KOUMAS LAW GROUP

Employment Law Update

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INSIDE THIS ISSUE:

HEALTH CARE REFORMS ARE HERE!

President Obama has just signed legislation that makes major changes to the healthcare system in the United States. The President has signed the Patient Protection and Affordable Care Act, which will pose a significant challenge to employers, because the rules implementing this new law have not been written yet by the federal regulators. What is clear is that employers are facing some big changes to their healthcare benefits, as well as penalties if an employer fail to provide the right coverage to its workers.

Some of the changes that will affect employers in significant ways are discussed below:

Beginning in Six Months from Enactment:

- **Dependent Coverage.** Health plans that provide dependent coverage will be required to provide it up to age 26. In addition, the legislation prohibits health plans from excluding coverage of pre-existing conditions for children. This provision applies to all employer plans and new plans in the individual market. This provision will apply to all people in 2014.
- **Ban on Lifetime Limits.** The law prohibits insurers from imposing lifetime limits on benefits.
- **Ban on Discrimination Based on Pay.** The law prohibits new group health plans from establishing any eligibility rules for healthcare coverage that have the effect of discriminating in favor of higher wage employees.

Beginning in 2014:

- **Employer Responsibilities.** Beginning in 2014, the legislation

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NEW SUPERVISORS: HAVE THEY BEEN PROPERLY TRAINED?

Whether an organization has recently promoted an employee to a supervisory position, or newly hired an individual into a management related position, the following question should always be asked: "Has the individual been properly trained to act in the capacity of a supervisor?" Supervisors are supposed to be a company's eyes and ears, and the first line of defense in preventing or, *at least*, minimizing legal claims.

Organizations promote employees for a myriad of reasons. Often times it is not because the employee is well-equipped to act in a supervisory role, but rather because of seniority, duration in former position, recommendation by a manager, history of positive evaluations in former position, or simply to satisfy an employee's request. Just because an employee exceeds a company expectations in a *non-supervisory* position does not necessarily mean the employee will be a successful manager. Great employees do not always equate to great managers. A promotion into management is not automatically accompanied with effective communication and evaluation skills required to be a good manager. But that should come as no surprise since brand new managers have never had any management training and have probably even had a few poor role models along the way.

Before filling a supervisory position, employers should give more consideration to whether the individual knows how to handle tricky situations including but not limited to discipline, harassment, intermittent leave, and disability accommodation Although a new supervisor may be well-intentioned, major damage can be caused if they try to handle such situations before having proper training and experience.

Transforming rank-and-file workers or new hires into effective frontline supervisors is a huge challenge.

- They must learn how to give — rather than follow — directions.
- They must make the transition from team member to team leader, learning how to coach and discipline workers who were once their peers (and may still be their friends).
- They must help you boost morale and retention despite tough economic times, a skill not required of your average employee.
- They must learn the legal dos and don'ts of supervising to avoid legal mistakes that could cost you big bucks and lots of embarrassment.

Even after ensuring the proper training is given to a new manager, employers should not expect the individual to be transformed overnight into an effective supervisor. The responsibilities for directly resolving important situations that could lead to legal problems should be transferred to the new manager gradually. At first, new mangers should told they are in a *reporting* mode, rather than trying to *re-*

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solve certain issues themselves. Examples of some circumstances that a new supervisory should be initially told to report immediately to Human Resources for resolution include the following:

- "Accommodation" or a related phrase ("I need an accommodation." or "I can't do my job because of a physical limitation." or "I need special equipment to do my job." Or words to that effect.)
- "Harassment," "Discrimination" or a related phrase ("I am being harassed." or "I am being bothered." or "Joe makes me uncomfortable.")
- "Leave" or a related phrase ("I need a few days off to care for ___" "I'm pregnant and I don't feel well and need to go home." "I need to take FMLA/CFRA [or family medical] leave.")

Recognizing that most managerial placements made by employers are not made based on the individual possessing these skills, more focus should be directed at whether someone has received sufficient prior training and had prior experience necessary to handle challenging personnel situations such as those referenced above, or the employer should arrange for such training. After all, people in supervisory positions can make the biggest and costliest mistakes for a company.

PRACTICE TIP: Ms. Koumas has conducted "Supervisory Techniques" training for several organizations. The training provides guidance from how managers should document issues with individual employees and administer discipline effectively, to identifying effective techniques to deliver constructive feedback without demoralizing employees in the process. For more information on the nature of the training available, please contact Elizabeth Koumas at ejk@koumaslaw.com or (619) 398-8301.

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will require an employer with more than 50 full-time employees to pay $2,000 per employee if the employer fails to offer health coverage and has at least one full-time employee receiving a premium assistance tax credit or cost-sharing reduction created by the legislation. The first 30 employees of the employer will be excluded from the calculation of the penalty. (An employer with 70 employees that fails to offer insurance would pay a penalty of $80,000.)

- **Ban on Annual Limits.** In 2014, the use of annual limits will be banned for new plans in the individual market and all employer plans. Before that ban goes into effect, there will be restrictions on annual limits for new plans in the individual market and all employer plans.

Some other changes include:

- **Tax Credits for Small Employers.** For small businesses that choose to offer healthcare coverage to

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employees, the law offers tax credits beginning in 2010. Beginning in 2010, tax credits of up to 35 percent of premiums will be available to firms that choose to offer coverage. In 2014, tax credits will be up to 50 percent of premiums for the smallest employers.

- **Tax on "Cadillac" Plans.** Beginning in 2018, there will be an excise tax on any "excess benefit" of employer-sponsored coverage. The legislation defines "excess benefit" as one that exceeds $10,200 for individual coverage and $27,500 for family coverage. The thresholds will be indexed to inflation.
- **Breaks for Breastfeeding.** The legislation will amend the federal Fair Labor Standards Act to require that employers provide unpaid breaks for employees to express breast milk. The legislation will also require that employers provide a private location for employees to have these breaks. (Recall- California state law already provides its own protections for breastfeeding mothers in the workplace pursuant to Labor Code sections 1030-1034.)
- **Automatic Enrollment.** The legislation will require that employers with more than 200 employees automatically enroll full-time employees in health coverage. The legislation will allow employees to opt-out of the coverage after automatic enrollment.

PAYROLL TAX EXEMPTION FOR NEW HIRES IN 2010

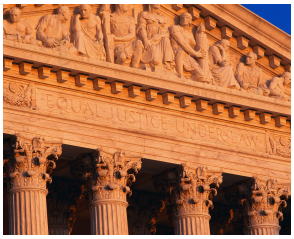
The U.S. Senate and House of Representatives recently agreed to end debate on legislation that would give employers a payroll tax exemption for hiring new employees in 2010. The vote to end debate clears the way for a final vote on the legislation.

> *"Getting Americans back to work is our number one priority and today we will take another step forward, with more action to come, in our multi-pronged effort to create jobs and strengthen our economy."* Speaker Pelosi's office.

The Hiring Incentives to Restore Employment (HIRE) Act would offer an exemption from payroll taxes for each worker hired in 2010. The hired employee must have been unemployed for at least 60 days for employers to qualify for the tax credit. The maximum value of this incentive is $6,621, which equals to 6.2 percent of wages paid in 2010 up to the FICA wage cap of $106,800. The longer that a business has a new qualified worker on its payroll, the greater the tax benefit. If an employer retains the new employee for at least 52 weeks, the employer would be eligible for $1,000 business tax credit for 2011.

The legislation also includes a provision that allows small businesses to write off more of their expenditures.

BACKGROUND CHECKS VERSUS THE RIGHT OF PRIVACY—BEING REVIEWED BY U.S. SUPREME COURT



If you are looking for a job in California or even if you have one, an employer is almost certain to seek information about you. It is common for some employers to conduct background and reference checks in the hiring process. Sometimes employers conduct such checks on current employees when an investigation becomes necessary following allegation of misconduct or wrongdoing, such as harassment or theft. Applicants and employees can expect some form of a background check as employers today are faced with news of workplace violence, falsified credentials, embezzlement, and lawsuits that result from bad hiring decisions. Applicants and employees, on the other hand, have well-founded concerns if an employer asks about things that have no apparent connection to the job.

The U.S. Supreme Court has decided to hear a case regarding whether a federal contractor's employees in "low risk" positions can be required to undergo extensive background checks. The case involves employees at a laboratory, which is located on federally owned land but is operated by a private California research university pursuant to a contract with a federal agency.

In 2007, the federal agency amended its contract with the university to require that *every employee* at the lab undergo a background check with inquiries, the same background investigation required of government civil service employees. During the investigation, each of the employee's references, employers, and landlords is sent an "Investigative Request for Personal Information" asking whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." At issue was the agency's implementation of 2004 Homeland Security Presidential Directive # 12.

Under the new policy, the employees were required to clear the background check in order to gain access to the lab. The university took it a step further, stating that employees who did not successfully clear the background check would be deemed to have voluntarily resigned.

The lab's long-term lab employees objected to the background check. They argued that since they are in low-risk positions (*i.e.,* they have no access to classified information), the background checks are an invasion into their "informational privacy" under the U.S. Constitution. The Ninth Circuit Court of Appeals enjoined the federal agency from requiring the investigations, finding that the process violates employees' privacy rights and is not narrowly tailored to a legitimate business need.

Employees have a right to privacy in certain areas, a right they can enforce by suing the employer in court. An employer in California has a duty to ensure it does not negligently hire or retain an employee in order to protect other employees. An employer must carefully balance the need to obtain

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background information with the applicant's/employee's right to privacy, in order to avoid subjecting itself to a potential claim for invasion of privacy Therefore, an employer must conduct *reasonable* background checks which do not intrude on the applicant's right to privacy. What is reasonable will depend on the type of business and the position at issue. If an employer hires or retains someone who the employer knows, *or should know (*if a reasonable investigation had been conducted), is unfit, in that he or she is a potential risk to others, the employer may be liable to an employee or a third party who is intentionally injured by such an employee.

Although the federal agency had a desire for the university to obtain a bit more information about its employees, an employer does not have unlimited rights to dig into an individual's background and personal life. Stay tuned, as the U.S. Supreme Court exercises its discretion to review the foregoing case to see if the extensive background check is confirmed to be too invasive for the laboratory positions at issue.

PRACTICE TIPS: Before making an employment related decision, employers should ensure they know certain rules, including but not limited to:

- Proper disclosure requirements for using credit/consumer reports relating to applicants or current employees;
- The extent of criminal history that can be asked of an applicant;
- When bankruptcies, and prior workers comp injuries can and cannot be considered;
- When driving records can be investigated.

For more information on avoiding liability in the hiring process or during background checks, please contact Elizabeth Koumas at (619)398-8301, or ejk@koumaslaw.com.

FUTURE SEMINAR

Employment Law Update

Date: April 22, 2010 **Time:** 6:30pm-7:30pm

Location: Life Technologies /Invitrogen, 5791 Van Allen Way, Carlsbad

Cost: $30 (annual membership fee)

Sponsor: American Payroll Association, No. County Chapter

Topic: We will discuss a myriad of employment issues, including the New HIRE Act, Responding to Employment Verifications, Direct Deposit Rules, Vacation Pay At Termination, Exempt Employee Pay Issues.

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