Labor & Employment Law Update

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New Form I-9 and Handbook for Employers Issued – Delayed Effective Date

On March 8, 2013, the Department of Homeland Security issued a new version of the Form I-9, Employment Eligibility Verification ("Form"). The current version of the Form expired last August; however, implementation of a new Form was delayed when the United States Citizenship and Immigration Service ("USCIS") received over 6,000 comments on the draft version it had issued earlier in 2012 and re-opened the comment period. Nonetheless, despite numerous objections to the proposed changes, the new final Form essentially mirrors the initial draft.

While the new Form may be used immediately, the USCIS has granted employers until May 7, 2013, to begin using the new version for all new hires and reverifications. There have been reports that the E-verify Program is claiming that the new Form must be used immediately. This is not true; employers have until May 7th.

Before beginning to use the new Form, we recommend carefully reviewing the new Form and its new instructions as well as reviewing the new *Handbook for Employers* issued on March 13, 2013 to ensure that your staff understands how to properly complete the new Form. Please be sure that the Form you are using has "03/08/2013 N" at the bottom of the page on the left side.

The most significant changes to the new Form include:

1. New data fields requesting information not requested in prior Form versions;
2. Expanded format/layout of the Form; and
3. Expanded instructions (6 pages) for the Form.

The new Form is two pages, instead of the traditional single page. The first page consists solely of Section 1 which is for the employee. The second page includes both Section 2 and

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Section 3, but pertains solely to the employer.

In Section 1, the grid for employee information has been completely reformatted. The Form more clearly requests full last names and specifies that all "other" names should be listed, not just maiden names. In addition, the Form requests the employee's email address and telephone number. However, the Form does *not* make it clear that these are optional. The Form also no longer indicates that the social security number is optional in certain circumstances.

The "Status box" now encompasses nearly a quarter of a page and requests more detailed information, especially from those employees who qualify as "aliens authorized to work." Even the Preparer/Translator box has become a full section with more expansive information requested.

Employers must now also include the employee's full name at the beginning of Section 2 which is at the top of the second page. The section for recording information on documentation presented by the employee now covers nearly one-third of the page and will allow employers to more easily record List A "documents" that consist of multiple documents. Further, the line for recording an employee's start date has been separated from the attestation clause. Even Section 3 has been re-vamped and gives employers additional room to record information on documentation and a place to print the name of the person completing the Section.

This synopsis provides employers with basic information on the new Form. However, we would not recommend beginning to use the new Form until a thorough review of the Form, instructions, and Handbook have been completed. We will also be covering the new Form at our Labor Law Forum next month. If you have any questions, please feel free to contact us. ■

Amy Erlbacher-Anderson

Patient Protection and Affordable Care Acts Adds Employee Retaliation Protections

Employers addressing the variety of new obligations imposed by the Patient Protection and Affordable Care Act ("PPACA") should also be aware of the PPACA's whistleblower protection amendment to the Fair Labor Standards Act ("FLSA"). The U.S. Department of Labor published its interim final regulations governing the employee whistleblower protection of Section 1558 of the PPACA, which added section 18C to the FLSA. This new provision protects employees against retaliation from employers (and "health insurance issuers") for reporting potential violations of the PPACA's consumer protections or affordability assistance provisions. The interim final rule establishes procedures and time frames for employee complaints to the Occupational Safety and Health Administration ("OSHA"), investigations of complaints, and appeals.

The PPACA allows employees to receive tax credits or cost-sharing reductions while enrolled in a qualified health plan through an insurance exchange, if their employer does not offer a coverage option that is affordable and provides a basic level of value (*i.e.*, "minimum value"). Certain large employers who fail to offer affordable plans that meet this minimum value may be assessed a tax penalty if any of their full-time employees receive a premium tax credit through an exchange. Thus, the relationship between the employee's receipt of a credit and the potential tax penalty imposed on an employer could create an incentive for an employer to retaliate against an employee. Section 18C is designed to protect employees from this retaliation.

Section 18C protects an employee from retaliation for providing information or participating in proceedings regarding any conduct the employee reasonably believes violates Title I of the PPACA.

Section 18C protects an employee from retaliation for providing information or participating in proceedings regarding any conduct the employee reasonably believes violates Title I of the PPACA. Rights protected under Title I of the PPACA include, for example, coverage of preventative services at no cost, lifetime dollar limits on coverage, and a prohibition on denial based upon pre-existing conditions. Section 18C also protects employees who object to or refuse to participate in any activity, policy, practice, or

assigned task that the employee reasonably believes violates Title I of the PPACA.

The interim rule notes that Section 18C adopts the procedures, notifications, burdens of proof, remedies, and statutes of limitation under the Consumer Product Safety Improvement Act of 2008 for whistleblower complaints and that OSHA's Whistleblower unit is responsible for investigating complaints.

The key procedural requirements include:

- Employees must file complaints with the Secretary of Labor within 180 days of the alleged retaliation.
- Within 60 days of receiving the complaint, the Secretary must give the employee and the employer/issuer an opportunity to submit a response and meet with the investigator to present statements from witnesses and conduct an investigation.
- The Secretary may conduct an investigation only if the employee has made a prima facie showing that the protected activity was a contributing factor in the alleged adverse action and the employer/issuer has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity.
- If the Secretary finds reasonable cause to believe that retaliation has occurred, it may issue a preliminary order that requires the employer/issuer to:
    - o take affirmative action to abate the violation;
    - o reinstate the employee to his or her former position together with the compensation for that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
    - o provide compensatory damages to the employee, as well as all costs and expenses (including attorney fees and expert witness fees).
- The parties then have 30 days to file objections to the preliminary order and/or findings and request a hearing before an Administrative Law Judge ("ALJ") or, if no objection is filed, the preliminary order becomes final and is not subject to judicial review.
- The ALJ must hold the requested hearing "expeditiously" and issue a final order within 120 days of the conclusion of the hearing.
- Employers are entitled to a reasonable attorney's fee not exceeding $1,000 if the employee's complaint is deemed frivolous or was brought in bad faith.
- Within 60 days of the issuance of a final order by the Secretary, any person adversely affected or aggrieved may file an appeal with the appropriate United States Court of Appeals.

Finally, the interim rule stresses that nothing in section 18C shall be deemed to diminish the rights, privileges, or remedies of any employee under any federal or state law or under any collective bargaining agreement, and the rights and remedies in section 18C may not be waived by any agreement, policy, form, or condition of employment. Therefore, an employee may still bring claims under other laws and regulations protecting the employee from retaliation including, for example, Section 510 of ERISA.

It is now increasingly important for employers to carefully assess any conduct by an employee that could be deemed protected by Section 18C before taking adverse action and, as always, have a clear record of the employee's conduct that led to the adverse action. Because an employer may avoid a Secretarial investigation under Section 18C by showing, "through clear and convincing evidence," that the employer would have taken the same adverse action in the absence of PPACA protected activity, such a record is crucial. ■

Scott P. Moore

New Guidelines on Preventative Care Benefits

The Departments of Labor, Health and Human Services, and Treasury recently issued guidance in the form of frequently asked questions ("FAQs") that clarify and expand the rules regarding preventive care benefits that non-grandfathered group health plans must provide to a participant with no cost-sharing. Specifically, the new guidance addresses the following preventive care benefits: over-the-counter (OTC) drugs and medications prescribed by a doctor, polyp removal during a colonoscopy, genetic testing for breast cancer, and contraceptive support.

By way of background, the Patient Protection and Affordable Care Act ("PPACA") requires that non-grandfathered group health plans provide benefits for certain preventive services at no cost to participants. The frequently asked questions guidance provides specific clarity on the preventive care benefits identified above as follows:

- **Prescribed OTC Drugs and Medications.** The FAQs provide that OTC drugs and medications that are prescribed by a health care provider must be covered at no cost-sharing to the participant by the group health plan. The FAQs specifically listed aspirin as such an OTC medication to be covered, but did not specifically identify other OTC drugs and medications.

- **Polyp Removal During Preventative Colonoscopy.** The FAQ's state that a group health plan may not impose cost-sharing for removal of a polyp during a colonoscopy performed as a screening procedure.

- **Genetic Testing for Breast Cancer.** The FAQ's provide that a group health plan is required to pay for genetic counseling and genetic testing for breast cancer without cost-sharing, if appropriate, as determined by the woman's health care provider.

- **Contraceptive Coverage.** The FAQ's clarify that plans must cover the full range of FDA-approved contraceptive methods for women including, but not limited to, barrier methods, hormonal methods, and implanted devices, as well as patient education and counseling, as prescribed by a health care professional.

As the agencies further clarify the required mandates under PPACA, it will be important to continually address these items during the plan design process of your group health plan. ■

Adam L. Cockerill

Other State Specific Developments:

Iowa: A transgender Iowa City woman, born male and presenting as female, recently prevailed in the civil rights complaint she filed with the Iowa Civil Rights Commission after a sheriff's deputy ordered her to leave a women's restroom at the courthouse, according to the Iowa City Press-Citizen. A state administrative law judge ruled in the woman's favor, concluding that there was probable cause to support her claims of discrimination on the basis of gender identity, sex, and sexual orientation in public accommodation. The Iowa Civil Rights Commission states that Iowa law requires that individuals must be allowed to use facilities in accordance with their gender identities, rather than their assigned sex at birth, without being harassed or questioned.

Kansas: The Kansas City Chiefs have started 2013 with a win! Nine members of a twelve-person Jackson County jury recently sided with the Chiefs in an age discrimination lawsuit. Steve Cox, the team's former maintenance manager, sued the Chiefs following his discharge in 2010 after he gave one of his subordinates an unauthorized raise. Cox claimed that he received good performance reviews and that his discharge was part of a larger plan to make the organization "go young." The jury did not endorse Cox's claims and did not award him any damages.

Minnesota: On February 11, 2013, two Minnesota State Representatives introduced H. F. No. 506, a bill that generally renders non-compete agreements void. The bill contains limited exceptions allowing non-compete agreements for: (1) sellers of a business's good will, (2) partners in a dissolving partnership, and (3) members of a limited liability company who are dissolving or terminating their interest in the company. The State House referred the bill to the Labor, Workplace and Regulated Industries Committee.

Missouri: On February 27, 2013, the U.S. Occupational Safety and Health Administration (OSHA) announced that it established an "Alliance" with the Mexican Consulate in Kansas City, Missouri to provide worker safety information to Mexican nationals working in Missouri and Kansas. The Alliance will provide information, guidance, and access to education and training resources which will be jointly developed by the Mexican Consulate and OSHA's offices in Kansas City, St. Louis, and Wichita.

Montana: The Montana Supreme Court recently upheld a Motion to Compel Arbitration by Blue Cross Blue Shield of Montana. A terminated employee argued that his case against Blue Cross was covered by the Montana Wrongful Discharge from Employment Act ("WDEA") since he claimed that Blue Cross had terminated him at will under the contract. Because that issue implicated the provisions of the employment contract, the court held that an arbitrator should decide the case and whether the WDEA applied to the claim.

North Dakota: An occupational therapist sued a long-term care health facility for sexual harassment after the CEO terminated her employment in 2008. She alleged that she got drunk at a conference with the CEO in 2005 and fell asleep in his hotel room. She awoke, found him naked on top of her trying to remove her clothes, resisted him, and left the room. She claimed that the CEO treated her differently thereafter, paid female employees less than a male employee, and refused to pay her a premium wage for working "short staffed" just days before her termination. The employer moved for summary judgment on grounds that the therapist's sexual harassment claim was time-barred. The North Dakota Supreme Court recently rejected the employer's argument, reasoning that it was possible that the alleged assault and subsequent incidents were related and part of the same actionable hostile work environment. The court reasoned that, since at least one incident contributing to the hostile work environment claim occurred within the 300-day statute of limitations period, the therapist's claim could not be dismissed as untimely.

South Dakota: South Dakota passed a law this month allowing school employees to carry guns in school buildings. Other states have also made changes in their laws to allow teachers to carry guns in the classroom, but this is the first legislation that specifically allows elementary school employees to carry guns in school. The law leaves it up to individual school districts to set the rules for their schools as to whether guns are allowed. ■

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