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EMPLOYMENT-RELATED OBLIGATIONS IMPOSED BY HEALTH CARE REFORM LAW

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The Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 impose numerous requirements on employers, health care providers and health insurance providers. A chart summarizing the law's primary requirements for large and small employers and their effective dates is available on our web site at http://www.fordharrison.com/files/FHHealthCare2010.pdf. This white paper discusses in more detail certain provisions of the law that create additional employment-related obligations.

NEW PRIVATE RIGHT OF ACTION FOR WHISTLEBLOWERS

Section 1558 of the PPACA amends the Fair Labor Standards Act (FLSA) by adding whistleblower protections. The amendment prohibits employers from retaliating against any employee who provides or is about to provide to an employer, the federal government, or a state attorney general information that the employee "reasonably believes" to be a violation of Title I of the PPACA. Employers are also prohibited from retaliating against any employee who participates in investigations into alleged violations, or objects to or refuses to participate in any activity that the employee reasonably believes to be a violation of Title I of the PPACA. Among other things, employees can object to activities ranging from denials of coverage due to preexisting conditions to discrimination based on an individual's receipt of health insurance subsidies, all of which would violate Title I. Unlike some other whistleblower laws, the new provision does not require employees to notify the employer that they believe they have been asked to perform a task that violates the PPACA at the time they are asked to perform the task.

Retaliation occurs when an employer discharges or discriminates against any employee with respect to the terms, conditions, or other privileges of employment on account of the employee's whistleblower activity. Retaliatory actions are those that are likely to dissuade a reasonable worker from engaging in whistleblower activity. Such actions can include termination, suspension, demotion, reduction in pay, failure to promote, significant loss in benefits, and job reassignment to what are considered undesirable tasks.

Complaint Procedure

The complaint procedures, burden of proof, and remedies applicable to whistleblower retaliation claims arising under the PPACA are set forth in the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. 2087(b). An employee has 180 days from the date of the alleged violation to submit a complaint to the Department of Labor's Occupational Safety & Health Administration (OSHA). OSHA may grant preliminary relief during its disposition of the complaint.

Within 90 days of OSHA's written determination, or 210 days after the filing of the complaint, an employee may file a civil action in federal court and exercise his or her right to a jury trial. Available remedies include reinstatement, other injunctive relief, back pay with interest, litigation costs, expert witness fees, and reasonable attorney's fees.

Whistleblower Protections Cannot Be Waived by Agreement

"The rights and remedies in [Section 1558 of the Act] may not be waived by any agreement, policy, form, or condition of employment." Thus, an employer cannot require an employee to sign an agreement that causes the employee to relinquish these statutory rights.

AMENDMENT OF FLSA TO REQUIRE BREAKS FOR EMPLOYEES TO EXPRESS BREAST MILK

The PPACA also amends the FLSA to require employers to give an employee a reasonable break time to express milk for her nursing child for one year after the child's birth, each time the employee needs to express milk. The provision, which is found at section 4207 of the legislation, also requires the employer to provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, where the employee can express milk. The new provision will be added as subsection (r) to § 207 of the FLSA.

The employer is not required to pay the employee for this break time. Additionally, employers with fewer than 50 employees are not subject to these requirements if the requirements would impose an undue hardship "by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." The provision does not preempt state laws that provide greater protections to employees.

Unanswered Questions

The new provision raises a number of questions that, unfortunately, have no definitive answers at this point, including:

- Effective date. The amendment does not include an effective date; thus, it is presumed to be effective as of March 23, 2010, the date the President signed the PPACA. Accordingly, employers should begin taking steps now to prepare to comply with the new requirements.
- Penalty for noncompliance. The legislative provision containing penalties for noncompliance with the break requirements did not become part of the final law, thus it is not clear what penalties employers may face for noncompliance.
- Impact on collective bargaining agreements. The provision does not make exceptions for collective bargaining agreements and does not address what impact it has on such agreements.
- Whether the location for expressing milk must be maintained when no employee needs it. The provision does not specify whether the location provided for employees to express milk must be maintained at all times or only made available when there is an employee who needs such space.
- Impact of DOL's position that a meal break of less than 30 minutes is compensable working time. The statute specifically states that an employer is not required to

compensate the employee for the time spent expressing milk. If the break time to express milk is less than 30 minutes, the DOL might interpret it as compensable time. However, the statutory language arguably takes priority over the DOL regulation, although there is no guidance available on this issue at this point.

- Whether the provision will be interpreted to provide for any other exceptions, particularly with regard to specific industries where providing a dedicated space for expressing milk would be difficult or impossible or with regard to specific jobs whose duties make it difficult or impossible to take breaks.

Suggestions for Implementing Policies to Comply with the New Requirements

Many employers are already required by state law to permit employees to express breast milk at work and, accordingly, have already implemented such policies. The federal law does not preempt these state laws if they provide more protection for the employee. Following are some suggestions for employers who need to develop policies to comply with the new requirements:

Scheduling

- Educate supervisors regarding the requirement to accommodate an employee's need to express milk.
- Encourage employees to consult with the employer to develop a milk expression schedule, which can also assist supervisors in scheduling other workers to cover the employee's break.

Some Considerations in Determining an Appropriate Location for Expressing Milk

- The law requires the location provided for expressing milk to be shielded from view and free from intrusion. Depending on the size of the workplace, the employer may be able to utilize an existing empty office or conference room.
- Ideally the employee should be able to lock the room from the inside to ensure privacy.
- If possible, the room should have an electrical outlet to enable the employee to use an electric pump.
- The room should be located close to a source of running water, for sanitation purposes.
- The space should have room for a chair and, if possible, a flat surface for the pump to rest on.
- Consider supplying disinfectant wipes for sanitation purposes.
- Although not required by the law, consider providing a place for employees to store expressed milk.
- If more than one employee is likely to need the room at one time, consider using partitions to divide a larger space into private areas.

NATIONWIDE PROGRAM FOR BACKGROUND CHECKS ON DIRECT PATIENT ACCESS EMPLOYEES OF LONG-TERM CARE FACILITIES AND PROVIDERS

Section 6201 of the PPACA requires the Secretary of Health and Human Services ("the Secretary") to establish a nationwide program to identify efficient, effective, and economical procedures for long-term care facilities or providers to conduct background checks on prospective "direct patient access" employees on a nationwide basis. The nationwide program is essentially an extension of a pilot program that was established under Section 307 of the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA), and is conducted through agreements entered into between the States and the Department of Health and Human Services ("HHS"). The Act encourages States to participate in the nationwide program by making available federal funding to States that participate in and comply with the requirements of the nationwide program. To engage in the nationwide program and receive the federal funding, a State must (1) enter into an agreement with HHS to conduct background checks under the nationwide program on a State basis, (2) comply with all of the requirements set forth under the Act, and (3) provide partial funding for the program. Seven states participated in the original pilot program from January 2005 through September 2007 – Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin.

If a State participates in the nationwide program, all of the following types of long-term care facilities and providers within the State will be required to conduct background checks on prospective "direct patient access" employees in compliance with the Act: (1) skilled nursing facilities; (2) nursing facilities; (3) home health agencies; (4) providers of hospice care; (5) long-term care hospitals; (6) providers of personal care services; (7) providers of adult day care; (8) residential care providers that arrange for or directly provide long-term care services, including assisted living facilities that provide a level of care established by the Secretary; (9) intermediate care facilities for the mentally retarded; and (10) any other facility or provider of long-term care services under such titles as the participating State determines appropriate.

The Act defines "direct patient access" employee as any individual who has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one contact with a patient or resident of the facility or provider, as determined by the State. The Act makes clear that volunteers are not considered "direct patient access" employees unless the volunteer has duties that are equivalent to the duties of a direct patient access employee and those duties involve (or may involve) one-on-one contact with a patient or resident of the long-term care facility or provider.

Unless the State(s) in which a long-term care facility operates chooses to participate in the nationwide program, this Act will have no impact on the manner in which the facility will be required to conduct background checks on prospective employees. If the State(s) in which a long-term care facility operates does participate in the nationwide program, facilities within the applicable State(s) will need to ensure compliance with whatever background check procedures the State establishes and requires as part of its participation in the nationwide program.

NEW CRIMINAL ACTIVITY REPORTING REQUIREMENTS AND WHISTLEBLOWER PROTECTIONS APPLICABLE TO LONG-TERM CARE FACILITIES

The Elder Justice Act (EJA), subtitle H of the PPACA, amends Title XX of the Social Security Act to establish a federal elder justice program. Among other things, the EJA adds a new section to Title XX that requires "covered individuals" (defined as an owner, operator, employee, manager, agent or contractor of a long-term care facility that receives at $10,000 in federal funds annually) to report to the Secretary of HHS and law enforcement authorities any reasonable suspicion of criminal activity against anyone who is a resident of, or receiving care from, the facility. If the suspected criminal activity resulted in serious bodily injury, it must be reported immediately, but not later than 2 hours after the suspicion of criminal activity is formed. If the suspected criminal activity does not result in serious bodily injury, it must be reported within 24 hours of forming the suspicion. If the covered individual fails to make such a report, a penalty of up to $200,000 may be assessed and the individual may be excluded from participation in any federal health care program. If the failure to report the crime exacerbates the harm to the victim or causes harm to another person, the covered individual may be subject to a penalty of up to $300,000. Additionally, the covered individual may be excluded from participation in any federal health care program.

The EJA also prohibits discrimination or retaliation against any employee who makes such a report. A long-term care facility that violates the prohibition on retaliation may be subject to a penalty of up to $200,000 and may be classified as ineligible to receive funds under the PPACA. The amendment also requires long-term care facilities to notify covered individuals of their reporting obligation and the facility must post a sign (in a form specified by the Secretary of HHS) specifying the rights of employees under the EJA. The notice must also inform employees that they may file a complaint with the Secretary of HHS against a long-term care facility that violates the requirements of the EJA and must provide information on how to file such a complaint.

Employers' Bottom Line:

The PPACA contains numerous provisions impacting employers in a variety of ways. Ford & Harrison will continue to provide information and guidance on the various issues under the law as more guidance becomes available from the federal agencies charged with enforcing the law. If you have any questions regarding the new law or the issues addressed in this article please contact Daniel Sulton, dsulton@fordharrison.com, Isabella Lee, ilee@fordharrison.com, or Lucas Asper, lasper@fordharrison.com or the Ford & Harrison attorney with whom you usually work.