Robert Noonan & Associates LLC

Legal Services for Employers

HR Client Advisory July 2010

Insurance Department Explains Connecticut Requirements for Dependent Coverage To Age 26 and New 30-Month COBRA Extension

In looking at enrolling dependents under age 26, employers must determine the differences between the state and federal health plan laws on a provision-by-provision basis, according to Kathy Walsh of the Connecticut Insurance Department. Ms. Walsh, Principal Examiner in the Consumer Affairs Accident & Health Unit, presented the Department's position at a special seminar with Attorneys Robert Noonan and Jessica Wragg that focused on young-adult health coverage up to age 26 and the new 30-month extension of state continuation coverage.

Under the new federal health care reform law, all group health plans that cover dependents must extend coverage to child-dependents up to age 26. Until January 1, 2014, plans that are "grandfathered" (in effect on March 23, 2010, and remain substantially the same) may exclude an adult child under age 26 if the adult child is eligible to enroll in an eligible employer-sponsored plan, other than the plan of a parent. The federal requirement is effective for plan years beginning on or after September 23, 2010. However significant differences exist between the new federal law and Connecticut law, which has been in effect since January 1, 2009.

Under Connecticut's law, applicable to all policies (but not self insured plans) issued in Connecticut, coverage for dependents must apply up to age 26 so long as the dependent is a resident of Connecticut or a full-time student, is unmarried, and is not covered under a health plan through his or her own employment. However, federal health care reform law (HCR) does not restrict coverage to just those under age 26 dependents who are single, students or living in Connecticut or with their parents.

The Connecticut Insurance Department has adopted the position that the federal HCR, requiring coverage up to age 26, will preempt Connecticut law (that is federal law will control, rather than state law) because it provides a more favorable definition of dependent – with one exception. The one exception effects grandfathered plans up to 2014. For grandfathered plans issued in Connecticut, the plan may only exclude an adult child under age 26 if the child is actually enrolled in – as opposed to merely being eligible to enroll in – an employer-sponsored plan. Connecticut's law is more favorable on this one provision – requiring coverage until the adult-child is actually enrolled in other employer coverage – so it will apply.

The Bottom Line for Plans that Make Dependent Coverage Available: Beginning the first plan year following September 23, 2010, all non-grandfathered plans must cover dependents up to age 26. Starting in 2014, grandfathered plans must cover dependents up to age 26. From the first plan year after September 23, 2010, until 2014, grandfathered plans that are fully insured, written and delivered in Connecticut must cover dependents up to age 26 unless the dependent is enrolled in some other employer-sponsored plan. In all cases, marital status, student status, residency, and economic dependence are irrelevant.

Thirty Months of "State Continuation"

Included in the program was an explanation of the new continuation provision under "state continuation" or as it is sometimes called "state mini-COBRA"

The new Connecticut law (Public Act 10-13) extended continuation coverage for up to 30 months in the event of termination (except when due to gross misconduct) and reduction in hours. Effective May 5, 2010, the law applies to fully insured group health insurance policies issued in Connecticut, regardless of size of the employer. Additional information on the new 30-month continuation extension, including model forms, can be found on the Connecticut Insurance Department's website: http://www.ct.gov/cid/cwp/view.asp?Q=434920&A=1272.

For more on the 30-month extension, see page 3 of this Edition – Reminder: Connecticut "Mini-COBRA" Extends Continuation Coverage to 30 Months.

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Appeal of Ruling that Employers Must Count Workers Outside CT for CT-FMLA

On a groundbreaking case headed for appeal, a Connecticut Superior Court held on May 10th that employers should count out-of-state employees as well as in-state employees when deciding whether the employer is subject the Connecticut FMLA. The case, *Velez v. Mayfield*, reverses a final decision of the CT Department of Labor by holding that an employer will meet the 75-employee threshold, for application of the CT-FMLA, if the employer's total number of employees (working in and out of Connecticut) totals 75 or more, if employee – even though the employer may have fewer than 75 employee actually working within Connecticut.

The ruling could have a serious impact on employer with small branches in Connecticut who have a large workforce outside of Connecticut.

The case arose when Joaqina Velez, who had worked for Related Management Company for over 20 years, fell and fractured her hand in April 2005. After attempting to work with restrictions, the employer put her on an extended leave until she could physically perform her job. In July, Related terminated Ms. Velez's employment. In August, when she was fully able to return, she asked to be reinstated; Related declined, even though the position was still open.

Ms. Velez filed a complaint with the CT-DOL claiming a FMLA violation. The CT-DOL dismissed the claim on the grounds that it lacked jurisdiction because Related only had 35 employees in Connecticut. Ms. Velez appealed to the Superior Court.

Connecticut's FMLA defines a covered employer as "a person engaged in any activity, enterprise or business who employs seventy-five or more employees." Conn. Gen. Stat. 31-51kk(4). Unlike the federal law, which covers employers with 50 or more employees and employees who work at a location where the employer employs 50 or more employees within 75 miles, the Connecticut FMLA does not contain a reference to 75 employees "at-the-worksite" or "in Connecticut." Until this decision, the CT-DOL has interpreted the CT-FMLA to mean 75 employees in Connecticut, but the Court does not agree with the interpretation. The Court stated that: "[l]ooking at the statute rationally, the court can only conclude that it contains no geographic limitation on counting employees."

The decision has already been appealed to the Connecticut Appellate court. In the meantime, employers who have more than 75 employees working in and out of Connecticut should review their headcounts and FMLA procedures with experienced counsel with extra care.

New Website Launched July 1: Healthcare.gov

The Department of Health and Human Services' new health care website, www.healthcare.gov, launched July 1, 2010, has been getting positive reviews from interested consumers. The site's creation was required by health care reform laws (referred to as the Affordable Care Act). According to government figures, the website cost $3.5 million to build and is purposed to help consumers boost their knowledge regarding health care reform laws, prepare for the individual mandate that goes into effect on January 1, 2014, and make it easier for individuals and small businesses to buy insurance.

The website features a tool called Insurance Options Finder, by which a consumer can enter basic information and identify the private and public health insurance options available in the consumer's community. More information should become available as additional guidance, regulations, and programs are released or set up by Health and Human Services in accordance with the Affordable Care Act. As the effective date of January 1, 2014, approaches for two key provisions – the individual mandate requiring all Americans to have minimum essential coverage and the availability of state-based health benefits Exchanges – the website should provide valuable and necessary information to consumers and small businesses.

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New Connecticut Law: Employment Protections in Family Violence Situations

Public Act 10-144, effective October 1, 2010, places additional restrictions on an employer's right to terminate employees with or without cause. Beginning October 1st, employers are prohibited from terminating, penalizing, threatening, or otherwise coercing an employee with respect to his or her employment because the employee (1) is a family violence victim or (2) attends or participates in a civil court proceeding related to a case in which he or she is a family violence victim. Current law already prohibits employers from taking such action in a number of other situations, including when the employee (1) has been subpoenaed in a criminal case, (2) is a crime victim participating in a criminal case, or (3) has a protective or restraining order issued on his or her behalf.

The new law applies to employers with 3 or more employees. Also, the new law requires employer to allow family violence victims to take paid or unpaid time as reasonably necessary to:

- seek medical care or counseling for physical or psychological injury or disability,
- obtain services from a victim services organization,
- relocate due to the family violence, or
- participate in any civil or criminal proceeding related to or resulting from such family violence.

Employers may limit the unpaid leave available to such employees to 12 days per calendar year, but not less than that. Employers may require an employee requesting to leave to provide the certification to support the leave request, including:

- a signed, written statement certifying that the leave is for a purpose authorized by this law;
- a police or court record related to the family violence, or
- a signed, written statement that the employee is a victim of family violence from an employee or agent of a victim services organization, an attorney, an employee of the office victim services or victim advocate, or a medical professional or other professional from whom the employee has sought assistance concerning the incident of family violence.

Reminder: Connecticut "Mini-COBRA" Extends Continuation Coverage to 30 Months – Public Act 10-13, effective May 5, 2010

Public Act 10-13 went into effect on May 5, 2010. The Act extends state continuation coverage (mini-COBRA coverage) from 18 to 30 months for layoff, reduction in hours, leave of absence, or termination (other than for death or gross misconduct) that result in a loss of insurance coverage. The law applies to large and small employers and to all group health insurance policies issued through the Connecticut Insurance Department that provide medical coverage. The law does not apply to dental, vision or prescription drug coverage, where such coverage is in a separate free-standing policy. The law does apply if the dental, vision, or prescription drug coverage is combined with, and included under, the group health policy. The 30-month extension applies to individuals who are on continuation coverage as of May 5, 2010, as well as to individuals who have a qualifying even on or after May 5, 2010.

The CT Department of Insurance has posted FAQ's and model state continuation coverage notices on its website at: http://www.ct.gov/cid/cwp/view.asp?Q=434920&A=1272.

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Federal FMLA Applies Broad Meaning of "Son or Daughter" To Provide Eligibility for Non-Traditional "Parents"

An employee asks his manager for 2 months off to care for his same-sex partner's nephew, who is eleven, lives with employee and his partner, and has to undergo leukemia treatment. Is the employee entitled to FMLA leave to care for his partner's nephew? He may be – if the employee has assumed either the financial support obligations or day-to-day care responsibility of a parent. According to a newly released clarification of the federal FMLA by the U.S. Department of Labor, the recently issued a new interpretation of the phrase "son or daughter" under the federal Family and Medical Leave Act (FMLA) permits FMLA leave to care for an ill child or for the birth of a child even if no biological or legal relationship exists between that child and the employee.

The FMLA entitles an employee to 12 workweeks of leave in a 12 month period for the birth or placement of a son or daughter, to bond with the newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition. The definition of "son or daughter" includes "a child or a person standing in loco parentis." The DOL clarifies that the FMLA regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both date-to-day care and financial support in order to be standing in loco parentis to a child. Further, the DOL's interpretation makes it clear that even if a child has a biological parent in the home, or even has both a mother and father, that "does not prevent a finding that the child is the "son or daughter" of an employee who lacks a geological or legal relationship with the child" for the purposes of the employee taking FMLA leave.

The Labor Department's Secretary Hilda L. Solis released a statement, providing in part: "The Labor Department's action today sends a clear message to workers and employers alike: All families, including LGBT [Lesbian-Gay-Bisexual-Transgender] families, are protected by the FMLA."

But, the manager and Human Resources may not have enough information, based on just the employee's request, to make a determination of whether the employee is standing in loco parentis to the nephew. Next step: request that the employee provide documentation or a signed statement of the family relationship. Employers are permitted under the FMLA regulations to do so. The DOL describes the permitted documentation as: "a simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis." If the employee is otherwise eligible for FMLA leave (has one year of service and 1,250 hours in the last 12 months) and the employer is a covered employee, his leave will be protected FMLA leave.

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As part of our commitment to serve our clients, Robert Noonan & Associates is pleased to announce that our client alerts and advisories, as well as our upcoming seminar offerings, are now available on our website.

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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.

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