii's decision to close its schools on certain Fridays as a cost-cutting measure did not constitute a "change of placement" under the Individuals with Disabilities Education Act ("IDEA").

To help elevate a fiscal crisis, the State of Hawaii shut down all public schools for 17 Fridays during the 2009-2010 school year. School children, both disabled and non-disabled, did not attend school on those Fridays. The reduction of the 17 Fridays from the school calendar constituted a 10% reduction in instructional days. Hawaii reached a negotiated agreement with its state teachers union to implement the furloughs.

In response to the impending furloughs, a special needs child requested a due process hearing with the State Department of Education regarding the potential change in his Individualized Education Program ("IEP"). Along with his request, the child invoked the stay-put provisions of the IDEA. Hawaii did not adjust the furloughs in response to the implementation of the stay-put provisions and moved forward with the furloughs.

In response, a total of nine disabled children enrolled in five public schools in Hawaii filed suit against the State Department of Education. The lead child in the suit alleged that the furloughs constituted a change of

his educational placement, and as part of his request for due process, he was entitled to "stay-put" in his current educational placement. The child also sought a court order immediately enjoining the furloughs.

The district court held a hearing on the request for a preliminary injunction, and the child presented evidence as to the harm he suffered as a result of the furlough days already implemented. Hawaii submitted evidence that it was undertaking efforts to provide the disabled children with alternate services consistent with their IEPs. The district court denied the child's motion for a preliminary injunction.

On appeal, the Ninth Circuit noted that it had previously interpreted the term "current educational placement" to mean "the placement set forth in child's last-implemented IEP." The child's last-implemented IEP was agreed upon before the furloughs were implemented and that the child had not been moved from the school identified in his IEP. The court concluded that under the IDEA, the term "educational placement" means the general education program of the student. And specifically, whether the student is moved from one type of program (i.e. regular class) to another type (i.e. home instruction, etc.). The change in educational placement could also result where there is a significant change in the student's program, even if the student remains in the same setting.

The court noted the children at issue remained in the same classification, same school district and same educational program. Further, these children continued to attend the same school, have the same teachers, and attend the same classes. Therefore, the court held Hawaii's teachers furloughs and concurrent shut down of public schools was not a change in the educational placement of these disabled children.

Lessons learned

The Ninth Circuit clarified that the stay-put provisions of IDEA were not intended to cover system-wide changes in public schools that affect disabled and non-disabled children alike. However, the court tempered its decision by noting that school boards do not have free rein to make "any administrative change" in terms of cutting school days, without potentially triggering the stay-put provisions of IDEA. The specific facts of each case will drive a stay-put determination.

Ohio Supreme Court Holds Minimum Length of Service Requirements for Maternity Leave do not Violate Ohio's Pregnancy Discrimination Law.

Jan Hensel of Dinsmore & Shohl's employment and education law practice groups successfully argued a case before the Ohio Supreme Court that could have a bearing on how maternity leave is administered by Ohio employers - including Ohio public school districts. In *McFee v. Nursing Care Management of America, Inc. d/b/a Pataskala Oaks Care Center*, the Ohio Supreme Court held that Ohio law does not prohibit minimum length of service requirements for maternity leave, and does not require preferential treatment of pregnant employees who do not qualify for leave under their employer's leave policies.

At the time of Tiffany McFee's hire, Pataskala Oaks had a leave policy modeled after the federal Family and Medical Leave Act ("FMLA"). The policy permitted twelve weeks of leave for employees who had been employed for a minimum of one year. Approximately eights months into her employment, McFee requested leave for pregnancy-related conditions. However, McFee was ineligible for leave under Pataskala Oaks' policy because she had not worked a minimum of twelve months. McFee nonetheless took unapproved leave and was terminated.

McFee filed a charge of sex discrimination on the basis of pregnancy with the Ohio Civil Rights Commission ("OCRC"). The OCRC interpreted Ohio's pregnancy discrimination statutes, R.C. 4112.01 and 4112.02, to require Ohio employers to provide expectant mothers with leave for child birth or pregnancy-related conditions even if the employee is ineligible for such leave under uniformly-applied leave policies. Applying this logic, the OCRC found that Pataskala Oaks' leave policy constituted unlawful sex discrimination.

Pataskala Oaks appealed the OCRC's decision and the case ultimately made its way to the Ohio Supreme Court. The Supreme Court recognized that Ohio's pregnancy discrimination statutes direct that pregnant employees be treated "the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." Therefore, the Court held the statutes do not provide greater protection for pregnant employees than for non-pregnant employees. The Court further held that an employment policy that imposes a uniform minimum length of service requirement with no exception for maternity leave is not direct evidence of discrimination. In such instance, a claimant would need to offer evidence of discriminatory intent in order to successfully prove a case alleging sex discrimination on the basis of pregnancy leave. McFee in this case offered no such evidence.

Lesson learned

Many school districts have child care and family related leave provisions in their collective bargaining agreements. However, many of these leave provisions require the employee to be eligible under the FMLA (i.e. 12 months of continued employment) or some other period of continued employment (i.e. a full school year) for an employee to be eligible for such leave. Non-union school districts oftentimes model the eligibility requirements of their child care leave policies after the requirements set forth under the FMLA and/or state law.

This case makes clear that laws prohibiting sex discrimination on the basis of pregnancy do not require employers to waive eligibility requirements or otherwise afford preferential treatment to pregnant employees. Ohio employers should now be able to uniformly apply leave policies that treat all temporarily-disabled employees (including pregnant employees) the same without fear of reprisal from the OCRC.

Please join us for the upcoming HR & Employment Law Workshop for School Administrators:

August 5, 2010 - Cincinnati
Great Oaks Career Campuses
Scarlet Oaks East Wing - Room 200, Entry Door #3
3254 East Kemper Road
Cincinnati, Ohio 45241
Register Here

August 9, 2010 - Columbus
ESC of Central Ohio
2080 Citygate Drive
Columbus, Ohio 43219
Register Here

August 11, 2010 - Dayton
Montgomery County Educational Service Center
200 South Keowee Street
Dayton, Ohio 45402
Register Here

AGENDA FOR ALL LOCATIONS

8:00 a.m. **Registration and continental breakfast**

8:30 a.m. **Managing medical leaves and disability accommodation requests**
This presentation will focus on the latest developments in the Family & Medical Leave Act (FMLA), the

Americans with Disabilities Act (ADA) and Workers' Compensation leave. Sample scenarios involving medical leave and disability accommodation requests that schools frequently encounter will be presented and proposed responses will be discussed.

9:15 a.m. **Workers' compensation**
The first part of this presentation will focus on winning strategies a school district should follow to maximize its chance of success in hearings held before the Industrial Commission. The second part will shift focus on managing the impact and controlling the costs of temporary total disability and other lost time claims.

10:00 a.m. **Break**

10:15 a.m. **Employee evaluation and discipline**
Steps to improve the performance of marginal employees and procedures to non-renew or discharge chronically under-performing employees is the focus of this presentation. Learn the latest developments in the law governing the employment, evaluation and discipline of certificated and classified employees.

11:00 a.m. **Harassment and misconduct investigations**
Complaints of sexual harassment, retaliation, discrimination and employee misconduct have the potential to damage a school district's finances and reputation. Learn the best practices to investigate and resolve such complaints and to avoid future liability.

11:45 a.m. **Adjourn**

The cost for this Workshop is $40 per person. Written materials will be provided and Local Professional Development Committee certificates of attendance will be issued to all Workshop attendees.

Click here to register for the Workshop.