



# EMPLOYER NEWSLETTER ~ MAY 2010

## IRS Releases First Round of Health Care Reform Guidance



On April 28, 2010, the Internal Revenue Service (IRS) issued the first installment of what is expected to be an avalanche of guidance on the new health care reform law. The guidance confirms that an employer-sponsored health plan may provide coverage free from federal income tax to an employee's children up to age 27.

This exclusion applies regardless of whether the child is married and regardless of whether the child is regarded as a "dependent" under the Internal Revenue Code.

The gross income exclusion is subject to certain caveats, including the following:

- ⇒ The exclusion is effective for health coverage provided on or after March 30, 2010. Before March 30, 2010, coverage for the child will be excludable only if the child qualifies as a tax-code dependent.
- ⇒ The exclusion ceases to apply in the year in which the child turns 27. Thus, if a child will turn 27 on December 15, 2011, the exclusion applies to health coverage provided from March 30, 2010 through December 31, 2010.

Corresponding changes will be made to other regulatory requirements, including rules governing voluntary employees' beneficiary association (VEBAS), employment taxes under FICA and FUTA, and cafeteria plans.

For example, midyear changes will be permitted under a cafeteria plan

when an employee's 25 year old child no longer qualifies as the employee's dependent for federal income tax purposes.

On January 1, 2011, most calendar year health plans will need to comply with the new health care reform mandate to extend coverage to adult children **up to age 26**. Certain insurers have announced that they are preparing to implement this change earlier than required for certain adult dependents. A special transition rule allows an employee to contribute toward the cost of coverage for an adult child on a pretax basis under a cafeteria plan this year as long as the cafeteria plan is retroactively amended by December 31, 2010, (if an amendment is needed to encompass adult dependents). Although various questions still need to be answered about the new requirement to cover adult children, the change in tax rules does much to pave the way for the timely (and early) implementation of the mandate.



### Health Insurers Adopt Some New Rules Early

The Washington Post

Spokesmen for some insurance companies said they did not know details of how their coverage for young adults will work, including whether it will involve extra premiums and whether the dependents' medical status will affect premium costs.

The White House posted a list of dozens of insurers that will offer the early coverage, including WellPoint, Cigna, Aetna, United HealthCare, Humana, and BlueCross and BlueShield plans. The offer could spare insurers the headaches of dropping people this spring only to restore them a few months later. The fact that young people tend to be healthier could mitigate costs.

### KY Awarded Nearly \$10 Million for Health IT

KY was awarded nearly \$10 million in stimulus funds to develop health information technology initiatives, moving the state closer to the goal of building a statewide health information exchange, according to Governor Steve Beshear's office.

The exchange is currently under development by the State Cabinet for Health & Family Services and will be piloted by six hospitals and one clinic.

The funding for KY is part of nearly \$1 billion in American Recovery and Reinvestment Act funds largely aimed at Health IT throughout the U.S., and is in addition to \$2.6 million in stimulus dollars recently awarded to KY for health IT planning efforts related to Medicaid providers. "President Obama's administration is calling for universal adoption of electronic health records by 2014, and we believe Kentucky is poised to be a leader in this effort, said Cabinet for Health & Family Services Secretary, Jane Miller.

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## Researchers: Stolen Identities Often Slip Through E-Verify

Unauthorized workers using others' identities often are cleared to work by E-Verify, the federal government's electronic employment verification system, according to an independent evaluation.

During a two-month period in 2008, nearly 94 percent of the workers whose employment verifications were run through E-Verify were identified correctly as eligible for employment in the United States. The study found that the remaining 6 percent did not have proper work authorization, yet more than half of those were still granted work authorization through the system.

Research group Westat Inc. evaluated E-Verify for the U.S. Department of Homeland Security. The results were published on the U.S. Citizenship and Immigration Services' (USCIS) web site.

E-Verify cleared nearly 54 percent of the non-eligible workers by concluding incorrectly that they had proper work authorization. The report found that the unauthorized workers passed the E-Verify checks because they had used fraudulent or stolen identities.

The focus needs to be on reducing the rate of unauthorized aliens being granted work authorization, said Michael Aitken, director of government affairs for the Society for Human Resource Management and chair of the HR Initiative, a coalition of business and employment-related groups. Then USCIS officials can get a better picture of how identity fraud and theft is being used to beat the system, he added.

The report concluded that improving the system's ability to detect identity fraud should be a top priority. "While it's not perfect, it is important to note that E-Verify is much more effective than the **Form I-9** verification process used by employers not using E-Verify," the researchers stated. "E-Verify also deters many unauthorized workers from even applying for jobs with participating employers."

## New Drug Testing Cutoff Levels Effective May 1, 2010

On May 1, 2010 revisions to the U.S. Department of Health and Human Services' (HHS) *Mandatory Guidelines for Federal Workplace Drug Testing Programs* took effect, including reduced cutoff levels for amphetamine and cocaine. Although the *Guidelines* apply to federal employer drug testing, many private sector employers opt to follow the *Guidelines'* procedures for how testing is conducted and for the cutoff levels. The revised *Guidelines* also change other administrative aspects of the procedures.

Specifically, with respect to amphetamines, the initial test cutoff has been lowered to 500 ng/ml, and the confirmatory test cutoff has been lowered to 250 ng/ml. The confirmatory test cutoff for methamphetamines also is 250 ng/ml. The requirement for amphetamine presence to report methamphetamines has been lowered to 100 ng/ml. With respect to cocaine, the initial test cutoff has been lowered to 150 ng/ml, and the confirmatory test cutoff has been lowered to 100 ng/ml. Moreover, the *Guidelines* now allow for testing for MDMA (Ecstasy) and provide for an initial test cutoff of 500 ng/ml and a confirmatory test cut-off of 250 ng/ml.

With these changes having just taken effect, now is the time for employers with substance abuse programs modeled on the HHS *Guidelines* to review and update their programs.

## U.S. Department of Labor's OSHA Takes Action to Protect America's Workers

Every day, about 14 Americans fail to come home from work to their families. Tens of thousands die from workplace disease and more than 4.6 million workers are seriously injured on the job annually. The U.S. Dept. of Labor's OSHA, in an effort to address urgent safety and health problems facing Americans in the workplace, is implementing a new Severe Violator Enforcement Program and increasing civil penalty amounts.

"For many employers, investing in job safety happens only when they have adequate incentives to comply with OSHA's requirements," said Assistant Secretary of Labor for OSHA Dr. David Michaels. "Higher penalties and more aggressive, targeted enforcement will provide a great deterrent and further encourage these employers to furnish safe and healthy workplaces for their employees."

The new Severe Violator Enforcement Program is intended to focus OSHA enforcement resources on recalcitrant employers who endanger workers by demonstrating indifference to their responsibilities under the law. This supplemental enforcement tool includes increased OSHA inspections in these worksites, including mandatory OSHA follow-up inspections, and inspections of other worksites of the same employer where similar hazards and deficiencies may be present. SVEP will become effective within the next 45 days.

The current maximum penalty for a serious violation, one capable of causing death or serious physical harm, is only \$7,000 and the maximum penalty for a willful violation is \$70,000. The average penalty for a serious violation will increase from \$1,000 to an average \$3,000 to \$4,000. Monetary penalties for various violations of the OSH Act have been increased only once in 40 years despite inflation. The Protecting America's Workers Act would raise these penalties, for the first time since 1990, to \$12,000 to \$250,000, respectively. Future penalty increases would also be tied to inflation. In the meantime, OSHA will focus on outreach in preparation of implementing this new penalty policy. For more information on the penalty policy visit:

<http://www.osha.gov/dep/change-memo.pdf>

## Whistle-Blower Protections Tucked into Health Reform Law

As employers sort through the impact of health care reform on their business, many might be surprised to find tucked into the law a new set of whistle-blower protections for employees.

"The whistle-blower provisions are starting to grab the attention of employers, and I have had several clients inquire about them," said Daniel Sulton, a partner in the Spartanburg, S.C., law office of Ford & Harrison. "It's definitely an aspect of the reform law that many employers don't seem to be aware of—yet."

Sulton said that the exact impact of the whistle-blower protections won't be known until the U.S. Department of Labor issues a set of regulations on how it will enforce the provision. However, he said that new protections have the potential to generate a waive of complaints and litigation filed against employers.

"Anytime a law includes attorney fees as part of the available remedies, then there will be a number of plaintiff attorneys who will look for ways to file claims and try out the new remedies," Sulton said. "It's impossible to predict exactly what effect these changes might have, but the potential for an increased number of lawsuits is certainly there."

The whistle-blower provision of Section 1558 of the Patient Protection and Affordable Care Act amends the Fair Labor Standards Act to prohibit employers from retaliating against employees who apply for health benefit subsidies or receive tax credits under the health reform law. In addition, the law offers protections to employees who provide information or testimony about possible employer violations of

Title I of the law. Title I establishes the new requirements for businesses and individuals when purchasing health care insurance.

### "More Robust" Protections

The whistle-blower protections in the reform law are "more robust" than protections offered in laws such as the Sarbanes-Oxley Act, according to Jason Zuckerman, a principal with the Employment Law Group in Washington, D.C. The health care law's whistle-blower provision is stronger because it offers employees "an explicit right" to a jury trial, explains Zuckerman, a plaintiff attorney who specializes in whistle-blower cases.

Under the law, workers must file complaints with the U.S. Occupational Safety and Health Administration (OSHA) within 180 days of becoming aware of any retaliatory actions by their employers. OSHA will investigate the claims and can order preliminary relief, such as reinstatement of an employee. However, if OSHA fails to resolve a complaint within 210 days or if the Labor Department fails to act within 90 days of receiving a written determination from OSHA about possible violations, then the worker who filed the claim can seek relief through a federal court and request a jury trial.

The remedies available, according to the law, include reinstatement, back pay with interest, special damages, attorney's fees, litigation costs and expert witness fees.

According to court rulings and other whistle-blower statutes, "special damages" can include compensation for pain, suffering, mental anguish and career damage.

The law extends protections to employees who object to or refuse to participate in any practices or employer policies that they believe might violate the statute. According to Sulton, this provision might be open to broad interpretation, which could create problems for employers.

"It will depend on how the regulations define exactly what practices and policies will violate the law," Sulton said.

According to Sulton, one of the issues that the regulations will need to address is how employers and health care plans handle workers and plan participants who might qualify for high-risk insurance pools that states will establish under the law.

"The way the law is written, it's possible an employer could be in violation, if it even suggests that employees apply for the high-risk insurance pool," Sulton said. "There are a lot of questions that will need to be answered, and employers should be aware of the impact these new whistle-blower protections could have."

Source: Bill Leonard, SHRM

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or call us at 1.866.215.2414



## LEGAL CORNER

### 6th Circuit: Five-Week Employee Wins \$1.2 Million on Co-Worker Harassment Claim

An employer failed to take the necessary steps for appropriate corrective action in response to a complaint of co-worker harassment and indicated an attitude of permissiveness that amounted to discrimination, according to the 6th U.S. Circuit Court of Appeals.

Amanda West claimed she was sexually harassed and constructively discharged in violation of Title VII of the Civil Rights Act and the **Kentucky** Civil Rights Act.

Upon hiring West, Tyson Foods, Inc. informed her that company policy required any employee who suffered harassment to report it to the employee's supervisor and any employee aware of harassment to report it to management. The policy stated that complaints would be investigated within two weeks.

In her third-week of employment, West told her trainer and her supervisor about sexual comments, stares and wolf-whistles as well as offensive touching and lewd gestures toward her by co-workers, whom she identified. The supervisor responded that she should not take offense— "that's just how they treat their women over there" - and said she was "hot." He then said he would look into it, asked her not to go to Human Resources and offered to move her to a different production line. She agreed. The only other action the supervisor took was to "observe her for a few days."

Two weeks passed while the harassment continued. After she was followed to her car one night, West decided not to return to work. During her exit interview, she told a Human Resources Manager about the harassment and the complaint she had made. The manager said he would investigate, but did not. West filed a charge with the Equal Employment Opportunity Commission (EEOC), followed by her lawsuit.

Tyson did not conduct an investigation until after it received West's EEOC charge. The company's investigator did not interview a named harasser, a co-worker in whom West had confided or the person who conducted the exit interview. She sent the written statements she did collect to the company's equal employment opportunity specialist, and the company did nothing further except to respond to the EEOC charge.

At trial, a jury found for West, and the trial court entered judgment for approximately **\$1.2 million**, including punitive damages. On appeal, the 6th Circuit affirmed.

When an employer knows or should know of co-worker harassment, it must respond promptly and in a manner reasonably calculated to end the harassment, which will vary with the severity and persistence of the alleged harassment. The 6th Circuit found that Tyson failed to take steps necessary to establish a

base level of reasonably appropriate action: speaking with the individuals identified by West, following up with her as to whether the harassment was continuing and reporting the harassment to management. Instead, the supervisor justified and perpetuated the harassment. Moving West to a different place and watching her for a few days was "woefully insufficient," especially in light of the request she not report the matter to human resources. The supervisor and trainer had received harassment training, but neither reported the complaint to management. Tyson completely failed to follow through on the exit interview complaints. The charge investigation was deficient. No employee was disciplined for failing to follow the policy.

Tyson argued that West should have reported further harassment or complained to another manager. The court found that West had followed the policy and that the company's alleged ignorance of ongoing harassment could be attributed to its inappropriate response to the complaint.

Tyson also objected to the admission of post-termination investigation evidence. The court found it relevant to show Tyson's reckless indifference to West's federally protected rights to support the award of punitive damages.