Ogletree Deakins

The Employment Law
AUTHORITY

Today's Hot Topics in Labor & Employment Law

March/April 2010

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And Much More

Health Care Reform Bill Signed Into Law

Imposes Significant Financial Responsibility On Employers

President Barack Obama recently signed into law the Patient Protection and Affordable Care Act (PPACA), the first of two interrelated bills that together will embody Congress's comprehensive health care reform legislation. The second piece of the legislative package is H.R. 4872, entitled the "Health Care and Education Affordability Reconciliation Act of 2010." At press time, this bill has not yet been signed into law.

Employers will be affected most directly by the health coverage provisions of Titles I and IX of the Act. Those provisions will transform the current model for employer-sponsored health coverage, under which an employer generally can choose whether, to what extent, and on what terms it will provide health coverage for some or all of its employees. In place of the current model, the Act will place an obligation on most individuals to obtain coverage for themselves and their dependents beginning in 2014. That same year, the Act also will begin to impose a financial responsibility on employers to subsidize the coverage selected by most employees.

Short Term Effects

Before turning to the substantial changes that will begin in 2014, it is worth noting a few of the "early

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Minneapolis, Orange County Join The Fold

Ogletree Deakins Now Has 39 Offices Across The Country

Continuing the flurry of expansion in 2010, Ogletree Deakins announced new offices in Orange County, California on March 1 and Minneapolis on April 1. The firm has opened four offices in the first four months of this year, and now has 39 locations across the United States.

According to Ogletree Deakins Managing Shareholder Kim Ebert, "These are two markets we have wanted to be in for quite some time. We are delighted to have found the perfect lawyers for our firm, our clients, and each marketplace. These offices clearly enhance our capability to provide local and national service to our clients."

In Orange County, the office includes shareholders Vince Verde and Keith Watts, and associate Angela Pak – all of whom are experienced employment lawyers. Verde and Watts expect that the office will grow in the coming months to meet the demand of the firm's national clients, as well as local employers. Ebert noted, "With four offices in California (Los Angeles, San Francisco, Orange County and Torrance), Ogletree Deakins is now well positioned to provide state-wide representation of employers."

In Minneapolis, where the weather this time of year is a little different than in Southern California, the firm's presence will be led by three shareholders: Cynthia Bremer, Patrick Martin and Hal Shillingstad. Combined, the three attorneys have more than 50 years of experience representing management in labor and employment law matters. According to Ebert, "With the addition of Minneapolis to already existing offices in Chicago, Detroit and Indianapolis, the firm can now handle matters pretty much anywhere in the Upper Midwest." ■

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PRESIDENT OBAMA SIGNS JOBS BILL INTO LAW

Measure Will Provide Tax Credits For Hiring Unemployed Workers

On March 18, President Barack Obama signed into law the Hiring Incentives to Restore Employment (HIRE) Act. The bill contains approximately $17.6 billion in tax credits to stimulate employment and contributes about $20 billion toward highway and transit infrastructure programs. The President stated that while the jobs bill was "absolutely necessary," it was "by no means enough" and that "[t]here's a lot more that we're going to need to do to spur hiring in the private sector and bring about full economic recovery."

One of the more important provisions for business is the tax credit for hiring unemployed workers. In particular, HIRE exempts companies from paying the 6.2% Social Security payroll tax through December 31, 2010 for certain new employees. To qualify, the new employee must begin working after February 3, 2010, and before January 1, 2011, and certify that they have not worked more than 40 hours during the 60-day period before employment begins. Also, this new employee may not replace an existing employee of the employer unless the other employee's employment terminated voluntarily or for cause.

In addition, companies would receive a $1,000 tax credit on their 2011 tax return for each new employee who commences employment during the year and is employed for at least one year. The HIRE Act also includes a provision that will reimburse the Social Security Trust Fund from the general fund for the lost payroll taxes it will incur from the payroll tax exemption. Estimates are that these tax credits could stimulate the creation of up to 300,000 jobs.

Another provision of the HIRE Act that is especially important to small business is the increase in the "expensing" tax allowance. Small businesses will be able to write off up to $250,000 of certain capital assets and equipment instead of depreciating them over time.

Approximately $77.2 billion is provided in the HIRE Act for the surface transportation program last authorized by the 2009 transportation legislation. The HIRE Act will continue funding for a variety of federal-aid highway, transportation and surface transportation construction projects through the end of this calendar year.

The HIRE Act also generates revenue to offset the various investments or expenditures. One key revenue source would be a limitation on the ability of multinational corporations to shift assets among foreign institutions to minimize withholding tax. ■

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Additional Information
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DEADLINE TO BEGIN REPORTING PAYMENTS TO MEDICARE BENEFICIARIES DELAYED TO 2011

The Centers for Medicare and Medicaid Services (CMS) has postponed the implementation of new regulations requiring an employer to report to CMS any payment to a Medicare-eligible person, where that payment is for medical benefits or is in exchange for a release that waives claims for medical benefits. The new deadline recently announced by CMS requires that reports of covered payments must be submitted beginning in the first calendar quarter of 2011.

An employer that is fully or partially self-insured will be considered a "Responsible Reporting Entity" (RRE) and will be required to report payments to a person who is eligible for Medicare benefits, if the payments are for medical benefits or are in exchange for a release that has the effect of waiving claims for medical benefits. Where an RRE has assumed "Ongoing Responsibility for Medical Benefits" (ORMs), payments made on or after January 1, 2010, must be reported. Where the RRE makes a one-time or lump-sum payment to resolve all or part of a claim, which is referred to as a Total Payment Obligation to Claimant (TPOC), such payments occurring on or after October 1, 2010, must be reported. Without regard to whether the payment to be reported is an ORM or a TPOC, the RRE has until the first quarter of 2011 to submit its first report.

An RRE that fails to report covered payments will be subject to a civil penalty of $1,000 per day. Delaying the deadline to begin reporting will provide employers additional time to review the Section 111 regulations and begin the process of registration with CMS (if necessary). CMS cautions that RREs must begin the registration process a full calendar quarter before the obligation to submit reports arises. This period allows for testing of the technical elements of the reporting process. For more information, visit www.Section111.cms.hhs.gov. ■

Ogletree Deakins State Office Round-Up

ALABAMA

The Eleventh Circuit Court of Appeals recently held that a jury had sufficient evidence to find that an Alabama state agency failed to promote an African American engineer three times because of her race. The court rejected the jury's award in her favor, however, on six other promotion denial claims. *Brown v. Alabama Dept. of Transp.*, No. 08-14371 (February 23, 2010).

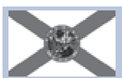
ARIZONA

A federal judge in Arizona has held that the EEOC may proceed with its lawsuit filed on behalf of an employee who was threatened with discharge after being named as a potential witness in a co-worker's EEOC charge. The judge found that being named a witness falls within the "participation" clause of the anti-retaliation provision of Title VII. *EEOC v. Creative Networks LLC*, No. 2:05-cv-03032 (January 15, 2010).

CALIFORNIA

The California Supreme Court has clarified the scope of Labor Code §233, which requires that employers that allow employees to accrue sick leave permit those employees to use a portion of this leave to care for ill relatives. The court held that the law does not apply to sick leave policies that provide an uncapped amount of paid leave. *McCarther v. Pacific Telesis Group*, No. S164692 (February 18, 2010).

FLORIDA



The Miami-Dade Board of County Commissioners recently approved an ordinance that eases workers' ability to sue for "wage theft." The ordinance bars wage theft, allows the county to use its police powers to intervene and help recover workers' back pay, and establishes specific procedures to handle and adjudicate complaints.

ILLINOIS

On March 4, the Seventh Circuit Court of Appeals rejected a lawsuit brought by an Illinois parks district police chief who was fired after his drunk driving caused an accident with injuries. The court held that the police chief had no basis for an ADA claim because his driving while intoxicated violated workplace rules and rendered him unable to perform the essential functions of his job. *Budde v. Kane County Forest Preserve*, No. 09-2040 (March 4, 2010).

INDIANA*

On March 18, Governor Mitch Daniels signed P.L. 90-2010 into law, making it illegal for Indiana employers to adopt any policy that prohibits, or has the effect of prohibiting, employees from having firearms in their locked vehicles while the vehicle is on company property. The law also authorizes civil lawsuits by employees and allows for actual damages and attorneys' fees for employees that prevail in a court action.

MISSOURI*

The Missouri Supreme Court recently reversed its precedent and held that contract employees have a right to pursue a claim for wrongful discharge in violation of public policy. According to the court, "the wrongful discharge action applies equally to at-will and contract employees." *Keveney v. Missouri Military Academy*, No. SC89925 (February 9, 2010).

NEW JERSEY*

A bill (S1449) introduced in the New Jersey Senate on February 18 proposes to require every employer, after hiring an employee, to verify the employment eligibility of the employee through the E-Verify program. If passed, the bill would prohibit the employment of unauthorized aliens and impose penalties on employers that knowingly or intentionally employ unauthorized aliens.

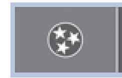
PENNSYLVANIA

The Third Circuit Court of Appeals recently held that a trial judge erred in denying a motion for front pay to a fired pregnant employee who prevailed on her FMLA claim. According to the court, the jury did not award front pay because it "believed the Court would calculate the amount of front pay itself." *Brown v. Nutrition Mgmt. Servs. Co.*, No. 08-3840 (March 17, 2010).

SOUTH CAROLINA

In November of this year, South Carolina voters will decide whether to approve a ballot initiative that is designed to preempt the proposed federal Employee Free Choice Act (EFCA). The initiative would amend the state constitution to guarantee an individual's right to vote by secret ballot for employee representation by a labor organization.

TENNESSEE



The Occupational Safety and Health Administration (OSHA) has found that Tennessee Commerce Bank fired its former chief financial officer in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act. In addition to ordering the bank to reinstate the worker, OSHA ordered it to pay over $1 million in back wages, interest, attorneys' fees and compensatory damages.

TEXAS

The Texas Court of Appeals has dismissed a lawsuit brought by a probation department employee who claimed that she was subjected to a hostile working environment on the basis of her gender because a male drill instructor allegedly shouted at her. Finding that she failed to show that the instructor's comments were motivated by unlawful bias, the court affirmed summary judgment in favor of the employer. *Martinez v. Wilson County, Texas*, No. 04-09-00233-CV (January 13, 2010).

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com.*

SOLICITATION AND DISTRIBUTION: WHO CAN DO WHAT, WHEN AND WHERE?

by C. Thomas Davis*

The potential last year for passage of the Employee Free Choice Act (EFCA) led many employers to ask: What actions should we take to prepare for increased union organizing? While EFCA, in its original form, appears dead for now, that is still a timely question. In fact, unions have elevated their levels of organizing activity as they realize they can no longer wait for new organizing rules.

Thus, this is the fourth article in a series that provides suggestions about how to prepare. In this article, we will review essential concepts about solicitation, distribution and access to private property.

Overview

These concepts are typically addressed in an employer's "no solicitation/no distribution" policy. Most employers have such a rule in place. If your company does not, it should adopt one now. Even if you are not particularly concerned with union activity, this is really a common-sense workplace rule which says, in essence, working time is for work and non-working time is the appropriate time for non-work related activities. Separate and apart from any union-related issue, that rule promotes safety, efficiency and productivity – all important concepts to the success of any work environment.

In terms of legal compliance, however, the presumed legality of a lawfully drafted no solicitation/no distribution rule can be challenged when the rule is adopted after union activity starts. Even if the policy is drafted and enforced in a legal fashion, the motivation for adopting the rule, after union activity starts, can create a legal problem. Perhaps more importantly, assuming that a lawful rule is in place, consistent regulation of all non-work related solicitation and distribution is critical to the lawful control of union related solicitation/distribution. Having a policy which states the rules and expectations in that regard helps ensure consistent regulation.

As a general proposition, a no solicitation/no distribution rule regulates two types of conduct: solicitation which is an oral call to action and the distribution of literature. Likewise, the rule typically regulates the conduct of employees and non-employees.

Non-Employee Activity

Under federal law, an employer may prohibit completely non-employee union organizers from entering onto the employer's private property to solicit and distribute as long as two conditions are met. Those conditions are: (1) the union has reasonable access to those employees through other avenues (that condition is met in all but the most extreme factual situations – *e.g.*, the employees work in a logging man camp miles away from civilization and consequently the union); and (2) the employer does not discriminate by allowing access to other non-employees.

The second condition is more problematic. It means an employer cannot allow non-employee access for other commercial solicitation and then lawfully deny access to the union. For example, if an employer allows Gold's Gym to sell memberships to employees from a table in the cafeteria, it is likely discriminatory to then deny the union similar access. While the law does allow for a few limited charitable exceptions (granting access for the United Way campaign or the Red Cross blood drive is not evidence of discrimination), other forms of non-employee access should not be allowed.

It should be noted that a few states (*e.g.*, California) have unique rules regarding access to private property. As a result, employers should confirm that their no solicitation/no distribution rules comply with any applicable state law.

Employee Activity

The rules with respect to employees are a bit more complicated. Obviously, employees have a right to enter an employer's private property when they are scheduled to work since that is where their job is performed. More critically, the law establishes a legal right for employees to engage in union related solicitation and distribution at work subject to the employer's right to enforce certain time and location restrictions.

"It should be noted that solicitation is a call to action – and is more than just talk."

Understanding those time and location restrictions requires understanding four terms: "working time," "non-working time," "working area" and "non-working area." As the term suggests, working time is the time when an employee is expected to be performing work tasks and does not include time before or after the shift or any rest, meal or other authorized break period during the shift. Both paid and non-paid breaks are considered non-working time.

Similarly, a working area is a location from which work tasks are being completed – a production line, the retail sales floor or a patient's room in a hospital. Again, it logically follows that non-working areas generally include all other areas of the work site, but clearly include break rooms, cafeterias, locker rooms, exercise facilities, lobbies and employee parking lots.

Employees have the legal right to engage in union solicitation (either for or against) while at work subject to the employer's right to prohibit solicitation during the employee's working time. Stated another way, employees must be allowed to engage in union solicitation at any location on the employer's property as long as it is done during the non-working time

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* Tom Davis is a shareholder in Ogletree Deakins' Nashville office, where he represents management in labor and employment-related matters.

EEOC Must Pay $4.5 Million In Legal Fees To Employer

A federal judge in Iowa recently ordered the Equal Employment Opportunity Commission (EEOC) to pay $4.56 million in attorneys' fees, costs and expenses to an interstate trucking company that successfully defended a sexual harassment class action. Last year, the court dismissed the federal agency's suit in its entirety, finding no basis for "pattern or practice" claims or individual claims of bias under Title VII of the Civil Rights Act. In granting the employer's request for attorneys' fees, the trial judge found that "the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon [the employer] and the court." *EEOC v. CRST Van Expedited Inc.*, No. 07-CV-0095 (February 9, 2010).

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of all employees involved. An exception to this rule exists, however, in industries such as health care and retail sales where solicitation during non-working time can still be prohibited in certain locations.

A policy which prohibits all solicitation while at work is unlawful. Likewise, a policy which bans solicitation during "working hours," "business hours," or "company time" instead of "working time" is presumed unlawful. Without a more specific definition, those terms are presumed to include both working and non-working time.

It should be noted that solicitation is a call to action – *e.g.*, sign a card or come to a meeting – and is more than just talk. Several recent decisions issued by the National Labor Relations Board have found rules which prohibit talking about the union during working time to be unlawful and it is clearly discriminatory to allow non-work related talk during working time (*e.g.*, sports, politics or religion) but to prohibit union related talk.

Employees have a similar right to distribute union related literature at work, again subject to the employer's right to prohibit distribution during working time. Because the distribution of paper involves the potential for litter, however, employers may also prohibit distribution during an employee's non-working time if the distribution is taking place in a working area. Thus, employers must allow employee distribution of union related literature if it is during the non-working time of the employees involved and being done in a non-working area (*e.g.*, parking lot, cafeteria or break room) but may prohibit that distribution during both working time and non-working times in a working area.

Finally, we want to review an employer's right to prohibit off-duty employees from returning to work outside their working hours. Indeed, it is not unusual to find a rule which says, in essence, when your shift is over go home and do not return to work until your next shift starts.

Under the federal labor laws, that rule is lawful only if three conditions are met. First, the rule must be clearly disseminated to all employees (which typically means it must be in writing). Second, the rule must limit access by off-duty employees only to the interior of the facility and to other work areas but generally cannot limit off-duty access to exterior non-working areas. Thus, a rule which denies off-duty employees from returning outside work hours to parking lots, the entrance gates, exterior smoking areas and other similar locations outside the facility, is likely unlawful.

The rule must prohibit off-duty employee access for all purposes and not just for employees who want to return and engage in union activity. That is, the prohibition must be uniformly applied. So, if an employer allows off-duty employees to return to work 30 minutes before shift start to sit in the break room and read the paper, denying similar access to an off-duty employee who wants to sit in the break room and discuss the union is evidence of discrimination.

Policy Enforcement

The biggest challenge to these rules, however, is the need to enforce them in a consistent fashion against all non-work related employee solicitation and distribution. These concepts do not relate just to union activity but must be applied to regulate all non-business related solicitation and distribution.

The classic example is Girl Scout cookies. If you allow employees to sell Girl Scout cookies during working time and in a working area today but stop an employee from distributing a union pamphlet at the same time and location tomorrow because it is "during working time or in a working area" – that is discrimination. That does not mean you have to prohibit Girl Scout cookie sales – that just means you should ask employees to sell their cookies during non-working time and in the break room. Conversely, just because an employer prohibits all form of sales by employees does not mean they may, therefore, prohibit all union related solicitation and distribution.

Conclusion

Below are a few tips to ensure that your company's policies are compliant with federal and state laws.

- If your company does not have a no solicitation/no distribution rule, implement one.
- If your company has such a rule, confirm that it is drafted in a facially lawful way. The rule should: prohibit all solicitation and distribution by non-employees on the employer's private property; prohibit employee solicitation only when anyone involved in the solicitation is on working time; prohibit employee distribution during working time but also at any time in a working area.
- Ensure the rule is enforced consistently and in a common-sense manner.
- If you want to restrict access by off-duty employees, make sure the rule allows access to exterior non-work areas and that it can be enforced in a non-discriminatory fashion.

Finally, your Ogletree Deakins attorney can quickly and efficiently help review your compliance with these concepts. ■

Ogletree Deakins News

New to the firm. Several new lawyers have recently joined the firm. They include: Stacy Mueller, Hugh Thatcher and Cole Wist (Denver); Luther Wright, Jr. (Nashville); Elvige Cassard and Wesley Garten (New Orleans); W. Scott Hardy (Pittsburgh); Alka Ramchandani (San Francisco); Kelly Smith (Washington, D.C.).

Congratulations to . . . Chris Mixon (Birmingham), who has been selected by the *Birmingham Business Journal* as one of the city's top 40 professionals under 40; Craig Cleland (Atlanta) and Ted Speth (Columbia), who were named as 2010 Client Service All-Stars by the BTI Consulting Group; Jay Patton (Birmingham), who recently was elected to The Harbert Center's Center Management, Inc. board; and Ron Chapman, Jr. (Dallas), who was recently named to Law360's list of the United States' 10 rising stars in employment law.

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deliverables" under the Act, beginning with the one that arguably had the greatest popular appeal. Within 90 days of enactment, the federal government will establish a temporary high risk pool that will insure individuals with pre-existing conditions. That pool will continue through 2014, when a ban on pre-existing condition exclusions goes into effect.

Effective for plan years beginning on or after September 22, 2010, lifetime limits on the dollar value of coverage are prohibited, coverage of unmarried dependent children under a plan maintained by a parent's employer is extended to age 26, and "first dollar coverage" (*i.e.*, no cost sharing) for certain evidence-based preventative care is required.

The Individual Mandate

Beginning in 2014, the Act will add a new provision to the Internal Revenue Code that imposes a penalty tax on an "applicable individual" who does not maintain "minimum essential coverage" for himself or herself and for any dependent who is an "applicable individual" during any month after 2013. The amount of the penalty is determined by a complex formula that takes into account factors such as household income and the national average premium for coverage under "bronze plans" offered by state or regional insurance Exchanges. The maximum penalty tax will be phased in over three years, reaching $2,250 in 2016, and will be indexed thereafter.

Certain "applicable individuals" are exempt from the penalty tax, including (a) individuals whose household income falls below the federal poverty line; and (b) individuals whose share of premiums or employee contributions would exceed eight percent of their household income. These exemptions apply only after taking into account a means-based tax credit that will be available under the Act.

The Employer Mandate

The Act also adds a provision to the Internal Revenue Code that imposes a monthly assessment on certain employers that do not offer an employer-sponsored health plan that meets federally-determined standards for health coverage to their full-time employees, or that offer such coverage but whose plans have a waiting period of 60 or more days. The penalty for an extended waiting period is $600 per full-time employee to whom the waiting period applies.

The penalty for not offering all full-time employees an opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored plan can be far greater: if even one full-time employee obtains such coverage elsewhere and is eligible for a tax credit or cost-sharing reduction, the monthly assessment on the employer is a multiple of all the employer's full-time employees during the month.

Finally, an assessment also applies if an employer subject to the mandate fails to subsidize a sufficient portion of the employee's cost for "minimum essential coverage" to prevent the employee from qualifying for a tax credit or cost-sharing reduction. This "under-subsidization" tax also is based on the employer's total number of full-time employees, even if only one full-time employee qualified for the tax credit or cost-sharing.

The mandate applies only to an "applicable large employer," which generally means an organization that employed on average at least 50 full-time employees on business days during the preceding calendar year. However, beginning in 2013, employers with as few as five full-time employees can be subject to the employer mandate if substantially all their revenue is derived from the construction industry and their annual gross receipts exceed $250,000.

A series of complex rules governs the calculation of an employer's average number of full-time employees. Also, the term "full-time employee" is defined as a worker employed on average for at least 30 "hours of service" per week, using a new definition of "hour of service" to be promulgated by the Secretaries of the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Labor – a definition that may not precisely match the definition of an "hour of service" for qualified retirement plan purposes.

Health Care Exchanges

The most fundamental changes caused by the Act will result from the creation of 50 or more geographically-based marketplaces, referred to as "Exchanges," where standardized insurance packages can be purchased on what are expected to be favorable terms. The territory of many Exchanges will coincide with state or municipal boundaries, although multiple states can operate a single Exchange. In addition, the Act provides for multi-state health plans to be offered by these Exchanges. The multi-state plans will be established by the Director of the Office of Personnel Management by contracts with for-profit and not-for-profit insurers.

The Act creates incentives for employers and individual consumers to prefer Exchange-provided coverage

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I-9 AUDITS AT WORK SITES CONTINUE

Employers Should Review Policies And Consider Self-Audits

U.S. Immigration and Customs Enforcement (ICE) recently announced that it was issuing Notices of Inspection (NOIs) to 180 employers in Louisiana, Mississippi, Alabama, Arkansas and Tennessee, thus commencing an audit of each company's Form I-9 Employment Eligibility Verification records. Specifically, the NOI alerts businesses that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification laws and regulations. The agency's press release confirmed the government is following through on the policy announced in 2009 that "focuses resources on the auditing and investigation of employers suspected of cultivating illegal workplaces by knowingly employing illegal workers."

ICE's latest round of audits follow up on the July 1, 2009 nationwide I-9 audit blitz when it issued over 650 NOIs to employers and a second round in November which involved the issuance of NOIs to an additional 1,000 employers across the country. Based on ICE's announced policy and formal (and informal) statements from government officials, one can reasonably expect that I-9 audits will continue and will occur in other states in the South and elsewhere across the country in the coming months. Employers are urged to review their I-9 policies and consider a self-audit of I-9 records, both of which will almost certainly result in a reduction in penalties in the event of an I-9 audit. ■

High Court To Hear FLSA Retaliation Case

The U.S. Supreme Court recently agreed to review the Seventh Circuit Court of Appeals' decision in *Kasten v. Saint-Gobain Performance Plastics Corp.* (No. 09-834). The issue before the high court is whether a verbal complaint regarding the location of a company's time clocks is considered "protected activity" under the anti-retaliation provision of the Fair Labor Standard Act (FLSA). The Seventh Circuit dismissed the worker's suit, finding that "the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing." Oral argument has not yet been scheduled.

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to other coverage alternatives. The Act also bars an insurer from offering coverage on an Exchange unless the insurer's policies adhere to standards established under the Act or in regulations that will be adopted by HHS under the Act. In addition, insurers will be required to make periodic disclosures relating to rating, claims processing, and other matters. Each Exchange will have additional protections from competition that could allow it to become virtually the only viable marketplace for health care coverage within its territory.

Excise Tax On "Cadillac" Health Plans

Beginning in 2013, coverage under group health plans that departs upwards from the basic federal model will become subject to a non-deductible excise tax. The 40 percent excise tax will apply to the amount by which the cost of the coverage provided to an employee exceeds predetermined limits. In the first year the excise tax applies, the annual limits are $8,500 for self-only coverage and $23,000 for any other coverage. (The limits will be subject to cost-of-living adjustments thereafter.) Any cost above those limits will be taxed at 40 percent, even if the employee pays 100 percent of the entire cost of the coverage.

The Cadillac health plan tax is expected to discourage employers from offering any group health plan that is not an "off the rack" Exchange-available insured plan.

H.R. 4872 And Its Impact

H.R. 4872 will have several important effects on the employer-related provisions of the PPACA. It will extend the increase to age 26 for coverage of non-dependent children to all group health plans. Similarly, it eliminates an exception in the PPACA for "grandfathered plans" that exempts them from the prohibitions on lifetime limits, the prohibition on pre-existing condition exclusions, and other group market reforms.

H.R. 4872 also will postpone the excise tax on Cadillac group health plans until 2018, and raise the annual limits on which the tax will be based. In addition, it will allow for some relief in the case of an employer whose employee population deviates significantly from a national risk pool in a way that makes the employee group more costly to cover. It also reduces the penalty otherwise applicable to small employers that violate the employer mandate under the Act by permitting the penalty calculation to be based on the actual number of the employer's full-time employees minus 30. By contrast, H.R. 4872 will increase one significant limitation on the amount of the penalty tax due from an "applicable individual" who does not satisfy the individual mandate to be insured.

Conclusion

Although almost all of the most far-reaching provisions of the Act will not become effective until after 2013, Ogletree Deakins shareholder Tom Christina notes, the process of planning for compliance must begin much earlier. The firm plans to publish several in-depth analyses of particular provisions of the Act, as well as a series of updates regarding regulations under the Act as they are proposed and finalized.

In addition, a special breakout session on health care reform legislation has been scheduled during Ogletree Deakins' 2010 Workplace Strategies seminar on May 6-7, 2010 in Las Vegas. This session will bring seminar participants up to date on the implications for employers of this sweeping new legislation. To register for the program, visit www.ogletreedeakins.com or contact Kim Beam at (800) 277-1410 or kim.beam@ogletreedeakins.com. ■

COURT REVIVES WORKER'S FMLA LAWSUIT

Finds Lay Testimony May Be Used To Establish A "Serious Health Condition"

A federal appellate court recently reinstated a lawsuit brought by a worker who accused her employer of violating the Family and Medical Leave Act (FMLA) by firing her based on a medical condition. According to the Third Circuit Court of Appeals, the employee's own testimony regarding a period of incapacity may, in conjunction with medical evidence of her illness, create an issue of fact sufficient to have a jury decide the issue of whether she suffered from a "serious health condition" under the FMLA. ***Schaar v. Lehigh Valley Health Services, Inc.****, No. 09-1635, Third Circuit Court of Appeals (March 11, 2010).*

Factual Background

Rachael Schaar worked as a medical receptionist for the Lehigh Valley Physicians Business Services, Inc. in Bethlehem, Pennsylvania. On Wednesday, September 21, 2005, Schaar was diagnosed by one of Lehigh Valley's physicians with a urinary tract infection, fever, and lower back pain. The physician prescribed an antibiotic and an anti-inflammatory. He also wrote a note advising Schaar's supervisor, office manager Patricia Chromczak, that Schaar's illness would prevent her from working on September 21 and 22. Schaar taped the note to her supervisor's door and went home.

Consistent with that note, Schaar took September 21 and 22 as paid sick days. She previously had scheduled vacation days for Friday, September 23, and Monday, September 26. Schaar claimed that she stayed in bed until Saturday, but was ill until Monday.

When she returned to work on Tuesday, September 27, Schaar told Chromczak that she had been sick all weekend. However, she did not request FMLA leave for her absence, nor did she ask to have her vacation days converted to sick days. Schaar claims that Chromczak told her that she could be fired for failing to call off on her two sick days. After checking with human resources, Chromczak subsequently told Schaar that the decision to leave a note in lieu of calling off was not a terminable offense.

Six days later, however, Schaar was discharged. In a written explanation, Chromczak stated that one of the reasons for the termination was "never calling off from work," along with several mistakes and performance issues.

Schaar sued Lehigh Valley claiming discrimination and interference with her FMLA rights. The company argued that Schaar did not qualify for medical leave because she did not prove that she was "incapacitated" for three days and because she failed to give proper notice that she may qualify for leave.

The trial judge dismissed the case, finding that because Schaar had not presented expert medical testimony establishing three days of incapacity, she had failed to prove that she suffered from a "serious health condition." Schaar appealed this decision to the Third Circuit Court of Appeals.

"Given the FMLA's administrative complexities, employers should review requests on a case-by-case basis."

Legal Analysis

The "crucial question," the Third Circuit found, was whether Schaar was entitled to take FMLA leave. The FMLA entitles an eligible employee to 12 weeks of leave, but only if the employee can show that he or she suffers from a "serious health condition." The Act defines a serious health condition as an illness or other condition that involves "continuing treatment by a health care provider." The regulations interpreting the FMLA require a showing of at least three days of incapacitation plus treatment by a health care provider to establish a serious health condition.

On appeal, the Third Circuit addressed whether Schaar presented evidence that she was incapacitated for more than three days, and whether she had to establish that incapacitation through medical evidence. Courts have answered those questions in three ways, holding: (1) that the supporting evidence used to establish incapacity has to come exclusively through a medical provider; (2) that lay testimony, standing alone, is sufficient to establish incapacity; and (3) that lay testimony can be used to supplement a medical professional's testimony or evidence regarding incapacity.

In spite of the fact that district courts within the Third Circuit previously adopted the first approach, the Third Circuit established, through this decision, that lay testimony can create an issue of fact regarding a three-day incapacitation, so long as medical evidence has been proffered to establish the underlying medical condition.

The court observed that while the FMLA regulations do not speak specifically to whether medical testimony is required, a related regulation requires the testimony of a health care provider to determine when an employee is "unable to perform the functions of the position," thereby making medical evidence a necessary element of an employee's case. However, because there is no language in the regulations to exclude all lay testimony regarding the length of any incapacitation, the Third Circuit refused to categorically exclude such evidence. As a result, the court reinstated Schaar's FMLA suit.

Practical Impact

According to Maria Greco Danaher, a shareholder in Ogletree Deakins' Pittsburgh office: "While the court rejected the approach taken by the Fifth and Ninth Circuits (which each have held that lay testimony alone is sufficient to create a genuine issue of material fact regarding whether a 'serious health condition' existed), it has determined that such evidence can be sufficient if it is offered in combination with medical evidence linking incapacitation to the subject health condition. Given the FMLA's administrative complexities, employers should review requests on a case-by-case basis, including a review of both medical and lay information, before rejecting a claim for FMLA leave." ■