KOUMAS LAW GROUP

Employment Law Update

July 2010

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HEALTH CARE REFORM CONTINUES

The **Patient Protection and Affordable Care Act** (**PPACA**), a federal statute that was signed into law in President Obama on March 23, 2010, along with the **Health Care and Education Reconciliation Act of 2010** (signed into law on March 30, 2010), are a product of the health care reform agenda of the new administration and Congress. PPACA includes a large number of health-related provisions to take effect over the next four years, including expanding Medicaid eligibility, subsidizing insurance premiums, providing incentives for businesses to provide health care benefits, prohibiting denial of coverage/claims based on pre-existing conditions, establishing health insurance exchanges, and support for medical research.

The federal statute contains provisions that will go into effect immediately; on June 21, 2010 (90 days after enactment); on September 23, 2010 (six months after enactment); and provisions that will go into effect in 2014. Below are a highlight of some of the key provisions of the bill. For simplicity, the amendments in the Health Care and Education Reconciliation Act of 2010 are integrated into this timeline.

Effective June 21, 2010

Adults with pre-existing conditions will be eligible to join a temporary high-risk pool, which will be superseded by the health care exchange in 2014. To qualify for coverage, applicants must have a pre-existing health condition and have been uninsured for at least the past six months. There is no age requirement. The new program will cap an individual's out-of-pocket costs at $5,950 per year.

Effective September 23, 2010

- Dependent children will be permitted to remain on their parents' insurance plan until their 26th birthday.
- Insurers are prohibited from discriminating against any individuals under the age of 19 based on pre-existing medical conditions.

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COBRA SUBSIDY EXTENDED THROUGH MAY 2010

The American Recovery and Reinvestment Act of 2009 (ARRA), as amended, provides for premium reductions for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA. Eligible individuals pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider through a tax credit. To qualify, individuals must experience a COBRA qualifying event that is the involuntary termination of a covered employee's employment.

The involuntary termination must generally occur during the period that began **September 1, 2008 and ends on May 31, 2010.** (An involuntary termination of employment that occurs on or after March 2, 2010 but by May 31, 2010 and follows a qualifying event that was a reduction of hours that occurred at any time from September 1, 2008 through May 31, 2010 is also a qualifying event for purposes of ARRA.) The premium reduction applies to periods of health coverage that began on or after February 17, 2009 and lasts for up to 15 months. See our firm's March and February legal updates for more information on the law and prior extensions.

Efforts to renew the COBRA subsidy extension to help workers who have been recently laid off afford to keep their former employer's health insurance remains in limbo as lawmakers work at a measured pace to extend unemployment benefits and a tax package.

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- Insurers are prohibited from charging co-payments or deductibles for Level A or Level B preventative care and medical screenings on all *new* insurance plans.
- Individuals affected by the Medicare Part D coverage gap will receive a $250 rebate, and 50% of the gap will be eliminated in 2011. The gap will be eliminated by 2020.
- Insurers are required to implement an appeals process for coverage determination and claims on all new plans.
- Companies which provide early retiree benefits for individuals aged 55–64 are eligible to participate in a temporary program which reduces premium costs.
- A new website installed by the Secretary of Health and Human Services will provide consumer insurance information for individuals and small businesses in all states.
- A temporary credit program is established to encourage private investment in new therapies for disease treatment and prevention.

Effective by January 1, 2011

- Insurers will be required to spend 85% of large-group and 80% of small-group and individual plan premiums (with certain adjustments) on health care or to improve health-care quality, or return the difference to the customer as a rebate.
- Companies will be required to issue 1099 forms to *any vendor of services or rental property* to

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which the business has paid more than $600. Form 1099 is also sent to the IRS. (Under the existing law, businesses issued the Form 1099 only to individuals who provided services or property to a business. The healthcare law included the same form be issued to corporations as well, and that the form be issued to individuals and corporations that provide property to the business. Only business related payments are reportable, personal payments not. There are a number of exceptions, for example: payments for merchandise, telephone, freight, storage, payments of rent to real estate agents are excepted. The health care bill mandate aims to collect lost revenue from companies that under-report on their tax returns. The provision is expected to raise $17 billion over 10 years.

Effective by January 1, 2014

- Insurers are prohibited from discriminating against or charging higher rates for any individuals based on pre-existing medical conditions.
- Expand Medicaid eligibility; individuals with income up to 133% of the poverty line qualify for coverage, including adults without dependent children.
- Two years of tax credits will be offered to qualified small businesses. In order to receive the full benefit of a 50% premium subsidy, the small business must have an average payroll per full time equivalent ("FTE") employee, excluding the owner of the business, of less than $25,000 and have less than 11 FTEs.
- Impose a $2000 per employee tax penalty on employers with over 50 employees who do not offer health insurance to their full-time workers (as amended by the reconciliation bill).
- Impose an annual penalty of $95, or up to 1% of income, whichever is greater, on individuals who do not secure insurance; This is an individual limit; families have a limit of $2,085. Exemptions to the fine in cases of financial hardship or religious beliefs are permitted.
- Chain restaurants and food vendors with 20 or more locations are required to display the caloric content of their foods on menus, drive-through menus, and vending machines. Additional information, such as saturated fat, carbohydrate, and sodium content, must also be made available upon request.
- Members of Congress and their staff will only be offered health care plans through the exchange or plans otherwise established by the bill (instead of the Federal Employees health Benefits Program that they currently use).
- Earned income of individuals above $200,000 annually or couples above $250,000 annually will be subject to Medicaid Payroll withholding of 3.8%.
- The qualifying medical expenses deduction for Schedule A tax filings increases from 7.5% to 10% of earned income.

Effective by 2018

- All *existing* health insurance plans must cover approved preventive care and checkups without co-payment.
- A new 40% excise tax on high cost ("Cadillac") insurance plans is introduced.

WORKPLACE INVESTIGATIONS– DO YOU AVOID THEM?

When an employee complains that a supervisor or co-worker is harassing or bullying them, or engaging in discriminatory or other illegal conduct, an investigation is often required to resolve the matter. Unfortunately, many complaints never even make it to HR. Reasons that managers fail to start an investigation are:

- They have not been trained and they do not know what to do.
- They think the issue is cut and dried, so there's no need for an investigation.
- They think that the claim does not have merit.
- They are honoring a request for confidentiality from the employee.
- The employee requested that no action be taken.
- The complaint is made during an exit interview.

Risks of Bad (or Nonexistent) Investigations

The decision of whether to investigate is yours, not the manager's. First of all, there is financial risk. But there are others, including:

- Reputation—In this economy, negative commentary is no help.
- Investor confidence—Investors are taking a closer look at ethical issues of public companies.
- Market success—Consumers avoid companies with ethics issues.
- Staffing—You won't be an employer of choice any longer.

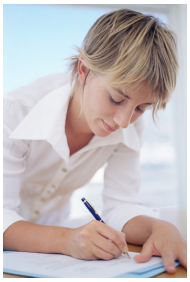
With internal investigations, however things turn out, you can rest assured that someone is going to wind up unhappy. But you still need to do your best to *make sure your investigations are timely, complete, and fair.*

The following are ten recommended tips for conducting the investigation:

1. Choose the proper investigator.
2. Obtain written statement from or interview complainant.
3. Interview the alleged offender
4. Identify issues in dispute and consider necessary interim measures.
5. Interview all witnesses identified– emphasize confidentiality.
6. Meet with management and/or legal counsel to arrive at conclusion or determine further investigation needed.
7. Draft report of investigation.
8. Communicate results to complainant and accused—reiterate any personnel policy at issue.
9. Limit communications of results within company management, on a need to know basis.
10. Preserve all evidence.

For more detailed information on any of the foregoing steps, or conducting investigations in the workplace, contact Elizabeth Koumas at (619)398-8301 or ejk@koumaslaw.com.

THE EMPLOYMENT APPLICATION– IS YOURS A LEGAL MINEFIELD?



Most employers issue their own pre-printed company application to job seekers. Therefore, job application styles will vary widely from company to company. Employment laws have changed quickly during the last 10 years and have become considerably more complicated. Many questions are off-limits to ask on a California employment application. Employers need to carefully consider what they ask. There are a number of potential problem questions on a California employment application that employers should not ask or discuss in the hiring process.

Inquiries should be avoided that although not specifically listed, are designed to acquire information about race, ancestry, color, age, sex, religion, and disability. There is an exception: an employer can voluntarily obtain data on race, sex, and national origin needed for recordkeeping by law and it is recommended this goal be accomplished through use of a voluntary disclosure form, attached to an application. Questions about a persons arrest and court records should not be asked unless these questions are based upon essential occupational requirements or qualifications for the job position.

The Department of Fair Employment and Housing has issued a guideline of prohibited inquiries and recommended acceptable methods of inquiring about certain job related issues.

Prohibited Inquiries include but are not limited to:

- Race
- Gender or questions regarding children/pregnancy
- Height or Weight
- National Origin or Citizenship (Form I-9 is the appropriate place to determine citizen ship status instead of the employment application.)
- Religion
- Disabilities
- Marital Status
- Physical Characteristics
- Arrest & misdemeanor conviction records (some exceptions)

It is no longer wise or safe to use standard or old California employment applications. You should make sure that someone reviews your California employment application and interview questions regularly.

Minimum Recommended Contents:

- Equal Opportunity Statement
- Ability to perform essential functions with or without reasonable accommodation
- At will disclaimer
- Statement limiting duration of application effectiveness
- Question to disclose exact job or category sought
- Section for detailed employment history
- Area to list references
- Criminal conviction disclosure- nature, date, location (CAUTION- must include statement that conviction does not automatically disqualify applicant from employment.)

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- Acknowledgement – no offer or promise
- Consent statement – background and reference checks
- Certification of accuracy and completeness of application and any resume submitted
- Notice and consent - required physical examinations (including drug tests)

To be obtained after an offer of employment has been accepted:

- Age/Date of Birth
- Social Security number and military record

Employers often hire a qualified applicant only to later learn that the individual's attendance pattern is less than stellar. The EEOC considers use of inquiries to determine an applicant's availability to have exclusionary effect on employment of persons with certain religious practices, and perhaps disabilities. Therefore, the following is recommended to obtain information about an applicant's ability to meet the position's scheduling requirements:

- Employer should state normal work hours for available job, and after clarifying the applicant is not required to disclose need to miss scheduled work for religious practices or due to disabilities, may ask applicant whether s/he is *otherwise* available to work those hours.
- After an offer is made, the employer can ask if an accommodation is needed, and then determine whether one is possible.
- Likewise, ensuring the candidate has reliable means of transportation to get to the workplace and satisfy the scheduling demands can also be asked. (You do not need to inquire whether they have a car, since the person may rely upon public or alternative private transportation to get them to work.)

Help protect your business. Have your current application reviewed by a California employment attorney to ensure you are not running afoul of the legal restrictions.

FUTURE SEMINAR

The Dance: The Overlap Between FMLA, ADA and Workers' Compensation Leave Laws

Handling employee requests for time off as a result of illness or injury is one of the most challenging and frustrating duties of a human resource employee's job. The difficulty arises from having to consider the complicated state and federal laws governing family leaves of absence, workers' compensation, and disability discrimination that may come into play. For example, some serious health conditions, including those which are work-related, may also fit the definition of a disability under state and federal discrimination laws. A work-related injury is covered by workers' comp, but if it qualifies as a "serious health condition" family medical laws kick in as well.

Date: Wednesday July 21, 2010 **Time:** 11:30am-1:30pm (lunch)
Location: 110 West C Street (The Chamber Building)
Cost: $ 45 RSVP by July 19th. *SPACE LIMITED*
Registration and Credit Card Forms on firm website.