

**Employers & Health Care Reform: Its Here, Ready or Not**

Health care reform is now law – Public Act 111-148.

While many portions of health care reform law will be implemented over the next four years, some of the provisions take effect almost immediately. Employers will need to better understand when and how the reform will impact their workplace and employees.

On September 23, 2010, six months after the law was signed by President Obama, the law will prohibit health plans from setting lifetime or annual caps on benefits, and health insurance plans will no longer be able to cancel coverage for plan participants who become ill. The law will allow for exceptions in the cancellation of coverage in cases of fraud or intentional misrepresentation of health conditions by plan participants.

Also effective September 23, health care plans cannot deny coverage to dependent children of plan participants because of pre-existing health conditions. Children who are not eligible for coverage under another employer’s health plan will be entitled to remain on their parents’ insurance plans until they reach age 26. This provision has less of an impact for Connecticut health plans, because a state mandate already defines the definition of dependent as unmarried children residing in CT (or full time students) under age 26 who are not enrolled in a group health plan through their own employment.

***Plan Reporting & Disclosure***

New reporting procedures for insurers become effective before the end of 2010. Insurers will be required to report to the government on the use of money collected for insurance premiums and the amount spent by plans to determine medical/loss ratio. According to the law, large health plans (a group health plan for businesses with 101 or more employees) must maintain a medical/loss ratio of at least 85 percent, and the law requires an 80 percent

medical/loss ratio for small plans (businesses with 100 or fewer employees).

Beginning in 2011, all U.S. health insurance plans must start to comply with new disclosure requirements, subject to forthcoming regulations from federal agencies. Much remains to be determined about these disclosures, but a few points are highlighted in the Patient Protection and Affordable Care Act itself, including requirements that large employers must report:

- Whether they offer to their full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.
- The length of any applicable waiting period.
- The lowest cost option in each of the enrollment categories under the plan.
- The employer's share of the total allowed cost option in each of the enrollment categories under the plan.
- The number and names of full-time employees receiving coverage.

In 2012, employers will be required to disclose the value of the benefits they provide for each employee’s health insurance coverage on the employee’s annual Form W-2. The set of forms going out in 2012 will reflect coverage provided in 2011.

*Article continued on page 3*

**Reminder on Upcoming Seminar Sessions**

*Date: Wednesday, May 12, 2010*

*Morning Session:*

**Health Care Reform: Its Impact on the Employer, the Agent, and the Individual**

*Afternoon Session:*

**Sexual Harassment Prevention**

Contact us by email, [jessenianarvaez@robertnoonan.com](mailto:jessenianarvaez@robertnoonan.com), or by telephone for more information or if you would like to register.

**CT Legislature Again Ponders  
Paid Sick Leave Bill**

On March 9, 2010, the Labor & Public Employee's Committee of the Connecticut General Assembly approved SB 63: An Act Mandating Employers Provide Paid Sick Leave to Employees. On March 23rd, the Legislative Commissioners' Office issued a favorable report on the bill and it is awaiting action on the Senate calendar.

The proposed bill would mandate employers with 50 or more employees provide five (5) sick days to regular employees who have worked a minimum of 520 hours in the past six months. The bill provides that sick days would accrue at the rate of one hour per 40 hours worked and it permits employees to carry over up to 40 unused accrued hours from one calendar year to the next. The measure would not only provide "sick" time off for illness of the employee and his or her children, it would also allow time off in instances where the employee is a victim of "family violence" or "sexual assault."

A similar bill was proposed last year, and it passed the House but did not reach a vote in the Senate. While this measure has vocal supporters and opponents, it doesn't appear that that much has changed in the legislative, economic, or workplace climate to make passage of this bill any more or less likely than last year. As the bill proceeds through the legislative process, employers in Connecticut, especially those with 50 or more employees, may want to keep a watchful eye.

**Connecticut Bill Proposes Change  
to Process for Discrimination  
Claims**

A bill, HB 5206, designed to enable employees to bypass the often-criticized Connecticut Commission on Human Rights and Opportunities, was revised and approved last week by the Labor & Public Employee Committee. The bill would allow a person who complains to the Connecticut Commission on Human Rights and Opportunities (CHRO) to opt out of the CHRO process at any time, in favor of filing a civil claim in court.

Under the proposed bill, the CHRO would have to provide the release within 10 days unless the case has been certified for a public hearing (the equivalent of a trial in an agency) or the executive director may defer the request for 30 days if he believes the claim is near resolution.

Under current law, the complainant must file discrimination claims under C.G.S. § 46a-60 et al. with the CHRO and cannot request a release from the CHRO's jurisdiction until 210 days have expired since filing with the CHRO. Interestingly, the original proposed bill, prior to revision by the Labor & Public Employee Committee, would have permitted a Complainant to file in court, in lieu of filing with the CHRO.

The bill is now in the Judiciary Committee for review.

**COBRA Subsidy Hits Sunset**

The qualifying period for the ARRA COBRA Subsidy did end on March 31, 2010. The COBRA qualifying event of involuntary termination must have occurred on or before March 31, 2010, for a beneficiary to be eligible for the COBRA subsidy. COBRA forms used for events after March 31, 2010, should not longer contain the ARRA COBRA Subsidy information.

The subsidy and reimbursement provisions will continue to have an impact for fifteen months, as Assistance Eligible Individuals who are eligible due to an involuntary termination on March 31, 2010, are entitled to 15 months of the subsidy, paying 35% of the COBRA premium cost for 15 months after the qualifying event.

## **More on Health Care Reform**

*Continued from page 1*

### **Employee Notifications & Coverage**

By March 31, 2013, employers must notify employees about state health insurance exchanges, whether the employer's plan meets minimum coverage requirements, and how to access information regarding premium subsidies that might be available for exchange-based coverage.

Chiefly, beginning in 2014, employers with 50 or more full time employees that do not offer coverage will have to pay a \$2,000 penalty per full-time equivalent employee if any worker receives federal subsidies to purchase health insurance. Fines are applied to the entire number of employees minus the first 30 employees, along with some other allowances. Further, Employer health care coverage must have an actuarial value of at least 60 percent. If it does not, penalties will be assessed. Beginning in 2014, waiting periods applied to employees looking to enroll in the employer plan cannot exceed 90 days.

Note that the law does not require employers to provide health insurance; rather larger employers will face possible fines if they do not. Importantly, employers with fewer than 50 employees will not be directly required to offer health insurance to employees, nor will they be fined for not offering coverage.

The law also requires states to create and maintain health care "exchanges" where health insurance providers offer coverage packages on equal terms. The exchanges will be available to anyone without employer-provided coverage. If an employee chooses to opt out of the employer plan because it is "unaffordable" (that is if the premium exceeds 9.5 percent of family income), the employer will be penalized \$3,000 for each full-time employee who receives a government subsidy and purchases coverage through an exchange.

Another significant provision provides for a 40

percent excise tax on insurance companies and plan administrators for group health coverage that exceeds a threshold of \$10,200 for single coverage and \$27,500 for families, not counting stand-alone dental and vision plans. For retirees above age 55 and for plans that cover employees in high-risk professions, the thresholds are \$11,850 for single coverage and \$30,950 for families. The tax will apply to the amount of the premium that is in excess of the threshold. However, this provision is not effective until 2018.

### ***What It Means For Employers Now***

For employers, large and small, health care reform requires immediate attention. Employers must learn about the law's provisions and must develop their long and short term strategies for meeting benefit plan, reporting, and employee communication obligations.

## **Form I-9 Audit Notices Issued in Southern States**

U.S. Immigration and Customs Enforcement (ICE) announced on March 2, 2010, that it is issuing Notices of Inspection (NOIs) to 180 businesses in Louisiana, Mississippi, Alabama, Arkansas and Tennessee. The notices alert business owners that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification laws and regulations.

The announcement follows the April 2009 implementation by ICE of a worksite enforcement strategy aimed at "holding employers accountable for their hiring practices." Under this strategy, ICE is focusing its resources on the auditing and investigation of employers suspected of cultivating illegal workplaces by knowingly employing illegal workers. ICE served 652 notices of inspection last summer across the nation, and 1,000 notices in November of 2009 on businesses selected for inspection as a result of investigative leads and intelligence and because of the business' connection to public safety and national security – for example, privately owned critical infrastructure and key resources.

*Article continued on page 4*

**Reminder for Employers on Sexual Harassment Policies**

Any manager or supervisor who has attended sexual harassment training is well aware of the employer’s affirmative defense: a reporting policy, when unreasonably not followed by the employee, may limit employee sexual harassment claims later.

Under two 1998 U.S. Supreme Court decisions, *Burlington Industries Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, an affirmative defense was created to claims of unlawful harassment. An employer can defeat liability for workplace harassment if it can show that it “exercised reasonable care to prevent and correct promptly any harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

But, a recent case out of the 2<sup>nd</sup> Circuit Court of Appeals reminds us that employers do not necessarily have blanket immunity under that *Faragher/Ellerth* defense. In *Gorzynski v. JetBlue Airways Corp.*, Ms. Gorzynski claimed her supervisor made repeated comments about female breasts, sex toys, to her previously having been employed as a stripper, and she claimed he gave preferential treatment to younger workers. She complained directly to the supervisor. Later she was fired and then she sued for sex and age discrimination.

JetBlue’s sexual harassment policy provided: “any crewmember who believes that he or she is the victim of any type of discriminatory conduct, including sexual harassments [sic], should bring that conduct to the immediate attention of his or her supervisor, the [human resources department] or any member of management.” JetBlue argued that, by making complaints only to the alleged harasser (Celeste), Gorzynski “unreasonably failed to take advantage” of the other people to whom she could have complained.

The 2<sup>nd</sup> Circuit Appeals Court held that making such complaints only to the alleged harasser could not, as a matter of law, be deemed unreasonable. The court

noted that, based on individual facts and circumstances, it might be unreasonable to require an employee to reach out to other managers identified in a policy. The case was remanded for a full trial.

Employers should revisit their sexual harassment policy and consider requiring complaints of harassment be made to one of two or several managerial employees, other than the alleged harasser. Employers need to keep in mind that no policy will be airtight in all instances; that merits and defenses in discrimination claims tend to be heavily fact-sensitive. However, having a clear, precise policy on how complaints are to be made and addressed (and following that policy) will reduce liability substantially.

**Form I-9 Audits** *(continued from page 4)*

Adding the latest round of notices, ICE will have served nearly 2,000 employers with notices of inspection the year since the new enforcement strategy was implemented.

***Steps for Employers***

An ICE I-9 audit notice should be treated seriously and addressed promptly by employers. This audit notice is the first step for ICE in initiating criminal investigation or prosecution, or in levying civil fines against the employer for I-9 violations. Employers should respond promptly to audit notices or request an extension of time from ICE if necessary. Also, caution should be taken to be forthcoming with ICE and to avoid conduct that could be viewed as tampering with Form I-9s or supporting documents. Employers should conduct their own internal I-9 audit, review procedures, and initiate corrective actions on defective I-9s in compliance with ICE and civil rights law.

**Robert Noonan & Associates provides legal services to employers. The firm:**

- Represents primarily employers in employment discrimination cases;
- Writes and reviews employee handbooks;
- Advises employers on day-to-day workplace issues;
- Trains supervisors and managers in sexual harassment, interviewing, leave issues, performance appraisals and the law of the workplace.

**Robert Noonan & Associates LLC, (860) 349-7010 or [robertnoonan@robertnoonan.com](mailto:robertnoonan@robertnoonan.com)**