KOUMAS LAW GROUP

Employment Law Update

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INSIDE THIS ISSUE:

NEW *CHIPRA* NOTICE EMPLOYERS MUST PROVIDE TO EMPLOYEES

Employers face a new notice requirement, potentially as soon as May 1, now that the U.S. Department of Labor (DOL) has issued a model notice to employees under the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA, was signed into law last year by President Obama, and is a program that provides assistance to parents in securing health coverage for their children. Under CHIPRA, any employer who offers group health coverage to employees must provide notice to those employees of their potential eligibility for state health insurance premium assistance for dependents.

The U.S. Department of Labor recently released new model notices, which must be provided to all employees working in California (and any other state that provides premium assistance for children), regardless of where the employer is headquartered. The model notice is a uniform standard document that may be used by employers nationwide to meet CHIPRA's employee notice requirement.

The notice describes the relevant CHIPRA provisions and lists contact information for the states whose CHIP or Medicaid programs offer premium assistance, as the CHIPRA law authorizes. Employers must send the notice annually, free of charge, *by the later of* (1) the first day of the first plan year after February 4, 2010; or (2) May 1, 2010. The notice may be provided with enrollment packets, open season materials or the summary plan description, but must appear , per the DOL, "separately and in a manner which ensures that an employee who may be eligible for premium assistance could reasonably be expected to appreciate its significance,"

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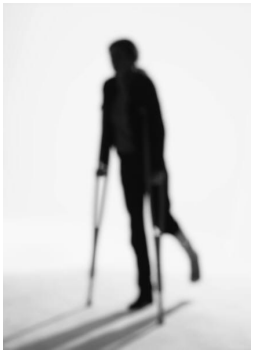
Employers that fail to provide the required notice are subject to civil penalties of up to $100 per day per employee. The model notice is available on DOL's Web site in both Word and pdf format.

PRACTICE TIP: Even though an employer may be located in state that does not provide premium assistance, such employer must still provide the notice to any employees who reside in states that do. Therefore, an employer should notify all its employees since that is easier than differentiating them by state of residence. A copy of the model CHIPRA notice is available on the firm's website at www.koumaslaw.com.

WORKERS COMPENSATION PREMIUMS ARE ON THE RISE AGAIN



Despite the budgetary issues, the state has restored programs designed to facilitate the courts' ability to adjudicate workers' comp claims quickly and to improve the overall efficiency of the state's workers' comp system. The California Legislature has authorized a temporary workers' compensation premium assessment (WCPA) to offset Department of Industrial Relations funding cuts. Legislation in 2009 also created the Labor Enforcement and Compliance Fund (LECF) to provide a stable funding source for the DLSE. The temporary premium assessment seeks to stabilize funding for the Division of Workers' Compensation (DWC), the Division of Occupational Safety and Health, and the Division of Labor Standards Enforcement, which enforces the legal requirement for employers to carry workers' comp insurance.

Q. What is the WCPA?

A. The WCPA is a shift in funding designed by the Legislature to address current budgetary conditions and stabilize funding for the Department of Industrial Relations (DIR) operations, which includes the Divisions of Workers' Compensation, Occupational Safety and Health and Labor Standards Enforcement.

Q. Are other divisions also affected by this new funding shift?

A. Yes, approximately 70 percent of the Division of Labor Standards Enforcement (DLSE) budget will also be provided by the assessments in the 2010/11 fiscal year. The remaining 30 percent of the DLSE budget will be covered by licensing fess and penalty assessments. As it is for DOSH, the DLSE assess-

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ments are capped at $37 million.

Q. What do the assessments actually pay for?

A. While the new funding is designed to bring stability to DOSH and DLSE operations, it also guarantees the services they provide and continues their efforts to create a better business environment for legitimate employers in California by removing unfair competition.

Q. Where does the WCPA money come from?

A. The WCPA collects fees from employer paid premiums assessed by insurance companies, and from self-insured employers based on paid indemnity.

Q. How long will the assessments be used to provide DIR and division funding?

A. The assessments will be in effect until 2013 when the Legislature will review the funding process to determine if the assessments should continue at their current level or if they will sunset—be removed from the budget.

Q. What benefit is that to employers?

A. Unstable budgets can erode the effectiveness of the services DOSH and DLSE provide which benefit all employers including:

- Enforcement of programs to eliminate the underground economy
- Labor law enforcement activities to ensure a more competitive business environment by pursing employers who break employment laws
- Pursuing uninsured employers who fail to carry workers' compensation coverage for their workforce
- Ensuring workplace safety
- Providing compliance assistance to employers who are striving to increase safety on their jobsites
- Decreasing injuries, illnesses and fatalities at jobsites across the state

The CA Division of Workers' Compensation (DWC) has posted the fiscal year 2009-2010 assessment rates for the Workers' Compensation Administration Revolving Fund (WCARF) and other funds on its Web site. Insurers must pay the funding due to the state for policy holders and recover those funds from policy holders through workers' compensation policy surcharges and assessments.

The division mailed letters and invoices to insurers and self-insured employers, showing the share of the assessments and surcharges due. Insurers or self-insured employers with questions should call DWC Staff Services Manager Amadeo Urbano at (510) 286-7083 or DWC Analyst Naomi Carter at (510) 286-7087 for more information.

ARE PAY CUTS PERMISSIBLE?

Whenever an employer is considering pay cuts or pay category re-organizations, the employer should ask itself the following questions before taking any action:

- Do any of the affected employees have written contracts that specify what they will earn? (This would include collective bargaining agreements.) If so, then the written contract will need to be renegotiated on an individual basis, taking into consideration the other terms of the contract;
- Do any of the affected employees currently have outstanding complaints related to discrimination, harassment, retaliation, or workers compensation, or have any of them complained to a government official or agency about improper conduct on the part of the organization? If so, make sure to fully investigate and resolve those complaints before implementing any pay changes for those employees, and;
- Are any of the affected employees disabled or pregnant? If so, caution should be taken to make sure that any pay adjustments made for these individuals relate to their jobs in a neutral way, and do not take the disability or pregnancy status into account.

Assuming that none of the affected employees have individual written contracts, are pregnant or disabled, and have no unresolved complaints, then an employer is free to modify pay ranges as needed or desired, provided that the new pay rate terms are presented to the employee *before* any time is worked to which the new pay rate applies. Downward pay rate changes may only be prospective. The employee is then free to accept the new terms and continue with the company, or reject the new terms and seek employment elsewhere.

PRACTICE TIP: To guard against the possibility that a disgruntled employee will claim that a pay reduction was discriminatory or retaliatory, employers should carefully and clearly document the reasons underlying any changes to pay rates or pay ranges. This is especially true if the pay cuts have a disparate impact on any protected group, such as older workers.

COBRA SUBSIDY EXTENDED, AGAIN

March 2, 2010, the Senate approved the legislation, the Temporary Extension Act of 2010 (H. R. 4691), extending the deadline for COBRA continuation coverage subsidies, allowing workers who are involuntarily terminated in March to qualify for the program. President Obama has signed legislation. H.R. 4691 extends protections to workers who are involuntary terminated between September 1, 2008 and March 31, 2010, making them eligible for up to 15 months of 65% COBRA subsidies. See our firm's February legal update for more information on the law and prior extension.

CALIFORNIA CASE LAW UPDATE

Kin Care– Recently, the California Supreme Court resolved whether Labor Code § 233, which permits an employee to use up to one half of annual accrued paid sick leave to care for ill relatives/family members, applies to paid sick leave policies that provide for an uncapped number of compensated days off. The Supreme Court concluded, contrary to the Court of Appeal, that Labor Code § 233 does *not* apply to paid sick leave policies that provide for an uncapped number of compensated days off.

Summary: Employees Kimberly McCarther and Juan Huerta brought a class action lawsuit against Pacific Bell and other affiliated companies. According to company policy, employees were entitled to receive pay for any days off due to their own illnesses or injuries, not to exceed 5 consecutive days in a 7-day period. Employees did not accrue paid sick leave in a bank, and there was no set cap as to the amount of sick leave that an employee could take. Employees were not permitted to use sick leave to care for an ill family member. At the same time, and despite being paid for sick days, employees were subject to progressive discipline for excessive absences, including absences taken due to illness or injury.

The employees argued that the companies' sick leave and absenteeism policies violated the KinCare law. Disagreeing with the appellate court, the Supreme Court ruled that the KinCare law applies to sick leave plans *only if* the employee actually accrues a set amount of sick leave in a given period of time. When paid sick leave is offered on an as-needed basis, the employer is not required to allow employees to use that leave to care for family members, and accumulated employee absences can be

WHEN PROTECTED LEAVE EXPIRES EMPLOYERS CANNOT AUTOMATICALLY TERMINATE EMPLOYEES

The federal Equal Employment Opportunity Commission (EEOC) recently reached a multi-million dollar class action settlement with Sears, Roebuck & Company. The EEOC sent a strong message to employers — You cannot just terminate employees who run out of leave without first exploring whether or not a reasonable accommodation can be provided.

The settlement was the result of litigation against Sears for maintaining an inflexible policy that automatically terminated employees who ran out of workers' compensation and other leave benefits under the Family and Medical Leave Act and the company's leave benefits program. The agency asserted that Sears' automatic termination policy violated the federal Americans with Disabilities Act (ADA), which requires employers to engage in an interactive process to determine if disabled employees (including those with long-term workplace injuries) can be accommodated and returned to work.

Although the EEOC's complaint was brought under federal law, California law also requires employers to attempt to accommodate employees who exhaust leave entitlements, to see if they can be reinstated back on the job. As part of the settlement, Sears also agreed to change its policy regarding employees who run out of workers' compensation leave benefits. Similar class action complaints have been filed by the EEOC recently against other national companies, including UPS and JP Morgan Chase & Company. **PRACTICE TIP:** Employers should review their written policies and actual practices for handling employees who take leave but do not return when the leave expires to ensure the comply with the requirement to engage in a good faith interactive process to explore leave as a reasonable accommodations, if needed and its does not create a hardship..

FUTURE SEMINARS

Surviving the Economic Times:
50 Tips For Avoiding Employment Lawsuits

This in-house luncheon seminar will provide a 50-point self-audit checklist of important areas that should be reviewed at least annually by small and large employers. Periodic compliance of procedures is an essential preventative tool, especially in the current economic climate where many companies face daily challenges to remain in business. One lawsuit could decide that fate and close the doors. We will discuss practice tips for before, during and after employment, as well as 10 tips if you are sued.

Date: March 18 **Time**: 11:30-1:00 **Cost**: $35pp (includes meal)

Location: The Chamber Building, 110 West C Street,
7th Floor Conference Room A, San Diego, CA 92102

American Payroll Association, North San Diego Chapter

Date: April 22, 2010 **Time:** 6:30pm-7:30pm
Location: Stone Brewery, Escondido **Topic:** *TBD*
Cost: $30 (annual membership fee)

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