Robert Noonan & Associates LLC

Legal Services for Employers

HR Client Advisory

March 2011

Connecticut's SustiNet Steadily Moves Forward at One Year Anniversary of Federal Health Care Reform Law

It's been one year since President Obama signed the health care reform bill into law on March 23, 2010. What has taken effect in this first year of the groundbreaking legislation?

- Children with preexisting conditions can not be denied coverage;
- Plans cannot rescind coverage except in cases of fraud;
- Lifetime caps on benefits removed and annual caps reduced;
- Preventative screenings must be permitted without additional charge;
- Adult-children can remain on parent's policy until age 26; and,
- Payments to seniors given to shrink the Medicare prescription drug "doughnut hole."

The Affordable Care Act still has a ways to go until the big year, 2014, when the coverage mandate for individuals is set to take effect. Constitutional challenges to Act linger in 25 separate lawsuits across the county, with many predicting that the U.S. Supreme Court will ultimately decide the issue. However, implementation of the law continues to progress and its implementation impacts employers and states.

HHS Grants $35.6 Million to UMASS to develop "Health Care Exchange"

Massachusetts is one of seven "Early Innovator" states to receive grants from HHS as the nation prepares for implementation of federal health care reform. Starting in 2014, all states will be required to set up online health care exchanges to help individuals and small employers shop for, select and enroll in high-quality, affordable private health plans that fit their individual needs at competitive prices.

UMass Medical School will partner with the Massachusetts Executive Office of Health and Human Services (EOHHS) and the Massachusetts Health Insurance Connector Authority to develop an online "health care exchange," a resource through which consumers and small business owners can efficiently shop for health insurance plans.

The health care exchange model developed by UMASS is likely to be utilized by Connecticut beginning in 2014, to provide options to individual's seeking coverage.

The UMASS framework is expected to be completed by 2013, a year ahead of the federal deadline. Lessons learned from its creation and implementation will be used to inform best practices, help gain efficiencies and accelerate development for participating New England states. This will help those states establish their exchanges quickly and efficiently using the models and building blocks created by the Massachusetts project. At the same time, individual states will continue to have the flexibility to develop an exchange that best meets the needs of their unique health insurance market without having to start from scratch.

Article continued on next page

Reminder on Upcoming Seminars

Tuesday, April 19, 2011

Morning Session

Connecticut Unemployment Compensation: Understanding Your Costs and Winning Cases

**With Guest Speaker Theresa Kowalski, Operations Coordinator of the Merit Rating Unit for the CT Department of Labor

Afternoon Session

Sexual Harassment Prevention

Contact us at jessenianarvaez@robertnoonan.com, or by telephone for more information or to register.

Article continued from prior page

Connecticut's SustiNet Efforts Continue

On January 7, 2011, the SustiNet Health Partnership Board of Directors delivered its Final Report to Governor Daniel Malloy and the Connecticut General Assembly. The SustiNet plan was developed by an 11-member board of directors that includes Lt. Gov. Nancy Wyman and state Comptroller Kevin Lembo. The board was established by legislation passed by Democratic lawmakers in 2009 in response to the rising cost of health care and to increase access to care.

The central component of the plan includes establishing a self-insured state insurance choice for municipalities that would gradually be expanded to private employers, small businesses, nonprofits and households. That option would be offered both inside and outside the health insurance exchange that Connecticut is required to setup by 2014 under the new federal health care reform law. The plan also calls for payment reforms including implementing the medical home model concept and linking provider payments to performance; expanding the state's Medicaid program; and investments in electronic health records.

The SustiNet report and recommendations will be likely be taken up by the House soon for budget and financing considerations.

US Supreme Court Says Firing Fiancé of Complaining Worker Is Unlawful Retaliation

It's illegal retaliation to terminate an employee because the employee files a discrimination claim, but what about terminating the employee's fiancé? The U.S. Supreme Court says that can also be illegal retaliation.

In *Thompson v. North American Stainless*, Miriam Regaldo, an employee of North American Stainless, filed a sexual harassment complaint with the EEOC against the company. Three weeks after the company was notified of the claim by the EEOC, the company fired Eric Thompson, Ms. Regaldo's fiancé. Thompson then filed a charge with the EEOC claiming that North American Stainless had fired him in order to retaliate against Ms. Regalado for filing the sexual harassment action. The Kentucky Federal District Court and the Sixth Circuit Court of Appeals en banc held that Thompson's third party retaliation claim was not permitted – that since Mr. Thompson himself did not engage in statutorily protected conduct, he cannot have a valid cause of action for retaliation.

On January 24, 2011, the U.S. Supreme Court disagreed, holding that Title VII of the Civil Rights Act of 1964 grants Thompson a cause of action as a third-party victim of the employer's retaliation.

Article continued on page 5

Paid Sick Leave on the CT Senate Table Again

Following a favorable vote in the Labor Committee, Connecticut's legislature will once again have the opportunity to consider passing a law to require paid sick leave for certain workers.

This year's version of the law, Senate Bill 913, would require employers with 50 or more employees in Connecticut to provide up to 5 paid sick days. Days would accrue for most regular non-exempt employees at the rate of one hour per 40 hours worked, up to 40 hours or 5 days of paid sick time. The law proposed would become effective January 1, 2012. The time could be used for the employee's own illness, to care for a sick child, parent, or spouse, or for the employee to receive services as a victim of domestic violence or sexual assault.

Governor Malloy has voiced support for the idea of mandatory paid sick leave. More so than in past years, the bill is receiving a favorable response from some legislators. It is currently awaiting debate in the Senate. If the bill passes, Connecticut will become the first state to have such a mandate and employers will be required to revise their existing policies to reflect the law's rate of accruing time.

U.S. DOL Announcing Large Recovery from Employers for Wage Law Violations

The media has been reporting since early 2010 that the United States Department of Labor is hiring more investigators and planning new initiatives to enforce wage and hour law, including in particular misuse or abuse of independent contractors by companies and misclassification of employees as exempt from overtime law.

The DOL has increased its efforts to crack down on wage and hour law violations. .
In February, the DOL announced results of its investigation into the wage practices of Hartford's UnitedHealthcare. The DOL recovered a total of $934,551 in overtime back wages for 479 employees and $104,280 in civil money penalties from the Hartford operations after an investigation by the department's Wage and Hour Division determined that the employees had been incorrectly classified as exempt from the Fair Labor Standards Act and consequently denied compensation for all hours worked.

The UnitedHealthcare workforce in Hartford specializes in the IT, finance, actuarial and underwriting operations. DOL investigators determined that UnitedHealthcare incorrectly classified employees in several different occupational categories as administratively exempt from FLSA, thereby denying them overtime compensation for all hours worked over 40 in a week.

The FLSA provides an exemption from both minimum wage and overtime pay for workers employed as bona fide administrative employees. To qualify for this exemption, an employee must be paid on a salary basis at a rate not less than $455 per week (or $475 per week under Connecticut law), must perform work directly related to the management or business operation of the employer, and must be responsible for exercising independent judgment or discretion with respect to matters of significance. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Labor Department's regulations.

The Connecticut DOL notes that it looks at two critical areas when determining Exempt Status: the Salary Test and the Duties Test. For the Executive, Administrative, and Professional Exemptions, the employees must be receiving at least $475 in salary each week and, under the Duties Test, the actual duties performed by the employee on the job must be "exempt duties" that are characterized by the use of independent discretion and judgment on a regular basis. The CT-DOL offers an example: an ordinary bookkeeper may be described by an employer as one who determines credit policy when in fact, he or she merely deals with delinquent accounts in accordance with general guidelines by management. This kind of bookkeeper would not be considered exempt because he or she does not exercise discretion and judgment on a regular basis.

Problems with Misclassifications of Independent Contractors Too

Earlier this March, the U.S. DOL announced recovery of $219,390 in back wages and penalties for Boston-area restaurant employees who had worked at three different restaurants owned by the 1760 Society Inc. The principal wage law violation had been the improper classification of the employees as independent contractors. The Wage and Hour Division determined that the restaurants contracted with a staffing agency, to move many of their existing employees to the staffing ageny's payroll, resulting in the employees receiving less pay than the law requires.

The DOL sees the misclassification of employees as independent as an alarming trend. "The Wage and Hour Division wants to send a strong message that employers cannot evade their responsibility under the law by using staffing agencies or labor contractors," said Nancy J. Leppink, acting administrator of the Wage and Hour Division. "These business practices are not a legal way to reduce labor costs."

Article continued on next page

Article continued from prior page

More on DOL Recovery for Wage Violations

To ensure that all workers are properly classified, companies should perform an independent contractor audit. In Connecticut, employee-employer status is heavily favored and, to be a proper independent contractor, the relationship must meet the rigorous "ABC" test in addition to the general common law test.

Under Connecticut's ABC Test, to be an independent contractor the individual must:

A. Be free from the direction and control in the performance of the service, both under the contract of hire and in fact [this is akin to the general common law test]; AND
B. Perform the services either outside the usual course of the employer's business OR outside all of the employer's places of business; AND
C. Must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service being provided.

It is always better to address misclassifications before the DOL is knocking at the door requiring corrections and levying fines and penalties. In its determinations and penalty orders, the DOL responds positively to a showing by an employer that it made good faith attempts to correct classifications before the DOL ever appeared at its door.

If your company determines that some workers are not properly classified, you should consider with the help of employment law counsel whether to prospectively revise the classification or whether to adjust some tasks or nature of the service-relationship to improve the strength of the independent contractor status and diminish the likelihood of a challenge.

New H-1B Registration Requirements

With the start of H-1B application time around the corner, the U.S. Citizenship and Immigration Service (USCIS) posted a proposed rule which will establish an advance registration process for U.S. employers seeking to file H-1B petitions for foreign workers in the H-1B category. The H-IB Visa applies to "specialty occupations" requiring a bachelor's degree such as business specialties, architecture, engineering, mathematics, physical sciences, social sciences, biotechnology, medicine and health, education, law, accounting, etc.

In the past, without an advance registration process, employers had to exert considerable time and expense to prepare H-1B applications without knowing if a valid H-1B number was even available. There is a cap on the number of H-1B visas that will be issued each year. For individual's who have earned a Master's degree or higher from a U.S. university, the cap is 20,000. For those who do not qualify for that cap or once that cap is reached, there is a default 65,000 cap.

Companies prepare the H-1B package and mail it off on April 1, with hopes to receive a valid number for the next fiscal year beginning on October 1. In most recent years, the applications have far exceeded the award cap. So, the USCIS completed the application process using a random lottery and notifying lucky employers accordingly. Unlucky applications meant the employer exerted time, effort, and planning without any return on the investment.

The proposed electronic advance registry is projected to save U.S. business more than $23 million over the next 10 years by reducing the need for employers to submit petitions for which visas would not be available under the statutory visa cap. Under the proposed rule, employers seeking to petition for H-1B workers subject to the cap would register electronically with USCIS. This process would take an estimated 30 minutes to complete. Before the petition filing period begins, USCIS would select the number of registrations predicted to exhaust all available cap visas. Employers would then file petitions only for the selected registrations.

Article continued on next page

Article continued from Page 2

More on Third Party Retaliation Ruling Out of U.S. Supreme Court

So who is entitled to protection? What about an employee's girlfriend, close friend, or a trusted co-worker? The Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful – except to say that firing a close family member will almost always meet the standard as a potential illegal third-party reprisal, however "inflicting a milder reprisal on a mere acquaintance will almost never…"

Title VII allows a "person aggrieved" to file a civil action. In defining "person aggrieved," the Court relied on a "zone of interests" test, permitting a person to sue if he or she falls within the "zone of interests" sought to be protected by the statutory provision on which his claim is based – in this case Title VII.

The justices found that, if the facts are as alleged, Mr. Thompson "is not an accidental victim of the retaliation." Rather, injuring Mr. Thompson "was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In these circumstances, we think Thompson is well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue." The case was remanded to the lower courts for proceedings on whether Mr. Thompson's termination was actually due to retaliation. To read the decision: http://www.supremecourt.gov/opinions/10pdf/09-291.pdf

What does this mean for employers?

The FMLA makes it unlawful for any employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" any right under the FMLA, or to "discharge or in any other manner discriminate against any individual for opposing" any violation of the FMLA. In light of this language, it seems likely that employees' attorneys and the U.S. Department of Labor (DOL) will seek to apply the Court's logic in Thompson to third-party retaliation claims under the FMLA.

Employers should keep this in mind when making employment decisions. Employers should be accustomed to considering whether the employee the company wants to terminate is a member of a protected class or has recently engaged in a protected activity.

Employers need to also ask: Is the employee the company wants to terminate married to, dating, or close friends with an employee who recently filed a discrimination claim, wage claim, filed an OSHA complaint, or took FMLA leave, etc.? If so, the employer should use extra caution. It won't necessarily mean the company can't terminate the employee, just that the company needs to make sure it has, and more importantly can prove, a legitimate, nondiscriminatory reason for the termination.

Article continued from prior page

More on New H-1B Registration

The new registration process is projected to go live on October 1, 2012, to accept petitions for the 2013 Fiscal Year – until then employers are left to mail in petitions and hope the USCIS lottery tilts in their favor. Electronic registration will not increase the statutory caps on H-1B workers or increase the likelihood of an award, but it will curtail unnecessary effort, costs, and frustrations for employers. For more information on H-1B registrations, go to: http://www.uscis.gov/portal/site/uscis