

IRS delays W-2 Reporting of Health Coverage Cost

Yesterday, October 12th, the IRS announced that it will delay the new requirement for employers to report the aggregate cost of coverage under an employer-sponsored plan. IRS Notice 2010-69 provides interim relief from the reporting requirement for the tax year 2011, which makes reporting the cost of coverage optional for 2011. Prior to this announcement, employers would have been required to report the value of their employee's health coverage on the W-2's issued to employees beginning with the 2011 tax year.

The Treasury Department and the IRS have determined that this relief is necessary to provide employers the time they need to make changes to their payroll systems or procedures in preparation for compliance with the new reporting requirement. The IRS will be publishing guidance on the new requirement later this year, which should provide employers with necessary guidance to comply with reporting obligations beginning in 2012.

The IRS also issued a draft Form W-2 for 2011, which includes the codes that employers may use to report the cost of coverage under an employer-sponsored group health plan.

Although reporting the cost of coverage will be optional with respect to 2011, the IRS continues to stress that the amounts reportable are not taxable. Included in health care reform, within the Affordable Care Act passed by Congress in March, the new reporting requirement is intended to be informational only, and to provide employees with greater transparency into overall health care costs.

The new form can be found at http://www.irs.gov/pub/irs-utl/draft_w-2.pdf.

New Leave Rights for Family Violence Law

Connecticut's new family violence leave law became effective on October 1, 2010. The new law, Public Act 10-44, mandates that employers with three or more employees permit employees to take up to 12 unpaid days of leave for medical care or counseling arising from a domestic violence situation, to obtain victim services or relocate due to family violence, or to participate in any court proceeding related to family violence. Employees taking such leave need not be paid, unless the employee has accrued, unused paid time off available to him or her.

The new law expressly provides that the employer does not have to pay the employee for such time out of work if the employee is not otherwise entitled to pay under the employer's leave policies or has exhausted all available paid leave under the employer's policies. Furthermore, 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.

If an employee's need for leave under this section is foreseeable, the law provides that an employer may require advanced notice of not more than 7 days prior to when the leave is to begin. However, if the need for leave is not foreseeable, like the employee needing to suddenly take time to relocate his or her residence for safety reasons, the employer may only require notice as soon as practicable.

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Two Years Later “Informal Interactive Discussion” Remains Trap for Unwary Employers

In 2008, the Connecticut Supreme Court made it clear in *Curry v. Allan S. Goodman, Inc.* that Connecticut employers have an affirmative obligation to engage in “an informal, interactive discussion” with employees who are seeking a reasonable accommodation due to a disability. However, two years later, many employers leave themselves open to claims of disability discrimination because they have not engaged in the “informal, interactive discussion” of reasonable accommodation before determining that an employee cannot perform the work due to an injury. Employers are particularly vulnerable in workers’ compensation cases, as was the case in *Curry*.

When an employee has a physical or mental impairment or is physically disabled, state and federal disability law impose upon the employer provide a reasonable accommodation to the employee. The employee has the burden of initiating a discussion with the employer, that is the employee (or his representative, family member, etc.) has to let the employer know the he or she needs some sort of adjustment or change at work for a reason related to a medical condition. The employee’s request for accommodation does not have to be in writing and the employee does not have to use the words “accommodation” or “disability.”

Once the employee has initiated this, the employer has the legal obligation to engage in an informal process to clarify what the employee’s needs and limitations are and to identify the appropriate reasonable accommodation possibilities. **The employer must make a good faith effort to participate in that discussion.** Employers will need to make sure to exhaust this obligation any time an employee has an injury or illness that limits their ability to work or perform their job duties, including injuries and disabilities covered under workers’ compensation.

What is an “informal, interactive discussion?”

The exact nature and method of the dialogue will vary depending on the facts. In some instances, there will be little question about what the limitations are and what type of accommodation is required. For example, if an employee returns a doctor’s note that states that the individual is fully incapacitated and will not be able to return to work for 7 weeks. In other instances, the employer may need to ask questions concerning the nature of the disability, the limitations, and what type of accommodations the employee might suggest.

The employee is not required to specify a precise accommodation, but he or she should describe the problems posed by the workplace and his or her limitations. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained. The EEOC provides a list of resources to help in identifying, providing, or receiving funding for reasonable accommodations at: <http://www.eeoc.gov/policy/docs/accommodation.html#appendix>.

What happens if an employer doesn’t engage in the informal, interactive discussion before terminating an employee with a disability? The employee will have initial and immediate claim that the employer violated the ADA and Connecticut disability law and that the employer did not attempt to reasonably accommodate, as required.

Liability under disability discrimination law can be greatly reduced by engaging in the accommodation discussion and documenting the details; the failure to do so can impose on the employer an immediate finding of discrimination.

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What about Pay Deductions for Exempt Employees Taking Family Violence Leave?

The basics of the new law seem clear, however employers should tread cautiously when confronted with a request for time off for reasons arising out of a domestic violence situation. The need for time off for medical care or counseling in connection with a domestic violence situation may also be covered under the Family and Medical Leave Act (FMLA) as leave due to a serious health condition. For covered employers with 50 or more employees, FMLA leave would provide the employee with further rights, including a right to up to 12 weeks of protected leave.

Employers providing leave to exempt-employees will have to consider Connecticut wage and hour law in reviewing whether such leave should truly be “unpaid.” Exempt employees in Connecticut are generally entitled to their full salary for any week in which they perform work, with a few exceptions – meaning that generally the employer cannot deduct from pay for an absence during a given week.

Exceptions under the state law permit deductions:

- for one or more full days if the employee is absent for personal reasons other than sickness or accident (however, CT-DOL takes the position that the employee should agree to this deduction);
- for one or more full days of sickness or disability provided the deduction is made pursuant to a bona fide plan, policy or practice of making deductions from an employee’s salary after sickness or disability leave has been exhausted; and
- for absences of less than one full day taken pursuant to FMLA or CT-FMLA.

Leave to attend a court proceeding will not be leave for a sickness or accident – therefore, in accordance with wage law, the employer may be able to deduct from an exempt employees pay for one or more full days of absence. However, leave to seek medical treatment after a domestic violence assault may be leave due to “an accident” under state law, and then

the employer should not deduct from the exempt employee’s pay for the absence.

The question of whether the exempt employee is entitled to pay is not as black-and-white as with a non-exempt hourly worker; it will depend heavily on the factual circumstances of the leave.

Deductions from an exempt employees pay are disfavored by the CT-DOL and the language of the new law alone does not fully answer these questions about where state wage and hour law intersect with domestic violence leave rights. Until the DOL or legislature weighs in with guidance, employers should review the facts closely of the leave request closely before deducting for an absence of less than a full week from any exempt employees pay.

Health Care Reform – First Landmark Date Has Passed

Under the health care reform law, the Affordable Care Act, the following provisions take effect for insured and self-insured group health plans on the first day of the plan year beginning after *September 23, 2010* or on January 1, 2011:

- dependent coverage must extend to cover children up to age 26, regardless of state of residency, marital status, or student status;
- prohibition on preexisting condition exclusions for individuals under age 19;
- prohibition on lifetime limits on the dollar value of coverage;
- plans cannot reduce annual limits on essential health benefits;
- no rescission of coverage permitted, except due to fraud;
- over-the-counter drugs other than insulin, without a doctor’s prescription, are no longer reimbursable through FSAs, HSAs, or HRAs (begins January 1, 2011); and,
- tax credit provided to small businesses that pay for at least 50% of cost of employee coverage, if fewer than 25 employees and average wages of less than \$50,000 (credit for 2010 tax year and beyond).

I-9s and Puerto Rico Birth Certificate Law Change

On July 1, 2010, the Commonwealth of Puerto Rico began issuing new certified copies of birth certificates to U.S. citizens born in Puerto Rico because of a new Puerto Rico birth certificate law. After Oct. 30, 2010, all certified copies of birth certificates issued prior to July 1, 2010, will become invalid. The law only affects the validity of certified copies of Puerto Rico birth certificates; it does not impact U.S. citizenship status for individual born in P.R.

What is the Impact on Employment Eligibility Verification (I-9) Process?

New Employees

- All certified copies of P.R. birth certificates are acceptable for Form I-9 purposes through Oct. 30, 2010.
- Beginning Oct. 31, 2010, only certified copies of P.R. birth certificates issued on or after July 1, 2010, are acceptable for Form I-9 purposes.
- Beginning Oct. 31, 2010, if an employee presents for List C a birth certificate issued by the Vital Statistics Office of the Commonwealth of P.R., the employer must look at the date the certified copy of the birth certificate was issued to ensure that it is still valid.

Existing Employees

- Employers must not re-verify the employment eligibility of existing employees who presented a certified copy of a P.R. birth certificate for Form I-9 purposes and whose employment eligibility was verified on Form I-9 prior to Oct. 31, 2010.

Federal Contractors

- Employers awarded a federal contract that contains the Federal Acquisition Regulation (FAR) E-Verify clause have special Form I-9 rules for the verification of existing employees.
- **If completing new Forms I-9 for existing employees**, certified copies of P.R. birth certificates are acceptable as a List C document under the following circumstances:
 - Prior to Oct. 31, 2010, all certified copies of P.R. birth certificates are acceptable for Form I-9 purposes.
 - Beginning Oct. 31, 2010, only certified copies of P.R. birth certificates issued on or after July 1, 2010, are acceptable for Form I-9 purposes.

If updating existing Forms I-9, an employer must not ask an employee to present a new certified copy of a Puerto Rico birth certificate if the employee presented a certified copy of a birth certificate issued in Puerto Rico before July 1, 2010 that was valid and acceptable for the Form I-9 at the time it was presented.

Connecticut Independent Contractor Crackdown Law Now In Effect

Effective October 1, 2010, Connecticut Public Act 10-12 provides that any employer that "...knowingly misrepresents one or more employees as independent contractors...shall be guilty of a class D felony and shall be subject to a stop work order issued by the Labor Commissioner in accordance with section 31-76a." New penalties are also in effect, increasing the penalty to \$300 per day for any employer who misrepresents the number of its employees or classifies them as independent contractors to defraud or deceive an insurance company, in order to pay lower workers' compensation insurance.

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