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EEOC Issues Proposed Rule on Employer-Sponsored Wellness Programs
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Planning Ahead for the Cadillac Plan Tax
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Coordinating FMLA, ADA and Workers’ Compensation
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(Expected Release Dates – mid-July)

Supreme Court Ruling on PPACA Exchange Subsidies

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Important Reminder!

Upcoming Deadlines
Arthur J. Gallagher & Co.
How PPACA has Already Affected Employers

The Patient Protection and Affordable Care Act (PPACA) might have all sorts of big, complicated effects on employers in the future — and it's already having effects on employers today.

Analysts at the International Foundation of Employee Benefit Plans (IFEBP) recently put their crystal ball aside long enough to look at what PPACA has done to employers and their benefits' programs so far.

The benefits group based the results on a survey of the people in its own database and the database of an affiliate, the International Society of Certified Employee Benefit Specialists (ISCEBS). The people in that database tend to work for larger employers with a high level of interest in their benefits programs.

But about 10 percent of the 598 benefits specialists who responded were at employers with 50 or fewer employees, and another 24 percent were at employers with 51 to 499 employees.

1. **About 29 percent of the participants said they know how much PPACA is affecting their employers' costs this year.**

   Some participants said PPACA is affecting their employers' health benefits costs. One said PPACA will *reduce* costs 30 percent this year.

   Half of the participants said PPACA is increasing costs less than 3 percent this year, and half said the law is increasing costs more than 3 percent.

2. **For some, paying for the preventive care and wellness programs associated with PPACA is a headache.**

   About 21 percent of the employers listed adding PPACA-related wellness benefits, running existing PPACA-related wellness programs, or offering the basic PPACA preventive services package "for free" as one of the top three PPACA-related cost drivers.

3. **Those PPACA fees, assessments, penalties and other extractions of cash can add up.**

   When listing the top three PPACA-related cost drivers, 18 percent of the participants named the new health insurance provider fee as a top driver, and 33 percent named the Patient-Centered Outcomes Research Institute (PCORI) treatment effectiveness research fee.

4. **Reporting on what's going on, and communicating about it, costs a fortune.**

   About 17 percent of the participants said explaining PPACA to benefit plan participants and potential participants has been a major health benefits cost driver.

   Thirty-eight percent said higher spending on complying with the new PPACA reporting, disclosure and notification requirements has been a big driver.
5. **Employers have accelerated the process of giving employees skin in the game.**

About 41 percent of the survey participants said their employers have responded to PPACA by increasing plan enrollees' out-of-pocket spending limits, up from 14 percent in 2013, and 37 percent said their employers have increased in-network deductibles, up from 15 percent.

Only 10 percent said they have increased voluntary, employee-paid benefits options as a result of PPACA.

For years, some benefits experts have talked about employers adopting "defined contribution health plans," or giving employees a fixed amount of cash that the employees can use to buy their own health coverage. One mechanism for making that transition is to have employees buy their coverage through a private exchange — a multi-carrier enrollment website.

Only 3 percent of the survey participants said their employers now provide coverage for full-time employees through a private exchange, but 12 percent said their employers are considering the private exchange option.

The percentage of employers interested in the private exchange strategy may look low, but, at this point, only 8.9 percent of the employers have a majority of their employees in health maintenance organization (HMO) plans.

The survey responses suggest that private exchange program organizers may soon have a shot at offering the third most popular health benefits strategy, after health account-based programs, which are the dominant programs at 27 percent of the survey participants' employers, and preferred provider organization (PPO) plans, which are the dominant programs at about 52 percent of the participants' employers.

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**Spiraling Prescription costs may leave families stuck with “Cadillac plans” by 2018**

*Spencer’s Benefits*

According to projections by actuarial services firm Milliman, a typical American family of four covered by an employer-sponsored preferred provider organization (PPO) health plan is likely to incur health care costs surpassing $25,000 by 2016. Costs for this typical family of four have nearly tripled since 2001.

Milliman calculates these figures according to the Milliman Medical Index (MMI), which is its analysis of the projected total cost of health care for a hypothetical family of four with an employer PPO, and it includes all total health care benefits in its calculations, including employers’ costs and premiums. These rising costs may make it more likely that the Cadillac tax threshold will be reached by 2018. The tax applies to individual health plans worth more than $10,200 and family plans worth more than $27,500.

Milliman estimates that the Cadillac tax amount is more likely to be reached if the plan is provided by a smaller employer and if trends exceed recent levels. For example, the health care cost growth rate is up in 2015, after last year’s 5.4 percent growth rate was the lowest in the history of the MMI, to 6.4 percent. Employer size typically affects the portion of premium attributable to loads for administrative expenses and health plan profits, and larger employers tend to command lower loads, Milliman explains.

Milliman cautions that, once the Cadillac tax threshold is exceeded, the tax amount will grow every year. This is because health care expense trends will likely exceed the Consumer Price Index (CPI) that will be used to adjust the threshold to years beyond 2018.
Costs can be traced to prescriptions. The rise in costs so far is largely due, says Milliman, to increases in prescription drug costs. From 2014 to 2015, pharmaceutical costs spiked, growing by 13.6 percent, whereas growth over the previous five years averaged only 6.8 percent.

Milliman attributes the 2014/2015 numbers largely to the introduction of new specialty drugs, price increases in both brand and generic name drugs, and increases in the use of compound medicines. Prescription drug costs, it says, now comprise 15.9 percent of total health care spending for the above family of four. Such costs only made up 13.2 percent of health care spending in 2001.

For more information, visit http://us.milliman.com/uploadedFiles/insight/Periodicals/mmi/2015-MMI.pdf.

Rising Cost of Specialty Drugs Concerns Employers

Rising drug costs have always been a concern to employers, but one major driver of health care costs might be drug spending that’s not even part of your pharmacy benefit.

Specialty drugs have emerged as a significant concern for employer-sponsored health plans, because these costs are often hidden in medical claims, rather than pharmaceutical billing, and because they often are extremely expensive. Specialty drugs that treat multiple sclerosis, cancer, or heart disease can range in cost from $50,000 to more than $100,000 a year. And because they are often administered in clinics or hospitals, they fall under medical benefit claims 47 percent of the time, according to data in a brief by Health Affairs.

The high cost of specialty drugs has drawn notice from President Obama, who has suggested allowing Medicare to negotiate prices for such drugs, and the editorial page of the New York Times. In a separate article, the Times noted that Medicare beneficiaries and government programs account for 25 to 33 percent of spending on specialty drugs. “The rising cost of specialty drugs has the potential to bankrupt our health care system,” said John Bennett, M.D., of the Capital District Physicians’ Health Plan, in the article. “What good is a miracle drug if you can’t afford it?”

A hidden cost for employers

If approximately 30 percent of specialty drugs costs are paid for by government payers, the private health insurance system is picking up the other 70 percent. And employer-sponsored plans are often not able to get a clear picture of what those costs are, due to the complexities of billing for such drugs.

One group of employers trying to get a better picture is the Minnesota Health Action Group, a coalition of payers that includes 3M, Best Buy, Target, Wells Fargo Bank, and government groups such as the City of Minneapolis and the Minnesota Department of Human Services.

An Action Group committee has been studying the issue of specialty drug costs for more than six months, and the group plans to continue to devote resources to working on solutions for the problem. “Specialty pharmacy is probably the No. 1 issue on employers’ radar right now,” said Carolyn Pare, president and CEO of the group. “The costs are absolutely crazy and completely unsustainable.”
Pare said the group’s Specialty Pharmacy Learning Network is working with employers, policymakers, and health industry groups to get a handle on the high costs of specialty drug pricing.

**A call for transparency**

One of the experts the Action Group is working with is Stephen Schondelmeyer, Pharm.D., Ph.D, director of the PRIME Institute at the University of Minnesota. Schondelmeyer said that many employers have no idea of how much specialty drugs are costing them. “This is a drug spend they don’t even realize they have,” he said. “And that’s where the growth of these new products is and new utilization is expected.”

Schondelmeyer is working with Minnesota employers and providers to identify the codes for specialty drug payments and get a better understanding of what is being spent on specialty drugs on the medical benefit side.

He says eventually health plans should require providers to provide the specific code of each drug used in a clinical setting. “The way it’s recorded now, an employer can’t tell whose product was used, how much was paid, and how much it costs in the system elsewhere,” he said. He added that under the current system, drug manufacturers will not even let providers share information on discounts or rebates they receive for using certain drugs.

Schondelmeyer said that when prices are difficult or impossible to quantify, and consumers don’t have alternatives, marketplace principles don’t work. “If my doctor has written a prescription for my cancer drug, I don’t have any choice,” he noted. “That’s not a market setting the prices. We’ve got to find ways to make this work more like a market, including price transparency.”

**A political solution?**

Both Schondelmeyer and officials with the Action Group said it might be necessary to turn to legislators to bring price information to the public. Linda Davis, a health care consultant who works with MNHAG, said recent surveys have found that drug prices are the second-highest concern for consumers when it comes to health care issues. “It’s not only a concern of employers, consumers are worried about it as well,” Davis said. “I think that’s really increasing the possibility of legislative action.”

Schondelmeyer said business owners understand that the question is a practical one. “We don’t have unlimited resources. Congress faces that every day. Employers face that every day when they try to pay for the health benefits of their employees. The goal isn’t to cut benefits; the goal is pay a reasonable price for their benefits so they can continue to provide other benefits.”

The Times editorial noted that several states are considering bills that require drug makers to report profits and expenses for costly drugs or sometimes for all drugs. “Such disclosures might shame companies into restraining their price increases and provide state officials with information to determine what action to take.”

The practice of “naming and shaming” is also something employers are considering. Schondelmeyer said. “We’ll report the extremely high prices they’re charging and ask them to justify it publicly,” he said. He noted that he preferred to work with providers and insurers to find a more collaborative approach to transparency.

According to Schondelmeyer, the next step for employers is to continue to push for price transparency of specialty drugs, while adopting coverage and benefit policies that encourage appropriate use of the drugs.

He also warns employers that pharmacy benefit administrators might have a conflict of interest when it comes to specialty pharmacy pricing. “Don’t rely upon benefit administrators who are also selling and managing a product,” he said. “You need someone analyzing your data who doesn’t make any money from selling the
Anthem, Inc., an insurer and service provider for many employer sponsored health plans, recently discovered a cyberattack that compromised the personal health plan data of millions of current and former participants in Anthem’s affiliated health plans, as well as many independent Blue Cross and Blue Shield (BCBS) plans for which Anthem processed claims through the “BlueCard” program. Anthem’s investigation to date indicates names, dates of birth, ID numbers, Social Security numbers, home addresses, phone numbers, email addresses, and employment information were accessed. Due to the massive scope of this breach and the relationships between Anthem and other health plans that are not labeled Anthem or BCBS, employers should not assume that their health plans were unaffected if they are not directly contracting with Anthem or BCBS.

As discussed later, an employer should:

1. Determine if the Anthem breach affects any of its employees and ensure that all obligations under federal and state law are being met,

2. Take other steps to control Health Insurance Portability and Accountability Act (HIPAA)-related risks affecting its health plan, and

3. Understand the ERISA fiduciary duties associated with such compliance efforts.

Even if your plan was not impacted by the Anthem breach, the following compliance pointers should still be considered now because your plan may not be as fortunate next time—and there will likely be a next time.

ANTHEM-BREACH ACTION ITEMS

If an employer has not done so already, it should contact the insurer or third-party administrator of its health plan and ask whether any of the participants or former participants in its health plan were affected by the Anthem breach. If so, the employer should:

- Alert affected employees that calls or emails purporting to be from Anthem are scams. Anthem has stated that affected individuals will receive information from Anthem via mail.

- Direct affected employees to Anthem’s toll free hotline and Web site1 for answers to frequently asked questions, as well as for information regarding credit monitoring and identity theft protection services provided by Anthem.

- Contact legal counsel to determine what notifications are required under state or federal law. Fully insured plans: Receive written confirmation from the insurer that it will comply with any breach notification requirements under HIPAA.

    Fully insured plans: Request evidence from the insurer that all required notifications were properly made. The employer’s group health plan (that is, as an entity separate from the
insurance policy) also is a “covered entity” subject to the HIPAA breach notification requirements, which means the plan could be liable if notifications were not made by the insurer.

Self-funded plans: Review HIPAA business associate agreements (BAAs) to determine if the plan has delegated breach notification responsibility to the third-party administrator. There have been reports that the U.S. Department of Health and Human Services (HHS) wants Anthem to handle the breach notification requirements under HIPAA. If that is the case, affected employers would be well-advised to contact their third-party administrators if they have not delegated breach notification responsibilities to another party under their BAAs.

Fully insured or self-funded plans: Evaluate whether any notifications are required under applicable state laws, if these notifications can or will be made by the insurer or third-party administrator, and document satisfaction of such requirements.

- Employers also should document the incident in accordance with the requirements of their own HIPAA breach policies and procedures.

The cyber-attack on Anthem may have resulted in a breach under HIPAA that requires notification to HHS, as well as notification to affected individuals and the media.

**ENFORCEMENT ACTIONS**

The cyber-attack on Anthem may have resulted in a breach under HIPAA that requires notification to HHS, as well as notification to affected individuals and the media. HHS must be notified within 60 days of any breach of unsecured protected health information (PHI) that affects 500 or more individuals in a state or jurisdiction, and annually of breaches affecting fewer individuals. Employers should be aware that HHS notifications of breaches affecting at least 500 individuals are public and could gain media attention. In addition, such notifications may trigger an investigation by HHS into the covered entity’s compliance with HIPAA’s security and privacy rules. HHS investigations also may be triggered by an employee complaint to HHS.

If HHS finds during its investigation that the covered entity was compliant with HIPAA, the breach was an isolated incident, and appropriate measures are in place to prevent a similar breach in the future, then HHS may close the case without requiring a resolution agreement or settlement payment.

If the covered entity’s current HIPAA compliance efforts are found lacking, however, HHS may require a resolution agreement to resolve the violations. To date, HHS has entered into more than 20 resolution agreements with covered entities. These resolution agreements are public and may require covered entities to pay a resolution amount, perform certain obligations (for example, training), and make periodic reports to HHS, generally for a period of three years. HHS entered into a resolution agreement with Affinity Health Plan, Inc., for instance, that included payment of $1,215,780 to HHS. Affinity impermissibly disclosed PHI when it returned copy machines to a leasing company without erasing the data contained on the copiers’ hard drives. Affinity also failed to include the leased copy machines in its HIPAA security risk assessment.

A $1 million settlement is not extraordinary. The final HIPAA omnibus regulations include the Health Information Technology for Economic and Clinical Health (better known as HITECH) Act’s tougher penalties for violations of HIPAA, which range from $100 to $50,000 per violation (that is, per affected individual) depending on whether the person knew (or by exercising reasonable care should have known) that he or she was
violating HIPAA, or acted with willful neglect. The maximum penalty for identical violations in a calendar year is $1.5 million. If more than one HIPAA requirement was violated, penalties could surpass $1.5 million. HHS may share information found during its investigations and compliance reviews with other law enforcement agencies.

In addition to investigations initiated by breach notifications or complaints by individuals, HHS also conducts random audits of covered entities, including employer plans. HHS conducted a pilot audit program in 2012 and is expected to conduct a second round of audits in 2015.

**CONTROLLING RISK UNDER HIPAA**

There are a number of steps that employers can take to reduce the likelihood that they will be the subject of a data breach or face penalties during a government audit or investigation. The time and expense to fully resolve a breach under applicable state and federal rules, not to mention any resultant damaging publicity, could be enormous. These action steps include the following:

- Ensure that the policies and procedures required under HIPAA privacy and security rules are compliant and up-to-date. For example, have such documents been revised for changes made by the final omnibus HIPAA regulations?

- Verify that the Notice of Privacy Practices is up to date, accurately reflects how the health plan uses and discloses PHI, and is being distributed in the time and manner required by HIPAA.

- Review current BAAs to ensure that they (1) have been revised for the final omnibus HIPAA regulations, (2) include adequate indemnification provisions (or that these are included in the related services agreement), and (3) accurately reflect the employer’s intentions with respect to the delegation of breach notification responsibilities. BAAs are not boilerplate documents. They need to be carefully reviewed and negotiated like any other important contract, such as a services agreement with a third-party plan administrator.

- Train all members of the workforce who may have access to PHI on its proper handling, as well as the other HIPAA security and privacy requirements that are relevant to the employee’s position.

- Perform a security risk assessment to determine where there may be a risk of an impermissible use or disclosure of PHI. The federal government has provided a downloadable security risk assessment tool that can be used to perform this risk assessment. ² The risk assessment should include coordination with the employer’s IT department to evaluate compliance with HIPAA’s security rules for electronic PHI.

- Ensure that adequate insurance coverage is in effect to cover losses resulting from cyberattacks and HIPAA violations. Cyber-security policies are increasingly common components of employers’ risk control programs.

**RELATED ERISA FIDUCIARY OBLIGATIONS**

Each employer-sponsored, group health plan that is subject to ERISA must have one or more responsible fiduciaries who are required by ERISA to act in the best interest of the plan’s participants. The plan’s fiduciaries also must ensure that the plan’s terms are being followed and comply with all applicable laws and regulations. Furthermore, the responsible plan fiduciary must ensure compliance with both governmental and participant reporting and disclosure requirements. Plan fiduciaries may include the employer, as well as the plan’s committee, claims administrator, and its HIPAA privacy and security officers. Under ERISA, fiduciary status is a functional test based on the person’s authority or control over the plan or its assets.
Group health plan fiduciaries have a responsibility to act prudently to prevent PHI from being impermissibly disclosed or compromised. In the event of a breach, the responsible plan fiduciary must stay informed and keep participants informed. In that regard, the fiduciary should recognize that all correspondence to plan participants may likely be fiduciary communications under ERISA. The responsible plan fiduciary should advocate for participants and work to minimize any harm to them and the plan itself that may result from a breach. The fiduciary also must keep a record of actions it takes to investigate and remedy the breach.

The U.S. Department of Labor enforces ERISA and may bring an action against a fiduciary who allegedly breaches a fiduciary duty to the plan. Plan participants also may sue a plan fiduciary for a fiduciary breach. In either case, a fiduciary who fails to take timely action to prevent a breach, or to minimize harm to the plan and its participants resulting from a breach, may be exposed to personal liability under ERISA.

An employer should ensure that plan fiduciaries are properly trained and understand their responsibilities under ERISA. The employer may indemnify the plan’s fiduciaries, and ERISA fiduciary liability and errors-and-omissions insurance coverage may be obtained to protect the plan and its fiduciaries from damages and expenses.

**CONCLUSION**

Hackers are out there, and mistakes happen. Real penalties are being assessed. Employers should prepare now to reduce the risk of impermissible uses and disclosures of PHI, as well as to establish policies to mitigate damages if a breach does occur.

**NOTES**


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**Court States that Solely Posting SPD on Employer’s Intranet is not Sufficient to Satisfy ERISA Requirements**

*Arthur J. Gallagher & Co.*

In *Thomas v. Cigna Group Insurance*, the Court issued an order finding that simply posting a Summary Plan Description (“SPD”) on the employer’s intranet is not sufficient to satisfy ERISA’s requirement that the plan administrator furnish participants with an SPD. The Court Memorandum and Order (“M&O”) included a lengthy discussion of ERISA’s SPD electronic furnishing requirement. Although the Department of Labor (“DOL”) regulations permit plan administrators to provide important documents, such as SPDs electronically, there are specific requirements that apply. Plan administrators should follow the DOL’s rules carefully to avoid problems – such as the litigation that happened in this case.
Background

An employer provided benefits to employees including group term life insurance. An employee was hired in 2002 and was eligible to enroll for benefits. She received an employment confirmation letter containing the following language:

“…offers employees and their dependents a comprehensive benefits package that includes medical, dental, vision, short-term & long-term disability and life insurance subject to benefits eligibility and election. Additional information about these programs is located in the Benefits Bookstore found online in the HR Café on your work computer.”

The group term life insurance contract was apparently modified in 2003, and a new SPD was created with an effective date of January 1, 2004. Based on the M&O, the Court was not provided with any evidence that that a 2004 SPD or prior SPD plus a Summary of Material Modification “(SMM”) was provided to the employee.

The life insurance contract provided that coverage under the contract would end when an employee’s active service ended. However, an employee who became disabled and satisfied the requirements of a waiver of premium provision in the contract could have life insurance coverage continued during disability without payment of premium.

The employee became disabled in October 2004 and did not return to work; she passed away in May 2008. The beneficiary submitted a claim for life insurance and received a denial letter. The claim was denied based on termination of the employee’s coverage when her active service ended in October 2004 and her failure to submit a claim for premium waiver. The beneficiary contended that the employee had never been furnished an SPD and was not aware of the requirement to submit a premium waiver claim. The (alleged) failure to furnish the SPD to the participant is a key issue in the Court’s order.

The Court’s Observations on ERISA’s Requirement and DOL Regulations

Due to the importance of the furnishing of the SPD to the employee in this case, more than half of the pages in the Court’s M&O discuss ERISA’s requirement that the plan administrator furnish participants with SPDs when first enrolled and SMMs when there are changes in the plan. The Court noted that among other things the SPD must inform participants with respect to eligibility for participation and benefits and circumstances that may result in disqualification, ineligibility, or denial or loss of benefits. The M&O begins with a summary of the DOL’s requirements regarding the furnishing of SPDs and SMMs and then reviews the DOL’s safe harbor for furnishing the SPD electronically. It focuses on the requirements as they apply to employees who have electronic access to the employer’s intranet as part of their regular job duties.

Two key requirements in the DOL regulations are: (1) the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt, and (2) a notice must be provided to each participant, beneficiary or other individual, in electronic or non-electronic form, when the document is furnished advising the individual of the significance of the document and of the right to request and obtain a paper copy. When the DOL published final regulations in 2002, it provided guidance as to the circumstances under which electronic disclosure adequately ensures actual receipt of the material by plan participants and includes a safe harbor for material provide on an employer’s website. First, the document must satisfy the same requirements as paper documents in terms of content. Second, the participant must be provided with a notice (electronically or in writing) indicating the significance of the contents. (Additional requirements – such as an affirmative consent requirement – apply if the recipient does not have worksite access to the employer’s computer system as part of their regular duties.)
The 2002 regulations also include a safe harbor for posting documents on the employer’s website for employee’s who have regular access as part of their jobs. In general, those requirements are:

- The information must be included under a separate section on the employer’s web site that is easily accessible from the employer’s home page with access restricted based on a password or PIN;
- Notice must be provided to the participant indicating where the material is located, the nature of the material, and the significance of the information;
- The material must remain on the web site for a reasonable period of time;
- The plan must take appropriate and necessary measures to ensure actual receipt of the material; and
- The site must contain instructions for obtaining a new PIN or password.

Click here for a copy of the DOL’s 2002 final regulations.

The Court noted that the requirement is that the SPD must be “furnished” to the participant, not simply made available. It quoted from another court decision which stated “Posting SPDs on the intranet without notice to the participant is tantamount to ‘plac[ing] copies of the material in a location frequented by participants,’…and ‘does not qualify as effective notification under ERISA’s guidelines...’” In other words, merely posting SPDs on an employer’s intranet would be similar to placing copies in a centrally located HR kiosk – something that the DOL regulations specifically said would not be compliant. This Court added: “Indeed, a finding that an administrator could furnish SPDs by placing them on the intranet without any notice whatsoever would render the DOL’s carefully crafted regulations entirely superfluous.”

Finally, the Court also commented that the SPD remains an employee’s primary source of information regarding employment benefits.

**Conclusion**

Although the government permits – and to some extent encourages – the use of electronic communication, there are strings attached. As this case illustrates, it is not sufficient to post SPDs (SMMs or other ERISA documents) on the employer’s intranet without taking additional steps to ensure that ERISA’s disclosure requirements are satisfied. Employers have been providing information electronically to employees for years and many have intranets where ERISA documents are housed. Maintaining documents on the employer’s intranet can provide employees with fast and easy access to valuable information and makes it easier for the plan administrator to make sure that the information available to employees is accurate and up-to-date. When a plan administrator sends paper documents and updates to employees it can never be sure that the employee has kept all of the information current. However, an employer that wants the advantages of electronic communications must be careful to follow the rules.

**Suggested Action Steps**

Employers that currently provide ERISA materials using electronic methods may want to take some time to review existing procedures to determine if their processes comply with the DOL requirements. Reviewing current procedures – and modifying, if needed – can go a long way toward avoiding this type of litigation.

In the M&O the Court notes that one member of the employer’s HR staff believed that the employee had not needed to file a claim for waiver of premium because she had already filed for, and was receiving, long-term disability benefits. The HR representative also stated that she was not even aware that a waiver of premium form existed. The court document does not provide details, but presumably the insurance company providing
LTD benefits also provided group term life insurance. As a general rule life insurance waiver of premium claims and process are different from LTD claims in several ways:

- Even if the life and LTD insurance are provided by the same insurance company, they are usually provided under separate contracts and are often handled by different departments within the insurance company. The individual reviewing the LTD claim may not be forwarding information to the department that handles life insurance. In any event, most life insurance contracts will require the employee to submit a separate waiver of premium claim using a waiver of premium claim form.

- The definition of disability (and resulting eligibility for benefits) is almost always different under life insurance and LTD contracts. Most LTD contracts consider an employee to be disabled if the employee is unable to perform the material duties of her own job (“own occupation” definition). After a specified time period such as two years, the LTD definition of disability typically changes from “own occupation” to any occupation for which the employee is qualified based on training or experience. The definition of disability under a waiver of premium provision is usually “total disability” and requires that the employee be unable to engage in any occupation for which she has the necessary training or experience. Employees who qualify as disabled for LTD may not qualify for waiver of premium.

- The time frames for filing disability and waiver of premium claims are usually different. LTD contracts typically pay monthly benefits after several months of disability – with six months being common. Life insurance contracts usually require total disability for a longer time period with nine to twelve months being common. As a result LTD claims may be submitted sooner than most premium waiver claims – e.g., the LTD claim may be filed after six months and the waiver of premium claim after twelve months.

Insurance claims need to be filed on the appropriate forms using the time frames and requirements specified in the insurance contract (and sent to the correct department.) Employers may want to review existing procedures to ensure that the HR staff understands the requirements in each of its insurance contracts and what process must be followed. Reviewing and updating procedures for furnishing SPDs and other ERISA documents can help an employer to avoid problems at a later date.

Note: In a similar vein, if the life insurance carrier also provides major medical insurance or pays medical claims as a TPA, the information in the carrier’s major medical files cannot be shared with the life insurance department without the individual’s written authorization. The carrier would be either a covered entity (if major medical is insured) or a business associate (if acting as a TPA) and bound by the HIPAA privacy rules. HIPAA specifically prohibits the disclosure of protected health information from a covered entity or its business associate to another benefit plan such as a life insurance plan unless a written authorization is in place. So even if the insurance carrier has paid out $1 million in medical claims and could reasonably infer that the employee is probably disabled, that information cannot be shared with the LTD department without a HIPAA authorization from the employee.

Human Resources View

DOL Posts FMLA Forms

Arthur J. Gallagher & Co.

The Department of Labor (“DOL”) recently posted revised Family and Medical Leave Act (“FMLA”) forms on the Wage and Hour Division section of its website. Four of the seven forms have a May 2015 revision date; the
remaining three have revision dates of February 2013 and January 2009. The instructions to the health care provider on the form (forms revised May 2015) now include language directing the provider to not provide information about genetic tests or genetic services. The good news is that all seven forms have a May 31, 2018 expiration date. The forms are:

**Forms with May 2015 Revision Date:**


**Forms with 2013 and 2009 Revision Dates:**


If employers rely upon the DOL model forms, they should begin using these revised forms as soon as practicable. In addition to the forms, the DOL has substantial guidance and helpful materials available on its website such as FAQs, Fact Sheets, Posters, and e-Tools. These materials may be accessed from the FMLA section of the DOL website at: [http://www.dol.gov/whd/fmla/index.htm](http://www.dol.gov/whd/fmla/index.htm).

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**Misclassifications of Nonexempt Employees and Some Ways to Avoid Them**

*Thomas H. Reilly*

*Employee Benefit Plan Review*

Misclassification of nonexempt employees continues to be a vexing problem for many employers, especially in California. In some cases, misclassifications result from ignorance of the law, such as an assumption that paying an employee a salary is, by itself, sufficient to exempt the employee from entitlement to receive overtime premiums. In other cases, misclassifications result from subtle legal distinctions, such as the Fair Labor Standards Act’s limitation of the inside sales exemption to employers who meet the esoteric requirements of a traditional retail sales or service establishment. Misclassifications also result from the natural migration of job duties from one employee to another as businesses evolve. Regardless of the cause, misclassifications of nonexempt employees inevitably lead to the same result: an expensive, time-consuming lawsuit that can spread like wildfire to an entire classification of employees.
Avoiding misclassifications should be a priority for every business owner and human resource professional. Gone are the days when employees were unaware of their legal rights in the workplace. A search of the Internet yields Web site after Web site purporting to educate employees about their rights and offering representation to employees who have been misclassified or otherwise denied an employment benefit. Employers, who are not vigilant or who fail to obtain competent advice, are often the last to know they are underpaying their employees and incurring liability for unpaid wages and penalties pay period after pay period.

An article is no substitute for competent legal advice and vigilance in auditing current practices to ensure compliance. However, a review of fundamental principles and a description of common pitfalls provides a useful starting point for any employer.

**REVIEW OF THE BASICS**

Under both California and federal law, employees are either exempt or nonexempt. Under California law, nonexempt employees are entitled to receive overtime pay when they work more than eight hours in a workday or 40 hours in a workweek. Under federal law, that is, the Fair Labor Standards Act (FLSA), nonexempt employees are entitled to overtime pay when they work more than 40 hours in a workweek. Exempt employees, on the other hand, are expected to work until the job is completed and are not entitled to overtime pay no matter how many hours they work.

All employees are presumed to be nonexempt and, therefore, entitled to overtime. This means that an employer claiming an exemption has the burden of proving every element of an applicable exemption. When an employer cannot prove by a preponderance of the evidence that every element of an applicable exemption is met, the employee wins and is entitled to overtime pay. In California, the window of liability can extend back four years from the filing of the employee’s complaint.

California law applies to all California employers, and the FLSA applies to enterprises and employees engaged in commerce or in the production of goods for commerce. Most employers are engaged in commerce as broadly defined in the FLSA. For this reason, in order to qualify for exemption, a position must meet the requirements of both state and federal law. The requirements are often similar, but there are differences. Employees are entitled to the protection of whichever law is most beneficial to the employee. Complying with the requirements of one set of laws while ignoring the other will not protect an employer from liability.

There are three primary exemptions under both California and federal law: executive, administrative and professional. To be exempt under one of the three, a position must satisfy both a salary test and a duties test. Under the salary test, an employee must be paid a predetermined amount on a weekly or less frequent basis that is not subject to reduction because of variations in the quantity or quality of work performed. With certain limited exceptions, an employee must receive his or her full salary for any week in which the employee performs any work, regardless of the number of days or hours actually worked. Under federal law, the salary must be at least $455 per week. Under California law, the salary must be at least two times the state minimum wage, which is currently $9 per hour but will increase to $10 per hour on January 1, 2016. By way of example, as of January 1, 2016, an exempt employee in California must be paid a salary of not less than $800 per week ($20 per hour × 40 hours), resulting in a minimum annual salary of $41,600.

The requirements of the duties test are determined by the class of exemption sought. California’s duty requirements for the executive, administrative, or professional exemptions generally are more stringent. Therefore, an employer meeting California’s requirements in most cases also will meet the federal requirements. To qualify for the executive exemption under California law, an employee must spend more than 50 percent of his or her work time (1) managing the business or a customarily recognized department, (2) regularly supervising at least two subordinate employees, and (3) exercising discretion and independent judgment.
To qualify for the administrative exemption, an employee must spend more than 50 percent of his or her time (1) performing nonmanual work directly related to management policies or general business operations of the employer or its customers, (2) exercising discretion and independent judgment, and (3) assisting a proprietor or bona fide executive or working along specialized lines with only general supervision. To qualify for the professional exemption, an employee (1) must be licensed and degreed in law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting, (2) must perform job duties commensurate with one of these recognized professions, and (3) must exercise discretion and independent judgment. There are similar exemptions for certain “learned” professions, in which a person has an advanced degree and is working in a profession requiring that degree, and for certain “artistic” professions such as actors and musicians. Under the FLSA (but not California law), there is also an exemption for highly compensated employees earning at least $100,000 per year who customarily and regularly perform some normally exempt duties.

In addition to the primary exemptions discussed above, there are limited exemptions available under California and federal law for outside and inside sales personnel. Under the FLSA, an employee qualifies for the outside sales exemption when (1) the employee’s primary duty is making sales or obtaining orders or contracts for services for which consideration will be paid by the customer, and (2) the employee is customarily and regularly engaged away from the employer’s place of business. Under California law, an outside salesperson is an employee who regularly works more than half the working time away from the employer’s place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or the use of facilities. When applicable, the outside sales exemption is a complete exemption from both overtime and minimum wage requirements.

By definition, inside sales employees do not qualify for the outside sales exemption. However, they may qualify for a separate inside sales exemption under certain circumstances. Under the FLSA, inside salespersons qualify for an overtime (but not minimum wage) exemption when (1) the employee’s regular rate of pay is greater than one and one-half times the federal minimum wage, (2) more than half of the employee’s compensation for a representative period derives from commissions on sales, and (3) the employer qualifies as a “retail or service establishment.” Although the FLSA does not specifically define “retail or service establishment,” the Department of Labor has promulgated extensive regulations on the subject. In general, the business must sell goods or services that are not for resale and the business must fit within traditional notions of a retail concept, for example, selling goods to the general public, serving the everyday needs of the community, and standing at the end of the stream of distribution.

California’s inside sales exemption applies to employees engaged in inside sales whose earnings exceed one and one-half times the state minimum wage (currently $9 × 1.5 = $13.50 per hour), and who receive more than half of their compensation through commissions. Although California law does not impose the “retail sales or service establishment” requirement, California’s inside sales exemption is only available to employees regulated under occupational Wage Order 4 (Professional, Technical, Clerical, Mechanical, and Similar Occupations) or industry Wage Order 7 (Mercantile Industry). The inside sales exemption is not available to California employers whose businesses fall under another Wage Order.

Under both California and Federal law, overtime exemption requirements are fixed by law and cannot be altered by the parties. Employers and employees cannot contractually “waive” the requirements. To avoid misclassifications, employers must understand the basic parameters of the law and ensure that they are consistently met. This is not an area in which creativity is rewarded.
COMMON PITFALLS FOR EMPLOYERS

Ignoring the Duties Test

A persistent misunderstanding held by many employers is that paying an employee on a salary basis automatically exempts the employee from overtime requirements. That is never the case. As discussed previously, the primary exemptions (executive, administrative, and professional) impose a salary test and a duties test. Paying a salary only meets half of the test. If the duties test is not also met, the exemption is lost.

There are a number of reasons why this misconception continues to thrive in the workplace. When employers pay salaries, they frequently set them at a level intended to compensate employees for both straight time and overtime, that is, they set the employee’s salary at a level that is substantially more than what the employer expected to pay for straight time work. Unfortunately, California no longer allows such arrangements and salaries paid to nonexempt employees are deemed to compensate them for straight time only.

A second reason is that payment on a salary basis is often popular with employees. No one enjoys keeping track of time and, in today’s hectic society, employees enjoy the flexibility of being paid on a salary basis and working flexible hours. Because of this popularity, nonexempt employees will go along with salary arrangements—until they discover that they are being underpaid and denied overtime premiums. When a claim is made, the employee’s perceived acquiescence to misclassification is of no relevance and the nonexempt employee will recover for unpaid overtime. A court or administrative hearing officer will take the agreed weekly salary, divide it by 40 hours, and multiply the derived hourly rate by time and one-half for hours worked in excess of eight hours in a workday or 40 hours in a workweek.

Misapplication of the Inside Sales Exemption

As discussed previously, the inside sales exemption is available to a limited subset of employers. Under California law, it is only available to employers who fall under Wage Order 4 (Professional, Technical, Clerical, Mechanical, and Similar Occupations) or Wage Order 7 (Mercantile). Under federal law, the inside sales exemption is only available to employers whose businesses fit within the rubric of a retail sales or service establishment. Moreover, both exemptions must be met or the employee will be entitled to overtime pay.

This exemption is somewhat unusual because the federal test can be more difficult to meet than the California test. For example, it is not unusual for an employer to meet the inside sales requirements of Wage Order 4 or 7, but nonetheless lose the battle because the business is not a “retail sales or service establishment” under the FLSA. Businesses engaged primarily in selling goods or services to other businesses rarely, if ever, qualify as retail establishments and their inside sales personnel are entitled to overtime pay for hours worked in excess of 40 hours per week unless they meet the requirements of another exemption.

Migration of Job Duties

Business organizations are dynamic. They add new levels of management and grow vertically at one point in time, and then eliminate jobs and flatten out at the next. Employees request jobsharing arrangements. New classifications are added. New offices open and underutilized offices close. Employees take leaves of absence for extended periods, resulting in the reassignment of job duties. Employees resign and retire. Employees are promoted, demoted, laid off, and terminated. Nothing seemingly stays the same—except for the duties requirements of the available exemptions.

As an employer’s organizational chart continuously evolves, the duties and level of responsibility required to qualify for exemption do not change, and an employee, who was legitimately exempt before a layoff or other reorganization, may be rendered nonexempt by a reduction or other change in his or her job duties. By way of
example, an accounting supervisor would be exempt under the executive exemption if he or she spent more than 50 percent of the time supervising two other employees, for example, an accounts payable clerk and an accounts receivable clerk. If a layoff occurs and one of the clerk positions is eliminated, the exemption would be in jeopardy because the accounting supervisor would no longer manage at least two employees. This problem could be corrected by assigning the accounting supervisor additional subordinate employees as part of the reorganization, but not if the failure to meet all exemption criteria went unnoticed by the employer.

CONCLUSION

Employment is a legal area in which an ounce of prevention is worth a pound of cure. After a lawsuit is filed, it is often too late to fix problems and secure exemptions. For this reason, employers must be constantly vigilant and continuously monitor the compensation and job duties of exempt personnel to ensure that all requirements of an applicable exemption are met. When exemption qualifications are unclear or too close to call, employers should seek legal advice. When job evolution causes an employee to fall below the line, additional duties should be added or compensation adjusted to bolster the exemption.

Notes

2. 29 U.S.C. §§ 201, et seq.
5. 29 §§ 541.600, 541.602.
10. 29 CFR §§541.601.

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Will a Smartphone Call Count as Overtime? DOL Is Exploring the FLSA Issues

Thompson Publishing Group

Smartphone use has complicated employer calculations of working time and overtime for years, and it now appears to have caught the interest of the U.S. Department of Labor, which recently announced plans to collect information on how the use of smartphones impacts hours worked under the Fair Labor Standards Act.
In its spring 2015 regulatory agenda, DOL indicated that it will seek input from stakeholders on the topic by publishing a request for information in August. (See the agency announcement here.)

The announcement said:

The Department is seeking information from stakeholders on the use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours … .

There is no formal rulemaking proposed at this stage; the agency merely indicated that it is looking for information on the subject. Whether that information leads to a proposed rule remains to be seen. The RFI will appear in the Federal Register when it is published in August.

**How Things Currently Stand**

Cell phones, iPhones, BlackBerrys, laptops, the Internet, and a host of other technology developments have changed how, where and when work is done. The FLSA generally mandates that employers pay nonexempt workers for all hours worked, and overtime for all hours worked in excess of 40 hours in a work week. Employers already struggle with how to track the hours their employees are working; and as the lines between work and home have blurred that has only gotten worse.

Time spent working outside the office on mobile devices and computers by nonexempt employees can complicate working time determinations made by employers under the FLSA, and could ultimately affect overtime determinations. There has been litigation around this issue, and many employers already have policies in place regarding off-hours use of technology by overtime-eligible employees. Additional agency scrutiny is unlikely to win fans among employers.

**Employer Best Practices**

Even if DOL decided to wade into the debate over working time and smartphones, any proposed changes are likely a long way off. In the meantime, there are steps employers can take to protect themselves under the current guidance on the topic. Thompson Information Services’ author and employment law expert Shlomo D. Katz recommends these best practices for employers that would like to reduce their exposure to overtime claims:

- Place controls on your network so that it cannot be accessed remotely by employees who are supposed to be off the clock.
- Regularly remind employees of company policies against performing unauthorized work, and follow through with disciplinary action.
- Watch for tell-tale signs of off-the-clock work. For instance, when an employee turns in a project on Monday morning that wasn’t completed at close of business Friday.
- Suspend the email or remote access privileges of employees who violate policies regarding unauthorized work.
- Suspend telecommuting privileges of employees who claim unauthorized overtime.
- Confiscate employer-owned devices if they are used to perform unauthorized work.
- Unless prohibited by privacy laws, collective bargaining agreements or other authorities, monitor employees’ access to and use of the network and email.
Supreme Court Confirms Continuing Duty of Fiduciaries to Monitor and Remove Imprudent Plan Investments

Spencer’s Benefits

A suit brought within six years of an alleged breach by plan fiduciaries of their continuing duty to monitor and remove imprudent plan investments was not barred by ERISA’s statute of limitations, according to the United States Supreme Court. The Court unanimously validated the “continuing duty” standard, under which fiduciaries have a continuing duty, separate and apart from the responsibility to exercise prudence in initially selecting plan investments, to monitor and remove imprudent plan investments. The case is *Tibble v. Edison International* (No. 13-550).

Allegedly imprudent retail fund investment options.

Individuals participating in a 401(k) plan maintained by Edison International brought suit in 2007, alleging violations of fiduciary duty with respect to three mutual funds added to the plan in 1999 and three mutual funds added to the plan in 2002. Specifically, the participants charged that the plan fiduciaries acted imprudently by offering higher priced retail-class funds as a plan investment, despite the fact that materially identical lower-priced institutional class funds were available. According to the participants, the allegedly imprudent decision of the plan fiduciaries to invest in expensive retail share classes, effectively reduced the plan’s assets through the payment of excess fees.

A federal trial court ruled that the plan fiduciaries had failed to exercise the care, skill, prudence, and diligence required under ERISA with respect to the three funds added to plan in 2002. However, the court dismissed, as time-barred, fiduciary breach claims with respect to the 1999 funds, noting that the funds were included in the plan more than six years before the complaint was filed in 2007.

The participants argued that the 1999 mutual funds underwent significant changes within the six-year statutory period that should have been sufficient to cause the plan fiduciaries to undertake a full due-diligence review and convert the higher priced retail-class funds to low-priced institutional class funds. The trial court, however, determined that circumstances had not changed to the extent necessary to obligate the fiduciaries to review the retail funds and convert them to institutional funds.

The Ninth Circuit U.S. Court of Appeals affirmed, ruling that the act of designating an investment for inclusion in the plan starts the six-year statute of limitations under ERISA for claims asserting imprudence in the design of the plan investment menu (see News, April 22, 2013, Failure To Investigate Alternatives To Retail Class Of Mutual Funds Breached Duty Of Prudence). The appeals court agreed with the trial court that the participants had not established the significant change in circumstances that was necessary to require the fiduciaries to review a change the investments within the six-year period.

**Note:** Under ERISA Sec. 413, no action alleging fiduciary breach may be brought after the earlier of:

- Six years after: (a) the date of the last action which was part of the breach or violation or (b) in the case of an omission, the latest date on which the fiduciary could have cured the breach of violation; or
- Three years after the earliest date on which the party bringing suit had actual knowledge of the breach or violation.
"Continuing fiduciary duty” rule. The applicable statute of limitations period, may be extended, however, if the fiduciary is viewed as having a “continuing duty” to the plan. For example, under the prudent investor rule, a fiduciary has a continuing duty to review plan investments and to advise the fund to divest itself of unlawful or imprudent investments. The Second Circuit has further ruled that a fiduciary’s continuing obligation to monitor plan investments effectively allows actions based on the prudent investor rule to be brought later than the three and six year statute of limitations period generally applicable to claims for breach of fiduciary duty that are based on the occurrence of a single event (Morrissey v. Curran, CA-2 (1977), 567 F2d 546). Similarly, the Seventh Circuit explained, fiduciaries have a “continuing fiduciary duty to review plan investments and eliminate imprudent ones” (Martin v. Consultants and Administrators, CA-7 (1992), 966 F. 2d 1078 .1435).

Thus a fiduciary with a continuing duty to monitor investments was subject to suit for failing to detect unreasonable fees and receiving unreasonable compensation under a contract that may been signed beyond the applicable limitations period (Diebold v. Northern Trust Invs., N.A., DC IL (2012), 201 U.S.Dist LEXIS 132715)).

By contrast, the Tibble court rejected the continuing violation theory, ruling that the act of designating an investment for inclusion on a plan’s investment menu starts the six-year period for claims asserting imprudence in the design of the plan menu. Accordingly, such claims must be filed within six years of the initial designation. Disregarding the ongoing duty of prudence during the limitations period, the Ninth Circuit has determined that the initial selection of the plan investments to be the last action constituting the alleged breach of duty.

Similarly, the Fourth Circuit has found time-barred a claim that fiduciaries breached their duty of prudence by failing to remove or replace imprudent funds in a 401(k) plan where the funds were initially selected before the limitations period (David. v. Alphin, CA-4 (2013), 704 F. 3d 327).

The Eleventh Circuit also has determined a claim for breach of fiduciary duty based on the failure to remove imprudent funds from a 401(k) plan to be time barred where the funds were first selected before the limitations period (Fuller v. Suntrust Banks, Inc., CA-11 (2014), 744 F. 3d 685). The continued failure of the fiduciaries to heed warnings of the funds’ poor performance and high fees (or to seek out such information) was not, the court stressed, “a distinct, cognizable breach that occurred at the selection.”

Continuing fiduciary duty to monitor prudence of investments

A unanimous Supreme Court forcefully confirmed the validity of the continuing fiduciary duty rule, holding that the Ninth Circuit erred by applying a statutory bar to a fiduciary breach claim without considering the nature of the fiduciary duty. The lower courts, the Supreme Court explained, failed to recognize that, under trust law, a fiduciary is required to conduct a regular review of its investments, remove those found to be imprudent. This continuing duty, the Court explains, exists “separate and apart” from the trustee’s duty to exercise prudence in initially selecting investments for inclusion in a plan’s investment menu.

Citing extra-judicial authority, the Court noted that trustees may not assume investments will remain appropriate indefinitely. Trustees must systematically consider all trust investments at regular intervals, exercise continuing oversight of prior investments, and remove imprudent investments.

An alleged breach of a fiduciary’s continuing duty must still occur within six years of the filing of a suit, the Court advised. However, a court may not impose a six-year statutory bar based solely on the initial selection of funds, without considering the “contours” of the alleged breach of fiduciary duty.
Note: The Supreme Court expressed no view as to whether ERISA’s duty of prudence required the plan fiduciaries to review the challenged mutual funds. The case was remanded to the Ninth Circuit for a determination of whether the fiduciaries actually breached their duties within the relevant six-year limitations period, recognizing the importance of analogous trust law.

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State Law Review

Safe Harbor is Announced for New Massachusetts Sick Leave Law

Employee Benefits Management

Massachusetts Attorney General Maura Healey announced that a safe harbor will be provided for employers that have existing paid time off policies for the period July 1, 2015, (when the new sick time law takes effect) to December 31, 2015. The Attorney General previously filed draft regulations that support the Earned Sick Time law passed by voters last November.

Earned sick-time mandate. Under the new law, employers with 11 or more workers must provide up to 40 hours per year of paid sick leave. Businesses with fewer than 11 employees must provide earned sick time but are not required to pay employees for time taken.

According to a notice of proposed rulemaking issued by the Office of the Attorney General on April 24, these regulations: (1) explain employees’ and employers’ rights and obligations under the law; (2) describe how employer size is calculated for purposes of determining whether earned sick time must be paid or unpaid; (3) further define the process for accruing earned sick time, wages that must be paid when using earned paid sick time, recordkeeping requirements, and appropriate documentation and notice when using earned sick time; and (4) explain actions the OAG may take to address violations of the law.

The proposed regulations further explain the law by declaring that earned sick time can be used for routine or emergency medical visits and travel time, if employees or a family member are sick, or to address issues of domestic violence. Under the regulations, employees begin to accrue sick time on the date of hire and must make a good-faith effort to notify their employers of their intention to use sick time. The regulations would also protect seasonal workers by allowing them to carry unused time from season to season.

Safe harbor provided. Under the safe harbor provision, for the period from July 1 to December 31, 2015, any employer that has a paid-time-off policy in existence as of May 1, 2015, that provides employees the right to use at least 30 hours of paid time off during the calendar year 2015 will be considered in compliance with the new law with respect to those employees and to any other employees to whom the use of at least 30 hours of paid time off under the same conditions is extended.

In order to remain in compliance, any paid time off including sick time, used by an employee from July 1 to December 31, 2015, must be job-protected leave subject to the new law’s non-retaliation and non-interference provisions. As to all other respects during the transition period, the employer may continue to administer paid time off under policies in place as of May 1, 2015.

However, on or before January 1, 2016, all employers taking advantage of the safe harbor provisions must adjust their paid time off policy to conform to the new earned sick time law.
Public hearings. The Attorney General’s Office expects to file final regulations with the Secretary of State this summer following a public comment period, which includes public listening sessions and hearings throughout the Commonwealth. Public comment on the proposed regulations may be submitted to the Attorney General’s office until June 10 by emailing AGOregulations@state.ma.us. Comments at listening sessions are not considered part of the official record but are considered a more informal dialogue about the proposed regulations. Comments may also be submitted in person at one of the six public hearings and three listening sessions that are detailed in the notice (http://www.mass.gov/ago/docs/regulations/proposed/940-cmr-33-notice.pdf).

What’s New in State Laws
CCH, Incorporated

For busy Human Resources professionals who want ready access to what is new and what has recently changed in State laws, here is a brief update.

Arizona Background Checks

The state has amended its law relating to background checks of nurses (H. 2196, L. 2015) and fingerprinting (Ch. 94 (H. 2086), L. 2015).

Arizona Veterans’ Preference

The state has enacted a law allowing private employers to adopt voluntary veterans’ preference employment policies (Ch. 202 (H. 2094), L. 2015).

Arkansas Background Checks

The state has amended its background checks law with respect to access to information (Act 1185 (H. 1727), L. 2015, effective January 1, 2016).

Arkansas Concealed Carry

The state has enacted a law permitting a county employee who works in the courthouse and who is also a concealed carry licensee to carry a concealed handgun in a county courthouse (Act 1259 (S. 159), L. 2015). Also, the statutory provision prohibiting the carrying of a concealed handgun by a licensee into a polling place has been repealed (Act 1175 (H. 1432), L. 2015).

Arkansas Wage Payment

The law relating to wage payment and deductions covering state employees has been amended to clarify payroll deductions. An authorized deduction for group hospital, medical and life insurance has been amended to read “group or individual hospital, medical, and life insurance deductions” (Act 1053 (S. 823), L. 2015, enacted April 4, 2015, and effective 90 days after adjournment of the state legislature).

Colorado Violence in the Workplace

The state has amended its harassment law by expanding the definition of harassment to include communication
through an interactive electronic medium (H. 1072, L. 2015).

**Delaware Unemployment Insurance**

The State Experience Factor for 2015 is 45. A supplemental assessment rate of 0.2% applies to all basic rates, as does the training tax assessment of 0.085%. Rates for 2015, not including the supplemental assessment rate or the training tax assessment, range from 0.1% to 8.0%. Also for 2015, new nonconstruction employers pay 2.1%. New employers under the NAICS pay total rates of 3.1% (NAICS 236), 6.3% (NAICS 237), and 4.4% (NAICS 238).

**Georgia Health Insurance Benefit Coverage**

The state has revised and expanded its coverage requirements for autism spectrum disorder, effective July 1, 2015 (Act 31 (H. 429), L. 2015).

**Georgia Medical Marijuana**

Georgia has enacted a medical marijuana law, effective April 16, 2015. The law, known as “Haleigh’s Hope Act,” permits the use of medical cannabis (THC) oil to treat certain conditions.

The law does not require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in any form. Employers may still have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana. Employers may also prohibit any employee from having a detectable amount of marijuana in such employee's system while at work (Act 20 (H. 1), L. 2015).

**Hawaii Smoking in the Workplace**

Effective January 1, 2016, the use of electronic smoking devices will be prohibited in the places where smoking is prohibited (H. 940, L. 2015).

**Indiana Fair Employment Practices**

Effective July 1, 2015, the state will prohibit an employer from terminating an employee based on a protective order (H. 1159, L. 2015).

**Iowa Child Labor**

Requirements for child labor work permits and work permits for migrant workers have been amended effective June 1, 2015. Permits are to be issued by the labor commissioner, and applications must be submitted to the office of the labor commissioner within three days after the child begins work.

In addition, exceptions under Section 92.17 are repealed June 1. These exceptions provided that the child labor law did not prohibit: (1) volunteer work for nonprofit organizations; (2) a child working in or about any home outside of school hours or during vacation; (3) work in the production of seed during June, July and August for those ages 14 and over; (4) a child from working in any occupation or business operated by the child’s parents; (5) a child under 16 years of age from work as a model of up to three hours a day; or (6) a juvenile court from ordering a child at least 12 years of age from completing a work assignment (H. 397, L. 2015).

**Kansas Concealed Carry**

The state has enacted a law authorizing the carrying of concealed handguns without a license under the Personal
and Family Protection Act (S. 45, L. 2015, effective upon publication in the statute book (usually July 1 after enactment).

**Kansas Unemployment Insurance**

The taxable wage base for 2015 is $12,000. In calendar year 2016, the wage base increases to $14,000.

**Maryland Fair Employment Practices**

Governor Larry Hogan signed into law a bill (S. 604) that extends employment discrimination protections to interns and applicants for internships in the state. The new law, effective October 1, 2015, prohibits employers from discriminating and harassing interns and applicants for internships based on their race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability (Ch. 43 (S. 604), L. 2015).

**Massachusetts Sick Leave**

The state’s Earned Sick Time law (M.G.L. c. 149, Sec. 148C) becomes effective on July 1, 2015.

Draft regulations 940 C.M.R. 33.00 have been filed with the Attorney General’s Office (AGO), and public hearings on the proposed regulations have been scheduled during May and June.


**Michigan Garnishment**

The law covering garnishment of wages through periodic payments has been amended to provide that a garnishment would remain in effect until the balance of the judgment is satisfied; to require a plaintiff to pay a $35 fee to the employer at the time the garnishment is served (increased from the current $6 fee); to include procedures and deadlines in a default, including allowing the garnishee to cure an identified failure after an entry of default but before a default judgment is entered; to provide that a garnishment or a notice of failure would not be valid or enforceable unless it is served on the garnishee in accordance with the Michigan Court Rules; and to specify that garnishments have priority in the order in which they are received, except that an order of income withholding for child or spousal support under the Support and Parenting Time Enforcement Act and a levy to satisfy a tax liability would have priority over a garnishment.

Also, an exemption has been made to provide that the garnishment of periodic payments law would not apply to an order of income withholding under the Support and Parenting Time Enforcement Act, a levy for tax liability, or a levy of restitution for overpayment of benefits under the Michigan Employment Security Act (Public Act 14 (H. 4119), L. 2015).
Michigan Wage Payment

The law regulating payment of wages and fringe benefits has been amended to allow an employer to deduct from an employee’s wages without the employee’s written consent an amount the employer paid of an employee’s debt under a default judgment, provided: (1) the employer gives the employee a written explanation of the deduction at least one pay period before the wage payment affected by the deduction was made; (2) the deduction was not greater than 15 percent of the gross wages earned in the pay period the deduction was made; (3) the wage deduction was made after the employer had made all deductions expressly permitted or required by law or a collective bargaining agreement, and after any employee-authorized deduction; and (4) the deduction did not reduce the regularly scheduled gross wages otherwise due the employee to a rate that was less than the state minimum wage rate or the federal minimum wage rate, whichever was greater (Public Act 15 (H. 4120), L. 2015).

Mississippi Disability Law

The state has enacted a law that will require state agencies that provide services and support to persons with disabilities to consider competitive employment in an integrated setting for persons with disabilities. The new law, effective July 1, 2015, will require all state agencies to follow this policy by coordinating all collaborating efforts among agencies (H. 836, L. 2015).

Mississippi Unemployment Insurance

For 2015, the general experience rate is 0.20% and the Workforce Enhancement Training Fund rate is 1.16%. The total new employer rate is 1.16%, and total experience rates range from 0.36% to 5.56%.

Montana Military Leave

The Montana Military Service Employment Rights Act has been amended to clarify duty status of Montana National Guard Members for leaves of absence from employment when called to “state military duty” (previously, state active duty) (H. 68, L. 2015, effective April 13, 2015).

Montana Minimum Wage

The state’s minimum wage law has been amended to add an exemption for employees of a seasonal nonprofit establishment that is an organized camp or religious or educational conference center (S. 270, L. 2015).

Montana Overtime

An exemption from maximum hour and overtime requirements has been added for employees of a seasonal nonprofit establishment that is an organized camp or religious or educational conference center.

Also, language in the law is amended to replace “defective” with “disordered,” in an exemption for an employee of a hospital or other establishment primarily engaged in the care of the sick, disabled, aged, or mentally ill or disordered working an alternate work shift (80 hours/14-day period). The language change is part of a measure revising terminology relating to mental illness in the Codes (H. 382, L. 2015, and S. 270, L. 2015).

Montana Social Media Privacy

The state has enacted a law prohibiting an employer from requesting online passwords or usernames for an employee’s or job applicant’s personal social media account (H. 343, L. 2015, effective April 23, 2015).
Nebraska Pregnancy Discrimination

Governor Pete Ricketts has signed into law a measure that adds, among other things, substantial protections for pregnant women in the state. Those protections include the addition of a separate category of discrimination based on pregnancy as well as reasonable accommodation requirements for conditions related to pregnancy, childbirth, and related conditions. The law also identifies certain incidents of discrimination, such as requiring a woman affected by pregnancy to accept an accommodation she chooses not to accept.

The new law, L.B. 627, amends Nebraska law to make it an unlawful employment practice for a covered entity to “discriminate against an individual who is pregnant, who has given birth, or who has a related medical condition in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

The law also bars pre-employment medical examinations and inquiries of job applicants as to whether the applicant is pregnant, has given birth, or has a related medical condition (L.B. 627, L. 2015).

Nevada Unemployment Insurance

The Nevada regulation containing the schedule of contribution rates has been amended to update reserve ratios for each class for 2015. The range of rates remains 0.25% to 5.4%. The range of reserve ratios is 12.2% or more for Class 1 and less than -13.4% for Class 18.

New Hampshire Minimum Wage

The state minimum wage law has been amended to end payment of a subminimum wage rate for persons with disabilities. Effective June 14, 2015, employers will be prohibited from employing a person with a disability at an hourly rate that is lower than the minimum wage (currently, $7.25 per hour), with an exception for students in practical experience or training programs and family businesses. Also, a provision of the law allowing for special authorization to pay a subminimum wage for those in sheltered workshops is repealed (S.B. 47, L. 2015, signed May 7, 2015, and effective April 15, 2015).

In addition, the minimum wage for tipped employees has been amended to include as tipped employees those working in ballrooms. Under the law, tipped employees of a restaurant, hotel, motel, inn or cabin, or ballroom who customarily and regularly receive more than $30 a month in tips directly from the customers will receive a base wage from the employer of not less than 45 percent of the applicable minimum hourly wage. If an employee shows to the satisfaction of the labor commissioner that the actual amount of wages received at the end of the pay period did not equal the minimum wages for all hours worked, the employer must pay the employee the difference to guarantee the applicable minimum wage.

“Ballroom” is defined to mean an indoor facility that has seating for at least 500 patrons, provides live entertainment, and is licensed by the New Hampshire liquor commission (Ch. 1 (S. 264), L. 2015).

New Mexico Genetic Testing

The state has amended its Genetic Information Privacy Act to except a clinical lab performing services pursuant to a written order from a health care practitioner from the requirement to obtain informed consent for genetic analysis or testing (Ch. 156 (H. 369), L. 2015).

North Dakota Background Checks

The state has amended its background checks law with respect to information sharing with other states (S. 2215, L. 2015).
North Dakota Domestic Violence Victims’ Leave

Employees of the state who are impacted by domestic violence, a sex offense, stalking, or terrorizing may use sick leave in order to deal with the consequences of such crimes (H. 1403, L. 2015).

North Dakota Family Leave

The state has enacted a pair of laws relating to use of sick leave following the birth or adoption of a child by a state worker (H. 1387, L. 2015, enacted April 15, 2015; and H. 1244, L. 2015, enacted April 20, 2015).

North Dakota Pregnancy Accommodation

The office of management and budget shall provide to a state employee a temporary permit or some other means that allow that employee to park on the capitol grounds in any parking area in which a member of the public is allowed to park, if the state employee is pregnant and employed by a state agency housed on the capitol grounds or if the state employee is allowed by a state agency housed on the capitol grounds to bring an infant to work. The special parking privilege expires when the employee is no longer pregnant or no longer authorized to bring an infant to work (H. 1387, L. 2015).

North Dakota Wage Payment

The state’s wage payment law has been amended with regard to limitations on payment of accrued paid time off following a separation from employment.

Currently, if an employee has separated from employment voluntarily, a private employer may withhold payment for accrued paid time off if: (a) at the time of hiring, the employer provided the employee with written notice of the limitation of payment of accrued time off; (b) the employee has been employed by the employer for less than one year; and (c) the employee gave the employer less than five days’ written or verbal notice.

In addition, effective August 1, 2015, if an employee separates from employment, a private employer may withhold payment for time off if: (a) the paid time off was awarded by the employer but not yet earned by the employee; and (b) before awarding the paid time off, the employer provided the employee with written notice of the limitation on payment of awarded paid time off (H. 1202, L. 2015, enacted April 9, 2015).

Oklahoma Background Checks

The state has amended its background check law with respect to the federal Rap Back Program (S. 90, L. 2015), certain school employees (H. 1154, L. 2015) and child care facility workers (H. 1274, L. 2015).

Oklahoma Child Labor

Oklahoma’s child labor law prohibits the employment of minors under the age of 16 in certain occupations deemed hazardous. An exception to the law has been added, effective November 1, 2015, to allow children to volunteer for a charitable organization recognized as exempt under the Internal Revenue Code, if the organization receives written permission from the child’s parent or legal guardian (H. 1903, L. 2015).

Oklahoma Disability Law

Effective November 1, 2015, the Oklahoma Employment First Act will require state agencies to coordinate efforts and collaborate to ensure that state programs, policies, procedures and funding support competitive integrated employment of individuals with disabilities (H. 1969, L. 2015).
Oklahoma Prevailing Wages

Oklahoma law relating to payment of minimum wages on public works will be repealed effective November 1, 2015.

Although the law (Title 40, Sections 196.1 through 196.14) has been on the books, the state’s prevailing wage law, also known as the “Little Davis-Bacon Act” was ruled unconstitutional in a 1995 Oklahoma Supreme Court decision, in City of Oklahoma City v. State of Oklahoma ex rel. Department of Labor, 918 P2d 26 (OK SCt 1995) [130 LC 58,007]. (H. 1375, L. 2015).

Oklahoma Smoking in the Workplace

The state’s workplace smoking laws have been amended with respect to educational facilities (H. 1685, L. 2015).

Oklahoma Veterans’ Preference

Effective November 1, 2015, the Voluntary Veterans' Preference Employment Policy Act authorizes private employers to give a hiring preference to veterans. The granting of such preference shall not be deemed to violate any local or state equal employment opportunity law or regulation (S. 195, L. 2015).

Oklahoma Wage Payment

New law has been enacted to prohibit state agencies from making any payroll deductions on behalf of a state employee for membership dues in any public employee association or organization or professional organization that on or after November 1, 2015, collectively bargains on behalf of its membership pursuant to any provision of federal law (H. 1749, L. 2015, effective November 1, 2015).

Oregon Military Leave

A provision relating to compensation for public officers and employees while on military leaves of absence has been amended.

While absent on leave, a public officer or employee may, but is not absolutely entitled to, receive the pay or other emolument of the office or position, and shall not become liable, as an officer or employee, on an official bond or otherwise, for the acts or omissions of any other person.

The state of Oregon, a county, a municipality or another political subdivision of the state may establish and administer a program that allows an officer or an employee who is absent on leave to receive an amount of pay or other emolument that supplements or exceeds any compensation received for performing military duty, provided the amount received by the officer or employee does not exceed the amount of the base salary the officer or employee was earning on the date the officer or employee began the leave of absence (Ch. 42 (H. 2763), L. 2015, effective April 23, 2015).

Tennessee Firearms in the Workplace

Effective July 1, 2015, no employer shall discharge or take any adverse employment action against an employee solely for transporting or storing a firearm or firearm ammunition in an employer parking area in a manner otherwise consistent with Tennessee law (Ch. 80 (S. 1058), L. 2015).

Also, the state has enacted a law relating to firearm ownership by teachers and other school employees. Specifically, no school administrator or other employee of an LEA shall require a teacher or other school
employee to provide information on firearm ownership by the teacher or school employee.

Additionally, any information on firearm ownership that is voluntarily provided by a student, parent, teacher, or LEA employee shall not be the basis for adverse employment action against a teacher or LEA employee (Ch. 214 (S. 633), L. 2015).

**Tennessee Social Security Number Privacy**

The state has amended its identity theft laws with respect to the protection of social security numbers from disclosure, effective July 1, 2015 (H. 114, L. 2015).

**Tennessee Wage Payment**

Public officers and employees may authorize deductions for the payment of membership dues and benefit premiums to be made from the employee's compensation for payment to an employee association, if certain conditions are met.

Effective July 1, 2015, any member of the Tennessee highway patrol may authorize payroll deductions for the payment of membership dues to be made from the member's compensation for payment to an organization of members of the Tennessee highway patrol, if such organization meets the following criteria: (a) It solicits membership from all commissioned members of the Tennessee highway patrol; (b) It grants the same rights and privileges of membership to all its members; (c) It provides equal services to its members; and (d) It has a membership of not less than 20% of the currently employed commissioned members of the Tennessee highway patrol (Ch. 314 (S. 582), L. 2015).

**Vermont Background Checks**

Governor Peter Shumlin on April 21, 2015, signed Executive Order No. 03-15 to implement a “ban the box” state hiring policy. The Order is intended to help people with criminal convictions find employment and build successful lives.

The “ban the box” Executive Order removes questions about criminal records from the very first part of job applications for state employment. Agencies will continue to conduct background checks, but only after an applicant has otherwise been found qualified for the position. The policy will prevent applicants from being immediately screened out of state jobs because of a criminal conviction. The policy will not apply to law enforcement, corrections, or other sensitive positions.

**Washington Health Insurance Benefit Coverage**

Effective after December 31, 2016, persons seeking home health care and/or hospice services for palliative care in conjunction with treatment or management of serious or life-threatening illness need not be homebound in order to be eligible for coverage of such services under their health care plan (S. 5165, L. 2015).

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**Important Reminder!**

**Upcoming Deadlines**

*Arthur J. Gallagher & Co.*

Keeping track of all of the compliance requirements that face employers sponsoring health and welfare plans has always been a challenge. The increase in requirements as a result of the Patient Protection and Affordable Care
Act ("PPACA") has added significantly to the burden. Each month this article will provide information on deadlines that are coming up in the next three months for a calendar year plan. Key requirements for July, August, and September 2015 are listed below.

Dates are based on the timing for a calendar year plan (except as noted); employers with non-calendar year plans will need to modify dates as appropriate.

**Deadlines for July, August, and September 2015**

- **July 29, 2015** – last day for ERISA plans to provide the Summary of Material Modification for plan changes in 2014 (210 days after the end of the plan year in which the change was made). *Note: If the change was a material reduction, a Summary of Material Reduction must be provided much sooner – no later than 60 days after the date the change was adopted.*

- **July 30, 2015** – due date for quarterly payment of the Michigan Health Insurance Claims Assessment (an assessment based on health claims paid in Michigan with a limit of $10,000 per individual).

- **July 31, 2015** – last day to pay PCORI fees for all plans. The PCORI fee for calendar year plans is $2.08 per covered life for 2014. Same date for all plans.

- **July 31, 2015** – last day to file Form 5500 (or Form 5558 for 2 ½ month extension to file Form 5500) for the 2014 plan year.

- **July 31, 2015** – medical loss ratio notices must be provided by insurance carriers to group policyholders that will receive a rebate for 2014. Same date for all policies.

- **August** – there are no general deadlines for calendar year plans that fall within the month of August. Non-calendar year plans may have deadlines for activities such as reporting creditable/non-creditable drug coverage to CMS or filing Form 5500.

- **September 30, 2015** – ERISA plans must distribute SAR to all plan participants (if no extension for Form 5500 filing).

- **September 30, 2015** – due date for carrier payment of Medical Loss Ratio rebates for the 2014 policy year.

**Ongoing Activities (Selected)**

Many compliance requirements apply every month. Some of the key ongoing requirements are:

- Marketplace notices - to all newly hired employees within 14 days of hire

- Provide the following materials when an employee becomes eligible for/enrolled in the health plan:
  - Summary of Benefits and Coverage ("SBC") – upon eligibility
  - HIPAA Privacy Notice – upon enrollment
  - COBRA General (Initial) Notice – to employee (& spouse if married) – upon enrollment
  - HIPAA Special Enrollment Rights Notice – upon eligibility
  - Part D certificate of creditable/noncreditable drug coverage- upon enrollment
In addition to federal requirements, some states have additional requirements such as reporting on the availability of dependent health coverage. Employers should check with their state(s) to determine what requirements and deadlines will apply.

Note: We include information about the above required communications indicating whether the requirement is triggered by the employee’s eligibility or enrollment in the plan. Exact timing varies by requirement.

Our list focuses on major federal and, in some cases state, requirements that will impact a significant number of employers. It is not intended to be a comprehensive list.

The intent of this Newsletter is to provide general information on employee benefit issues. It should not be construed as legal advice and, as with any interpretation of law, plan sponsors should seek proper legal advice for application of these rules to their plans. © 2015 Arthur J. Gallagher & Co.