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HR Compliance Library

Ideas & Trends

INSIDE THIS ISSUE

IMMIGRATION REFORM

Expert discusses how immigration reform could affect employers

The subject of immigration reform is all over the news these days, but it's not necessarily all that easy to pinpoint exactly where the legislation stands and what employers can expect if, and when, anything is signed into law. For help understanding the potential impact of immigration reform, Wolters Kluwer Law & Business asked immigration attorney Wendy Padilla Madden, Counsel in the Birmingham, Alabama office of Balch & Bingham to clarify where immigration reform currently stands, where it's headed and, most importantly, how best employers can prepare for what lies ahead.

Question: In a nutshell, what is the current status of immigration reform?

Padilla Madden: On April 17, a bipartisan Gang of Eight senators (now Seven), introduced the controversial *Border Security, Economic Opportunity, and Immigration Modernization Act*, otherwise known as S. 744. Without going into the myriad of details, the bill as written, encompasses overhauls to the immigration system, makes changes to the employment-based

continued on page 54

RECRUITING

Recruitment's "goin' mobile" so let's embrace it, expert says

When the fax machine came out in the 1980s, Terry Terhark thought, "Boy, this is as good as it gets for recruiting." But then came Internet job boards … and then social media came in by storm. Terhark, divisional president for The RightThing, a recruitment process outsourcing firm that is now part of ADP, talked about the next stage in recruiting's continuing evolution — mobile — at the Society for Human Resource Management (SHRM) 65th Annual Conference & Exposition. Held June 16 through June 19 in Chicago, Illinois, the 2013 conference drew 20,000 attendees representing more than 70 countries.

continued on page 55

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IMMIGRATION

continued from page 53

green card system, the H-1B highly skilled visa program, and low-skilled agricultural and nonagricultural guest-worker programs. It also makes the E-Verify electronic employment eligibility verification system mandatory for all U.S. employers, and finally, it grants legal status and a path to citizenship for most of the 11 million undocumented immigrants currently in the country.

If there is one point of agreement on all sides of this debate, it is that the current system does not work, for anyone. Now, this does not mean the new law will be the panacea most hope for. This gargantuan legislation of over 844 pages will be overlaid and intertwined with an already complex and convoluted Immigration and Nationality Act. This will present American employers with a significant number of opportunities, albeit at a cost and a slew of new compliance burdens. In the end it is clear, that regardless of the actual details of the law, the obligation to ensure America's workforce is indeed authorized to work in the United States will rest squarely on the shoulders of America's employers.

Question: If S.744 is enacted what should employers expect?

Padilla Madden: On the compliance side, employers should expect an increase in the burden to ensure its workforce is authorized to work in the United States. This will likely come in a variety of new compliance requirements.

1. A revamped but mandatory E-verify for all employers. There has been talk about including existing employees into the E-Verify mix. If implemented in this manner, E-Verify would give the Federal Government real time information as to who is working where. It would also allow for increased enforcement of employer compliance regulations as the information needed to investigate and prosecute non-compliant employers would now be available to the Government in easily searchable and mineable electronic records. The new proposed E-verify also contains measures to allow employees to file administrative appeals to contest the E-verify non-confirmation results, it expands anti-discrimination provisions and would severely penalize the unlawful use of the program. On the good side, the new E-Verify does contain more robust safe harbor provisions, where employers will be held harmless if they rely in good faith and take action based on the results of the system.
2. There will likely be new and updated identification and employment authorization documents in the form of biometrics work authorization cards. This would mean that employers will have to familiarize themselves with these new updated documents and its various security features.
3. While most of us hope that the Form I-9 is incorporated into this new version of E-Verify, eliminating the "double entry" requirement of the same data — the law is not there yet. Therefore, employers will need to continue to dedicate time and resources to ensure compliance with the newly released two-page I-9 form.

> *"Employers should expect an increase in the burden to ensure its workforce is authorized to work in the United States. This will likely come in a variety of new compliance requirements."*

Question: How would S.744, if enacted, affect employment visas?

Padilla Madden: If passed, and in regards to employment visas, S. 744 would create several opportunities for American employers.

Regarding the H-1B program:

- It would increase the number of available H-1B visas from 65,000 to at least 110,000, and up to 180,000 depending on employer demand. However, the law would also impose additional fees for those visas, and would require employers to pay H-1B beneficiaries' higher wages and most importantly it would impose recruitment requirements on employers before they can file an H-1B petition. Some employers who are deemed dependent on H-1B workers may be barred from hiring H-1B employees.

continued on page 55

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Ideas & Trends

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IMMIGRATION

continued from page 54

- Notably, under the bill, spouses of H-1B employees would be eligible to obtain work authorization.
- The bill would also eliminate per-country immigration caps, arguably opening the door to highly qualified employees that have been waiting in a long line for their green-cards, mainly in India and China.

Regarding the L-1 program:

- Under the law as written, managers and executives of multinational companies would be allowed to come to the U.S. for up to 90 days to "oversee and observe the U.S. operations of their related companies,…[and][e]stablish strategic objectives when needed." This could provide much needed relief for these companies allowing their managers and executives' flexibility in handling global obligations without the complexities and individual tax liabilities involved when obtaining an L-1 visa.
- The downside, L-1 employees would have to be paid "prevailing wage;" therefore the flexibility of structuring creative compensation packages for them would be lost.

Regarding other workers:

- Undocumented agricultural workers currently in the U.S. would be eligible for an expedited pathway to citizenship with a "blue card." Blue card holders who continue to work in agriculture would be eligible to become lawful permanent residents in 5-8 years.
- Employers would be able to register to hire low-tech workers through a program managed by a new bureau of DHS: Bureau of Immigrant and Labor Market Research. This program would also allow workers who obtain a W visa through the program to change employers as long as the new employer is also registered with the program.
- New agricultural workers would be eligible for temporary work visas subject to certain annual caps and other restrictions.

Question: What does this mean for HR Professionals? What should HR pay close attention to? How should HR prepare?

Padilla Madden: To be able to take advantage of the opportunities that may present themselves in the new immigration world, employers should:

1. Develop a relationship with knowledgeable outside counsel that can provide the wide array of services that encompass the immigration arena. These services may include, immigration compliance advice, immigration benefits procurement, tax advice (both corporate and in some cases individual), export control law guidance, corporate structuring, employment law and government relations.
2. Meet with your chosen counsel regularly. Discuss your business goals with them and seek to strategize how you can take advantage of immigration opportunities, fend off potential liabilities, streamline processes and eliminate redundant practices.
3. Get your outside counsel to assist you in demystifying the immigration process; this will help you see opportunities and "danger zones" with more ease.
4. On the compliance side, now is the time to act and clean up the oversights of the past. Bite the bullet and conduct an internal I-9 audit to ensure you are ready for E-Verify if and when it comes.

On June 27, the Senate passed S. 744 by a vote of 68-32. The bill is now headed for debate in the House. ■

RECRUITING

continued from page 53

The standard method of recruiting — identifying an opening, creating a requisition, sourcing and identifying candidates, screening and selecting, and offering a job — may be okay for some high-volume positions, but it can be ineffective for hard-to-fill openings. It is a reactive approach, Terhark said, and it is both time and labor intensive.

Today, recruiting involves not only sourcing, selecting and interviewing, but also public relations and messaging, social reputation, marketing, sales and relationship management, mobile and video communications, and community building. It used to be simple, but now it's confusing where recruiting even begins, Terhark admitted. "There are so many ways to engage with candidates today," he noted.

Mobile medium. A good portion of the SHRM session attendees said they use social media in their recruitment efforts, but very few use mobile or texting for this purpose. Why is now a great time to embrace mobile recruiting? Just look around, Terhark urged, "Our faces are constantly in the phone."

Data supports the popularity of mobile as a medium, too:

- 1.2 billion smartphones will enter the market in the next five years;
- 49 percent of American adults use a smartphone (62 percent for ages 25-34);
- 73 percent of cellphone owners send and receive texts at an average of 41.5 per day;
- 72 percent of jobseekers want to receive career opportunity information on their smartphones; and

continued on page 56

RECRUITING

continued from page 55

- 32 percent of jobseekers have applied for a job on a mobile device.

"The candidates of the future will not have the patience to use job boards," Terhark predicted, because the process is too difficult. Young people don't even check email much; if it's not right in front of them, they don't see it. "We must be able to engage with candidates in the ways they want to be engaged," he emphasized.

Before diving into mobile, however, employers should identify what their goals are. What do they want mobile recruiting to do?

- Enhance the candidate experience?
- Build up a talent pool?
- Attract active and passive talent?
- Speed up the recruitment process?
- Optimize the career site for the mobile web?

Once goals are identified, employers should ensure that the process of accessing mobile is candidate-friendly. It can be as simple as asking candidates to register by answering a few brief questions:

- What is your name?
- What is your zip code?
- What is your phone number?
- What is your email address?
- What types of jobs do you want to hear about?
- Would you like to receive automated job alerts by phone?

Registering does not need to be invasive, Terhark explained. It's about capturing as many people as the employer would like to engage with. Another option is adding a mobile opt-in widget to the organization's career site. This allows anyone who is browsing to register for automated job alerts via text.

Mobile-enabled tools may include: prescreening and initial screening, completion of applications that feed into an applicant tracking system, interview scheduling and reminders, location-based campaigns, hiring event registration, referral of friends, post-hire data collection, and employee engagement communications. "You can't just take what you do on the web and drop it on a mobile device," Terhark cautioned. It doesn't work; it must be enabled for the mobile device, and it must work on a tablet, too.

There also are a variety of existing applications that recruiters can download to their phones to help them perform their jobs. The Hire Syndicate, LinkedIn, Plaxo, and BeamMe are apps that may be of interest.

Most employers will not have the in-house expertise to develop their own mobile recruiting initiatives, so partnering with a mobile technology vendor — like mResource, iMomentous, JIBE, Bullhorn, Loop, or SmashFly Technologies — is typically necessary. This is a new space in the market, and most of the vendors are relatively new, explained Terhark. The cost of entry is low, so employers can start simple and build up over time. A vendor can help move information captured via mobile to the employer's applicant tracking system.

Talent communities. Terhark also spoke enthusiastically about the promise of "talent communities," which are networks of similar people with whom an employer may wish to engage in the future. Basically, the employer sets up a place where a group of interest (engineers, maintenance technicians, salespeople, etc.) can go. The sole purpose of the community, which must be mobile, is to drive two-way communications with the people who join.

On the company's career site, for example, there can be an option to join the employer's talent community and receive relevant updates by text. Individuals can register for the community by inputting their name, email address, zip code, and field of interest, and then checking an opt-in box. Joining should be quick and easy. An employer can also send invitations to targeted groups by using LinkedIn or association lists. At this point, however, the employer is not that interested in the specific skills of community members.

Once the community is established, the employer should post press releases, information about new product launches, and other interesting things that are going on at the company. This will keep members engaged in the employer's brand, and the employer will be seen as the expert. "Make sure you have fresh content to push out there," Terhark advised. "It doesn't have to be earth-shattering news." Soon, members of the community will start exchanging with each other.

The notion behind a talent community is engaging with people before there is a need for them. "We don't even know if these people will ever become candidates," explained Terhark. But when there is a need for people with their skills, the employer will have a pool of individuals who are already educated about the company.

Some of the benefits of talent communities include: creation of talent pools, engagement of talent, shorter cycle time and time to fill, and promotion of brand awareness. "The great thing is that it costs very little," said Terhark. "Time spent here will return your investment."

continued on page 57

BENEFITS

SHRM says employee benefits being impacted by new laws

Employers are making gradual changes in the benefits they offer employees in response to new laws and the economy, according to research released during SHRM's Annual Conference & Exposition, held June 16 through 19 in Chicago, Illinois. Legislation (including the Patient Protection and Affordable Care Act (ACA)), smaller organizational and HR budgets, an uneven economy, and other factors are influencing employers' decisions on what benefits to offer their employees, noted the *2013 Employee Benefits Research Report*.

The report found a large increase in the percentage of employers offering contraceptive coverage — 82 percent of surveyed employers in 2013, up from 66 percent in 2009. The ACA requires that preventive services, including birth control, be included in new health insurance plans. In 2010, a provision of the ACA required employers with more than 50 employees to provide private space or lactation rooms for nursing mothers. The new report showed that one-third of employers (34 percent) now have a separate lactation or mother's room that goes above and beyond the law, an increase from 25 percent in 2009.

Employers are also responding to state laws legalizing same-sex marriage. SHRM's research report found that about one-quarter of employers (24 percent) offer domestic partner benefits for same-sex partners, excluding health care coverage, an increase from 15 percent last year and 14 percent in 2009.

And employers are adjusting benefits as they compete for talented employees and struggle to address skills gaps in their workforces:

- Employee referral bonuses have gained in popularity over the last year, with 47 percent of surveyed organizations now offering such bonuses, up from 38 percent in 2012.
- Organizations are developing their employees' skill sets with professional development opportunities (offered by 88 percent of employers), cross-training to develop skills not directly related to employees' current jobs (44 percent) and formal mentoring programs (20 percent). Offsite professional development opportunities are offered by 85 percent of organizations surveyed.

The survey of 518 randomly selected HR professionals examined 299 benefits. Among other findings:

- Paid-time-off plans and wellness benefits continued to increase in popularity, while housing and relocation benefits were less common.
- The most commonly offered benefits were: prescription drug program coverage (98 percent of organizations offered them), paid holidays (97 percent), dental insurance (96 percent) and defined contribution retirement savings plans (92 percent).
- Among health care and welfare benefits, the majority of employers provide mental health coverage (89 percent), and the most common type of health insurance was a preferred provider organization (PPO) plan (86 percent). ■

RECRUITING

continued from page 56

Terhark stressed that talent communities are a great way to go after passive candidates that an employer would not otherwise have access to. "The passive candidate is like the holy grail in recruiting," he said. "You've got to be able to reach them at the right time, and you will because you are constantly engaging with them."

On the contrary, candidates who look on job boards, such as Monster or CareerBuilder, are often unemployed or very unhappy with their present jobs. The "post and prey" recruiting strategy of job boards doesn't work well anymore, in Terhark's opinion. This is why the number one source of hire is LinkedIn, he said, because people on LinkedIn are generally passive candidates who are not looking for jobs.

Multiple approaches. Drawing on his 30-year career in recruiting, Terhark concluded by urging conference attendees to remain flexible in their approach. Employers should use multiple channels — mobile career sites, email alerts, text alerts, apps, etc. — when trying to reach candidates. "Gone are the days when you just put a Facebook page out there and are on Twitter," he said. Just like Internet recruiting 10 years ago, mobile recruitment is revolutionizing how organizations source, recruit, and communicate with top talent. ■

Source: *"Celling to Candidates: Recruiting in a Mobile Era," presented by Terry Terhark at the SHRM Annual Conference & Exposition on June 18, 2013.*

ACCOMMODATIONS

Now that obesity has officially been declared a disease, employers should expect more workplace accommodation requests

On June 18, the American Medical Association voted during its annual meeting to adopt a policy recognizing obesity as a disease that requires a range of medical interventions to advance its treatment and prevention. The shift in the way the medical community views this too-common condition may have important implications for employers.

"Recognizing obesity as a disease will help change the way the medical community tackles this complex issue that affects approximately one in three Americans," said AMA board member Patrice Harris, M.D.

Obesity *is* a complex issue — one that can present complex challenges in the workplace, too — both legal and practical. In the post ADAAA-environment, employers struggle with when, and to what extent, they are obligated under the ADA to provide accommodations to overweight employees.

Brief ADA tour. To be protected under the ADA, a person must be qualified for the job at issue and have a "disability" as defined by the Act. The threshold requirement is that the person must have a "physical or mental impairment," defined as a physical disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more major body systems.

Just having an impairment, however, is not enough to warrant protection under the ADA. The impairment must affect a major life activity, such as caring for oneself, walking, standing, bending and other manual tasks, or the operation of a major bodily function, which includes the musculoskeletal, cardiovascular, endocrine and other systems that can be affected by obesity. The question is whether the person is substantially limited in one of these major life activities compared to the rest of the population. When making the comparison, we look at the individual without any mitigation measures such as medication, or a cane.

EEOC on obesity. Under the EEOC's interpretive guidance, being overweight by itself may not be an impairment qualifying for coverage under the ADA, but severe obesity, defined as 100 percent over the norm, would clearly be an impairment. It's important to note that obese individuals often have underlying physical conditions such as hypertension or thyroid disease that qualify independently as impairments.

Does the new label change legal obligations? David K. Fram, director, ADA & EEO Services for the National Employment Law Institute, and a former Policy Attorney for the EEOC's Office of Legal Counsel, said the AMA policy is consistent with both the EEOC's and the courts' decisions concerning obesity. "Over the years, most authority has supported the notion that obesity is an impairment, and the only question has been whether it substantially limits any of the individual's major life activities," he explained. Fram also pointed out that under the ADAAA, it is now easier to show "substantial limitation" because the threshold is lower than it used to be.

A large percentage of the population is obese, and some surveys report that most of that group believes they have been subject to discrimination on the job because of weight," noted David Wachtel, Partner at the Washington, D.C., firm Bernabei & Wachtel, PLLC. "The AMA decision will lend support to an argument that obesity alone is a physiological disorder," he said.

Wachtel noted that according to the EEOC, one way of demonstrating that an employee has a disability is by showing that the person has a "physiological disorder." But taking that definition into account, even before the AMA announcement, the EEOC viewed obesity as a disability, he explained. "However, some courts found that obesity itself is not a disability unless its effects (*e.g.*, high blood pressure or diabetes) or its underlying causes, such as Cushing's disease, could be a disability."

"Because some courts continue to require proof of an underlying condition, the AMA's recognition of obesity as a disease could increase courts' willingness to require employers to accommodate employees who are obese but have no accompanying health side effects, symptoms, or underlying causes, Wachtel suggested.

Chris Bourgeacq, General Attorney, Labor/HR, for AT&T Services, Inc., said it was only a matter of time before obesity itself, rather than its many symptoms or side effects, would acquire the status of a disease in its own right. It is beyond serious question that obesity is a virtual epidemic in the United States, he explained. The costs, both in economic terms and the toll on health — heart disease, diabetes, etc. — are staggering and probably the single greatest health issue plaguing America. Bourgeacq pointed to CDC data showing that 30 percent of adults in this country are obese.

continued on page 59

ACCOMMODATION

continued from page 58

The data also show that obesity among children (our future employees) has doubled or even tripled in just the last 30 years.

According to Bourgeacq, pre-ADAAA only a handful of courts found obesity a disability under the ADA, confusing perhaps its symptoms and limitations with the disease itself. After the ADAAA, however, it is far easier to claim a disability under the expanded definition, he observed. The AMA's declaration of obesity as a disease now provides "yet more heft" for employees seeking ADA protection in the workplace.

> *"It would be wise for employers to consider reasonable accommodation requests for obesity in the same manner they consider such requests for any other condition."*

Workplace accommodation requests. "With the AMA now 'officially' listing obesity as a disease, there is little doubt that employers will soon experience an increase in obesity-related accommodation requests and discrimination charges in this area," Bourgeacq said.

What sort of accommodation requests should employers expect? Bourgeacq predicted that employers may see more requests for:

- different furniture or different work areas for heavier people;
- more doctors' visits (implicating the FMLA as well as the ADA); and
- additional time to perform certain physical work functions (which may also implicate restructuring the job's essential functions).

Risks to others. Bourgeacq also suggested that as a result of obesity being labeled a disease, there may be increased litigation over the "risks to others" or the "risk to self" ADA defenses, as employers argue that heavier employees may present greater risks in physically demanding jobs, such as working aloft, working in small areas with sensitive equipment, or jobs with extensive climbing or other physical activity. This in turn could also spawn an even greater increase in ADA "regarded as" claims.

Impact on other claims. Other claims may also be impacted by the AMA's decision, according to Bourgeacq. He queried whether "appearance discrimination" claims may be litigated with greater success, now "buoyed by obesity as an 'officially' protected disability," when certain employers want only slim people or people whom they perceive as more attractive employees.

Apart from employment discrimination, airlines and other public businesses may also see a rise in complaints from obese people seeking greater facilities accommodation or complaining of discrimination under the ADA because of their obesity, Bourgeacq added. These claims might seek, for example, more suitable seating in stadiums or theatres, or challenge requirements to purchase two seats on an airplane.

Best practices. Given the AMA's recent classification of obesity as a disease, it may be time for employers to revisit job descriptions and tighten their essential job functions lists, Bourgeacq advised.

Employers should take steps to provide reasonable accommodations for obese employees including, as applicable, in office layout, ergonomics, and physical ability requirements, Wachtel suggested.

However, best practices for handling accommodations for employees with obesity remain the same as handling accommodations for any other employee who needs them, according to Wachtel. "Employers should be sensitive and discreet in addressing the workplace concerns of an employee with obesity, and have a conversation with the employee to determine what, if any, accommodations might be appropriate," he advised.

Echoing that advice and adding a practical twist, Fram said it would be wise for employers to consider reasonable accommodation requests for obesity in the same manner they consider such requests for any other condition. "First, it is smart to look at whether the individual is asking for something simple and easy to provide," he suggested. If there is a simple solution, it might be wiser to provide it without even asking for more medical information. If there is no simple solution, "the employer has the right to analyze whether the condition rises to the level of 'disability,' and whether the individual would be qualified for the job (with a reasonable accommodation, if one is needed)," he said. ■

Source: *Written by Pamela Wolf, J.D. and originally published in the June 20, 2013 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

HEALTH CARE

ACA compliance: What employers need to think about now

Attorneys Melissa R. Junge and Michael D. Rosenbaum, from the law firm Drinker, Biddle & Reath gave advice to employers and health plan professionals about remaining in compliance with the *Patient Protection and Affordable Care Act* (ACA) over the next few years, at the *GCG Regulatory and Compliance Update Seminar*, held on June 4 in Rosemont, Illinois. Junge and Rosenbaum pointed out that most practitioners know that the new health care flexible spending account (health FSA) limit is $2,500 (for plan years beginning on or after January 1, 2013), and also about the Patient Centered Outcomes Research Institute Fee (PCORI) fee which is, for 2014, $2 times the average number of covered lives, but advised audience members not to forget about evidence of compliance with those two. Plan amendments for the health FSA limit must be completed prior to December 31, 2014, along with updated summary plan descriptions (SPDs) and open enrollment materials evidencing compliance. The PCORI fee must be paid and reported annually on the second quarter IRS Form 720 (Quarterly Federal Excise Tax Return).

Get ready for questions. Model notices have been made available by the EBSA with regard to providing employees with notice of the new health insurance exchanges (also known as marketplaces). For employees hired on and after October 1, 2013, they must be provided within 14 days of the date of hire and by no later than October 1, 2013 for all current employees. The information on the notices is very general, the speakers pointed out, so employers should expect a lot of questions from employees. Not only must the notices provide basic information about the marketplace and the potential to receive subsidized coverage, they also must include such information as eligibility for employer coverage, whether or not employer coverage is affordable, and whether or not it meets the minimum value (MV) standard under the ACA.

Also, health insurance exchange applications have an "Employer Coverage Tool" through which employees are advised to ask their employers to provide them with exchange information, so attendees were told that they *will* get questions on this. Audience members were advised to take a look for themselves at the tool on the Internet. In addition, employers should realize that the application for coverage on the exchanges will have questions about an employees' coverage from their employers.

Employers should determine who should be listed as a contact for questions about employer coverage, Junge and Rosenbaum said. Employers also were advised to think about whether or not they have a "message" that they want employees to take away from their communications regarding their company's coverage, and whether or not they want to be reactive or proactive with regard to providing information.

When the speakers pointed out that the employer-sponsored coverage information will have to include the amount of premiums/contributions required for employee-only coverage (reflecting tobacco incentives, by the way, but not other wellness incentive, see http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf, Part B), one audience member responded that she could not know what her company's January 1, 2014 premium would be until November, when the company's open enrollment starts. She was advised to put the dollar amount in that is in effect now, and to amend it when she got the new information, perhaps with a footnote that an increase is expected, to put employees on notice.

Other compliance issues. Practitioners also were told to keep in mind the Transitional Reinsurance Program Fee that will be applicable to major medical coverage, including retiree (if not secondary to Medicare) and continuation coverage, and which includes both grandfathered and non-grandfathered plans. The fee is substantial — $63 per covered life per year for 2014, and practitioners should attempt to work it into calculations of employees' premiums. The fee is not applicable to HIPAA- excepted benefits, integrated HRAs, HSAs, health FSAs, stand-alone prescription drug coverage, EAPs, and wellness. The first report on the reinsurance fee will be due to the HHS by November 2014, and a notice of payment will probably arrive in employer's mailboxes later in 2015.

It was recommended that employers start to figure out how they plan to calculate "covered lives" (using either the "snapshot method" using representative dates selected by the plan sponsor from each of the first three quarters of the year, the Form 5500 method using participants counts, or the "actual method," which also looks at the first three quarters of the year. Audience members were reminded that "covered lives" means just that, so that they cannot count just employees.

Also applicable to both grandfathered and non-grandfathered plans starting in 2014 are the prohibitions on:

continued on page 61

HR Quiz

Are employers that don't provide health insurance required to send exchange notices?

Q Issue: *Your company does not offer health insurance coverage. Does it need to provide notice to employees about the health insurance exchanges created under the health reform law?*

A Answer: If your company is covered by the Fair Labor Standards Act (FLSA), it does. The *Patient Protection and Affordable Care Act* (ACA) requires employers subject to the FLSA to produce and distribute notices to employees about the health insurance exchanges (also known as marketplaces).

These notices were originally required to be distributed by March 1, 2013. But in January 2013, the Department of Labor (DOL) delayed this requirement until it had time to issue further guidance. On May 8, 2013, the DOL issued Technical Release 2013-02, which specifies that the notices now must be provided by October 1, 2013. That is the date that open enrollment begins for the exchanges, which become effective in January 2014.

Who must receive the notice? All employees must receive the notice, regardless of whether they are eligible to participate in the health plan and regardless of whether they are enrolled in the plan. However, separate notices are not required to be sent to dependents or former employees, even if they are still covered by or eligible for coverage under the plan (e.g., they are covered under COBRA or have retiree coverage).

What must be in the notice? The notice must:

1. inform the employee of the existence of an exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance;
2. if the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent, inform the employee that he or she may be eligible for a premium tax credit under Internal Revenue Code Sec. 36B and a cost sharing reduction under ACA Sec. 1402 if the employee purchases a qualified health plan through the exchange; and
3. inform the employee that, if he or she purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

Model notices available. Along with Technical Release 2013-02, the DOL issued two model notices for employers to use. One model notice is for employers that currently offer coverage to some or all employees (available at http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf). The second model notice is for employers that currently do not offer coverage (http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf).

Source: *EBSA Technical Release 2013-02, May 8, 2013.*

HEALTH CARE

continued from page 60

preexisting condition exclusions, annual limits on the dollar amount of essential health benefits, and waiting periods longer than 90 days.

For plans that do not have or have lost grandfathered status, audience members were reminded that 2014 will bring cost-sharing limits on deductibles and out-of-pocket payments, IRS coverage reporting requirements regarding minimum essential coverage and the number of full-time employees, provider nondiscrimination provisions, and required coverage for participation in clinical trials.

Finally, the presenters advised that there has been no guidance yet with regard to situations in which an employee opts for coverage through the exchange, but then, mid-year, wants to get back on his or her employer's coverage; nor has there been guidance on situations in which an employee might try to obtain coverage through the exchange mid-year. ■

Source: *Written by Carol Potaczek, J.D., and originally published in the June 18, 2013 issue of Employee Benefits Management Newsletter (No. 540), a Wolters Kluwer Law & Business publication.*

US SUPREME COURT DECISIONS

Supreme Court hands down four highly anticipated decisions

The Supreme Court ruled in four highly anticipated employment-related decisions in June. Here is a brief explanation of each case.

Defense of Marriage Act. In a greatly anticipated and deeply divided opinion, the Supreme Court ruled on June 26, that lawfully married, same-sex couples are entitled to equal protection of the laws pursuant to the Fifth Amendment to the Constitution, and thus, the Defense of Marriage Act (DOMA) must fall (*United States v Windsor*, June 26, 2013, No. 12-307). "The federal statute is invalid, for no legitimate purpose overcomes [its] purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity," wrote the Court.

Although they longed to marry, the two women at the heart of the case were unable to do so in the United States. In 2007, they were married in Ontario, Canada. In time, "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion," the Court observed. Presently New York, along with 11 other states and the District of Columbia, have "decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons."

The decision will not immediately change anything in the three-dozen states that ban same-sex marriage within their borders. Chief Justice John Roberts noted in his dissent, however, that the court's ruling on DOMA could eventually affect states' individual bans and their authority to define marriage as they see fit. In the meantime, employers can expect the decision to impact the benefits and associated tax rules related to same-sex spouse coverage under employee benefits plans. Several federal workplace laws will be impacted, including COBRA, ERISA, and the FMLA.

Proposition 8. Also on June 26, the Supreme Court ruled that California's Proposition 8 ban on gay marriage is unconstitutional, meaning gay marriage is once again legal in California (*Hollingsworth v Perry*, June 26, 2013, No. 12-144). The Court upheld the lower court's ruling determining that the backers of the ban lacked standing to appeal that court's decision. In so doing, the Supreme Court allowed same-sex marriage to continue in California while sidestepping the question of whether state-by-state gay marriage bans are constitutional.

Practically speaking, gay marriage is now legal in 13 states plus the District of Columbia. Almost one-third of Americans now live in states where gay marriage is legal, according to some population estimates.

Vicarious liability. An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the alleged victim of harassment or other unlawful activities, a divided U.S. Supreme Court held, (*Vance v Ball State University*, June 24, 2013, No. 11-556). The decision resolves a circuit court split and rejects the EEOC's guidance on the matter.

Under Title VII, an employer's liability for workplace harassment may depend on the status of the harasser. If the harasser is the victim's coworker, the employer is liable only if it was negligent (i.e., if the employer knew or should have known about the harassment but failed to take remedial action). If the harasser is a "supervisor," different rules apply. If the harassment involves a tangible employment action, the employer is strictly liable. If not, the employer may avoid liability by establishing, as an affirmative defense, that (1) it exercised reasonable care to prevent and correct any harassing behavior and (2) the employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

In this case, the Supreme Court ruled that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." Because there was no evidence that the employer empowered the individual in question to take any tangible employment actions against the employee, she was not a supervisor, and the lower courts correctly applied the negligence framework used for coworker conduct.

Retaliation. Title VII retaliation claims must be proved according to traditional principles of but-for causation, the U.S. Supreme Court ruled on June 24, not the lessened "motivating factor" causation test provided for discrimination claims under the statute (*University of Texas Southwestern Medical Center v Nassar*, June 24, 2013, No. 12-484). Looking to both the plain language and the structure of Title VII and the Civil Rights Act of 1991 compels the conclusion that while allegations of discrimination are subject to the lower causation standard, retaliation claims are not.

The Court noted that, particularly in light of the increasing number of retaliation claims, a lessened causation standard would mean more frivolous claims and would "siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harassment." ■

HR Notebook

1,301 mass layoff actions affected 127,821 workers in May

Employers took 1,301 mass layoff actions in May involving 127,821 workers as measured by new filings for unemployment insurance benefits during the month, the U.S. Bureau of Labor Statistics (BLS) reported June 21. Each mass layoff involved at least 50 workers from a single employer. Mass layoff events increased by 102 from April, and the number of associated initial claims increased by 10,972. In May, 276 mass layoff events occurred in the manufacturing sector resulting in 33,527 initial claims. Monthly mass layoff events are identified using administrative data sources without regard to layoff duration.

The national unemployment rate was 7.6 percent in May, essentially unchanged from the prior month and down from 8.2 percent a year earlier. Total nonfarm payroll employment increased by 175,000 over the month, and increased by 2,115,000 over the year.

Note that on March 1, 2013, President Obama ordered into effect the across-the-board spending cuts, commonly referred to as sequestration. Under the order, the BLS must cut its current budget by more than $30 million, 5 percent of the current 2013 appropriation, by September 30, 2013. In order to help achieve these savings and protect core programs, the BLS will eliminate two programs, including Mass Layoff Statistics, and all "measuring green jobs" products. Therefore, the May news release is the final publication of monthly mass layoff survey data.

Real average hourly earnings fall in May

Real average hourly earnings for all employees fell 0.2 percent in May, seasonally adjusted, the BLS reported June 18. This decrease stems from an unchanged average hourly earnings combined with an increase of 0.1 percent in the Consumer Price Index for All Urban Consumers (CPI-U). Real average weekly earnings fell 0.1 percent over the month due to the decrease in real average hourly earnings and an unchanged average workweek. Real average hourly earnings rose 0.5 percent, seasonally adjusted, from May 2012 to May 2013. The increase in real average hourly earnings, combined with a 0.3 percent increase in the average workweek, resulted in a 0.9 percent increase in real average weekly earnings over this period.

CPI for all items inches up in May as shelter rises, gasoline stays flat, and food declines

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.1 percent in May on a seasonally adjusted basis, the BLS reported June 18. Over the last 12 months, the all items index increased 1.4 percent before seasonal adjustment. The shelter index rose 0.3 percent and accounted for more than half of the seasonally adjusted all items increase in May. The energy index rose modestly, with the gasoline index flat but increases in the electricity and natural gas indexes accounting for the rise. The food index, however, turned down in May, with the food at home index falling 0.3 percent. The index for all items less food and energy increased 0.2 percent in May. Besides the shelter increase, advances in the indexes for airline fares, recreation, and apparel also contributed to the rise.

In contrast, the indexes for medical care and used cars and trucks declined in May. The all items index increased 1.4 percent over the last 12 months, an increase from last month's 1.1 percent figure. The 12-month change in the index for all items less food and energy remained at 1.7 percent. The food index has risen modestly over the last 12 months, advancing 1.4 percent, while the index for energy has declined, falling 1.0 percent.

DOL launches online retirement toolkit

The U.S. Department of Labor announced on June 5, the launch of an online toolkit to help workers identify key issues related to retirement planning. The department's Employee Benefits Security Administration developed the toolkit in cooperation with the Social Security Administration and the Centers for Medicare and Medicaid Services to help workers understand important decisions related to employment-based plans, Social Security and Medicare.

The toolkit includes a timeline illustrating key decisions to be made about retirement benefits, Social Security and Medicare; general guidance; and a list of publications and interactive tools to assist with planning.

The retirement toolkit is available at www.dol.gov/ebsa/pdf/retirementtoolkit.pdf. ■